

Protection from Discrimination because of Disability in European Community Law

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ABSTRACT

In 2000 the European Union adopted the Framework Equal Treatment Directive which prohibits discrimination because of a number of grounds including disability. This thesis examines the nature of that protection from discrimination because of disability and considers what contribution the directive may make to achieving the policy objectives of the disability rights movement in Europe. The discussion is based on the text of the directive, policy statements issued by the European Council, the Council of the European Union and the European Commission, academic commentary and decisions of the European Court of Justice. The dominant models of disability, the medical and social models, are described and analysed. A formulation of the disability rights movement's general policy themes in the European context is proposed. Conceptual tensions between policy approaches to disability and different understandings of the principle of equal treatment are outlined. A detailed analysis of the likely interpretation of the directive's provisions related to disability is based on the extensive European Court of Justice case law on other forms of discrimination. The directive is likely to provide protection for individuals who are discriminated against in the employment context where that discrimination is caused by bias against disabled people, stereotyping or failure to provide reasonable accommodation. The contribution of the directive to the policy objectives of the disability rights movement in Europe will vary among the Member States ranging from making little difference in those countries which already had non-discrimination legislation to being a major tool for promoting disability rights in those countries which had no history of such legislation.

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## List of Abbreviations

DRM	Disability Rights Movement
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
EP	European Parliament
EU	European Union
FETD	Framework Equal Treatment Directive
GED	Gender Equality Directive (1976 Equal Treatment of Men and Women Directive)
GETD	Gender Equal Treatment Directive (2002 Directive amending the GED)
ICF	International Classification of Functioning, Disability and Health
ICIDH	International Classification of Impairments, Disabilities, and Handicaps
RETD	Race Equal Treatment Directive
TEC	Treaty establishing the European Community
TEU	Treaty establishing the European Union
WHO	World Health Organisation

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## **I. Introduction**

The year 2000 was a watershed year for disabled people in the European Union (EU). After two decades of soft law<sup>1</sup> initiatives directed to improving the social and economic status of disabled people, the Council of the European Union (or 'Council' for short) and the European Parliament (EP) adopted the Framework Equal Treatment Directive (FETD)<sup>2</sup> which prohibits discrimination in employment, vocational training and membership in employment related organisations because of, among other grounds, disability. During those twenty years major changes had occurred in the political organisation of the diverse disabled community, the understanding of the nature of disability, and public policy responses to disability. These developments are reflected in the significant, and often noticeable, changes to the physical, social and legal environment to the benefit of both disabled and non-disabled people. The FETD takes its place within the context of these social, attitudinal and institutional changes.

The purpose of this thesis is to examine and assess critically the protection from discrimination because of disability which is offered by the FETD and consider its contribution to advancing the interests of disabled people in the EU. The specific research questions are, first, what protection from discrimination does the FETD offer to disabled people (what are its provisions and how are those provisions likely to be interpreted) and,

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<sup>1</sup> Soft law refers to one or more of a variety of instruments which declare policy objectives, political goals or social policy ideals but which are not judicially enforceable. In the EU examples of such instruments include declarations, resolutions, statements, recommendations and other pronouncements of various EU institutions, action plans and voluntary co-ordination of national programs.

<sup>2</sup> EC, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, [2000] O.J. L. 303/16 ["FETD"].

second, to what degree and in what ways will the FTED contribute to achieving the policy objectives of the disability rights movement (DRM)? Before discussing the details of FETD protection, the thesis outlines some theoretical issues which set the context for considering its potential contribution to the objectives of the DRM.

The current understanding of disability, what it means to be disabled, what society owes its disabled members, and how public policy should respond to disability have undergone rapid change in the last few decades. Building on the work of early 20<sup>th</sup> century disability activists,<sup>3</sup> disabled people around the world by the early 1970s began to challenge publicly their place in society and the reasons they were marginalised, socially excluded, and impoverished.<sup>4</sup> They began to challenge the idea that their impairments made their isolation inevitable. Disabled people became more and more organised and the number and variety of groups expanded and began to form into what today is recognized as the disability rights movement (DRM).<sup>5</sup> The voices of disabled people began to be heard and the dominant paradigm informing disability policy, the medical model, came under increasing challenge from both disabled people and their allies. Over the last two decades disability studies has emerged as a discipline in its own right with disability activists and scholars “articulating and theorizing a political, social, and

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<sup>3</sup> Some early 20<sup>th</sup> century disability heroes include Randolph Bourne, Helen Keller, Florence Haskell, Sylvia Flexer Bassoff, Hyman Abramowitz and Pauline Portugalo whose stories are told in Paul K. Longmore, *Why I Burned My Book and Other Essays on Disability* (Philadelphia: Temple University Press, 2003).

<sup>4</sup> James I. Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment* (Berkeley: University of California Press, 1998) at 17.

<sup>5</sup> *Ibid.* at 130 and 134-136.

ideological critique”<sup>6</sup> of long standing conceptions of disability which have resulted in the widespread social exclusion, marginalisation and oppression of disabled people. This critique, often described by the term critical disability theory, posits that disability is a social construct, not the inevitable consequence of impairment, and that the social disadvantage experienced by disabled people is caused by the physical, institutional and attitudinal environment which fails to meet the needs of people who do not match the social expectation of normalcy.<sup>7</sup>

The thesis begins with an examination of the two dominant models of disability, the medical and social models, which animate the development and implementation of domestic disability policies. The medical model is strongly associated with a social welfare based policy response to disability while the social model is strongly associated with a rights based response, specifically a legal right to be free from discrimination because of disability. Tensions often arise between these two types of policy response which reflect their different normative bases. Early in its history the DRM championed a very strong version of the social model and concomitant strong liberal rights discourse supporting its prime policy objective which was to have expansive anti-discrimination legislation enacted. There was a tendency for the DRM to leave behind those who needed

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<sup>6</sup> Lennard J. Davis, ed., *The Disability Studies Reader* (New York: Routledge, 1997) at 3.

<sup>7</sup> Richard F. Devlin, "Jurisprudence For Judge: Why Legal Theory Matters For Social Context Education" (2001) 27 *Queen's L. J.* 161; Richard K Scotch, "Models of Disability and the Americans with Disabilities Act" (2000) 21:1 *Berkeley Journal of Employment and Labor Law* 213; Dianne Pothier, "Miles To Go: Some Personal Reflections on the Social Construction of Disability" (1992) 14 *Dalhousie Law Review* 526. For a general overview of the key elements of a contemporary conception of critical disability theory see 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* (Vancouver: University of British Columbia Press, 2005).

a more broadly based policy response to meet their diverse needs. By focusing so strongly on non-discrimination rights the DRM minimised the need of many disabled people to be supported by a range of social welfare programs. The complex history of the evolution of the disability models and developments within the DRM, which includes a broadening of the movement to include an ever expanding collection of individuals and groups with a wide diversity of disability experiences, cannot not be dealt with in the thesis. However, the outcome was that, at about the turn of the century, a more nuanced social model of disability and a more inclusive DRM could be discerned which better reflected the complexity and diversity of the disability experience.

As the DRM became more conscious of the necessary role of social welfare programming in the lives of many disabled people the question arose as to how to devise such programs without returning to the oppression of earlier programs. The overarching objective of the DRM was (and remains) to achieve equality for disabled people which had led the movement to embrace rights based policy responses. To avoid the negative aspects of the old style social welfare programs which the DRM had reacted against so strongly and to minimize the tensions between the social welfare and rights based policy responses to disability, there is a need to find a normative base which will support both policy approaches. In this thesis I argue that a suitable base can be found in the norm of equality. Equality rights, particularly as they are disputed in the judicial arena, are often conceived in terms of liberal rights which mediate a particular relationship between the state and its inhabitants and between individuals in a polity. But equality (and equality rights) is a highly contested political value. The language of rights, including equality

rights, is highly malleable and indeterminate, sometimes operating at the level of broadly stated values and sometimes as specific claims which an individual may make against the state or other individuals. In the judicial arena a formal conception of equality is frequently held in opposition to a substantive conception of equality. After examining these two conceptions of equality and the tension between them, a possible approach to reconceptualising equality to move beyond the formal-substantive dichotomy is briefly canvassed.

These introductory theoretical issues set the stage, in response to the first research question, for the examination of the FETD. The influence of the models of disability and their impact on policy choices can be discerned in the decision of the EU to adopt the FETD's provisions respecting disability. The limitations on the promise of the FETD to promote equality for disabled people can be identified in light of the various conceptions of equality which could be applied in Community law. Finally, in answer to the second research question, the degree and manner in which the FETD might contribute to the objectives of the DRM can be assessed in light of the tensions which are common between social welfare and rights based policy responses and the interpretation of equality and non-discrimination applied in the jurisprudence of the European Court of Justice ("ECJ" or "the Court").

This thesis is organised in the following manner. Chapter 2 introduces the medical and social models of disability. These models have different implications for the quantitative and qualitative description of populations of disabled people and the objectives and, therefore, the design of disability policy. In the first part of chapter 2, I

provide an overview of these two models which dominate current disability policy in the EU and its member states.<sup>8</sup> In the following part, I provide a description of a revised version of the social model which more accurately reflects the complex reality of the disability experience. In the third part of chapter 2, I present some statistical data about disabled people in the EU. The complexity of defining who is or is not disabled is reflected in the unsatisfactory quality of the statistical data which is available to inform national and EU disability policy analysis.

Concurrently with the emergence of the social model, in many parts of the world disabled people began to speak with their own voices and to answer the questions, “What does it mean to have a disability?” and “What does society owe to disabled people.”<sup>9</sup> These voices soon developed into what is now described as the disability rights movement. To set the stage for considering the second research question posed for this thesis, in chapter 3 the early growth of the DRM in the United Kingdom (UK) is briefly outlined to give an example of the social movement’s origins and development. Following on that, my categorisation of the overarching disability policy objectives or policy themes of the DRM in Europe is presented.

Despite scepticism about the transformative power of legal rights, the DRM has been a proponent of legal rights, particularly non-discrimination rights, seeing them as

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<sup>8</sup> The same models are applicable to disability policy in Canada, Australia, New Zealand, the United States, and other ‘Western’ countries. Because of this disability theories and critiques coming from those jurisdictions are applicable to the European context.

<sup>9</sup> Jerome E. Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993) at 9.

indispensable for the eventual integration and equality of disabled people.<sup>10</sup> The key policy principle arising from the social model of disability is that disabled people have the right to an inclusive social environment not just a claim to social welfare programming to compensate for their disability. That right to inclusion must be enshrined in legislation. The second part of chapter 3 explores the tensions between rights based and social welfare based normative foundations for disability policy. To resolve these tensions I propose that equality be adopted as a common normative foundation for both types of policy response. However, equality itself is a highly contested political ideal. In the third part of the chapter the tensions between formal and substantive conceptions of equality, which commonly play out in the judicial arena when equality rights claims are disputed, are briefly discussed. The possibility of resolving these tensions is considered at the end of the chapter in a brief examination of the emerging 'social rights' paradigm.

These beginning chapters set the stage for looking at the rights based EU legislation which prohibits discrimination because of disability. Chapter 4 starts with a brief overview of the post war development of the Western European welfare state and its response to disability. The development of the human rights social dimensions of the EU is then traced through to the 1997 Treaty of Amsterdam, which for the first time gave the EU a general competency to respond to discrimination because of disability, and to the

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<sup>10</sup> Tanya Titchkosky, *Disability, Self, and Society* (Toronto: University of Toronto Press, 2003) at 215; Andrew Weis, "Jumping to Conclusions in "Jumping the Queue"" (1998-1999) 51 *Stan. L. Rev.* 183 at 217; Adrienne Asch, "Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity" (2001) 62:1 *Ohio State Law Journal* 391 at 397. See generally Deborah Mabbett, "The Development of Rights based Social Policy in the European Union: The Example of Disability Rights" (2005) 43 *Journal of Common Market Studies* 95 at 98.

adoption of the FETD in 2000 which, *inter alia*, prohibits discrimination in employment because of disability. In the third part of chapter 4, the provisions of the FETD are compared with those of the 2000 Racial Equal Treatment Directive and the 2002 amendments to the Gender Equal Treatment Directive which prohibit discrimination because of race and ethnic origin and gender (including marital and family status) respectively.

In Chapter 5 the provisions of the FETD relating to disability are examined in detail in order to answer the first research question, “What protection from discrimination does the FETD offer disabled people?” The methodology for interpreting the potential of the various provisions consists of textual analysis, literature review and, in the absence of any judicial interpretations of the FETD, the decisions of the ECJ which have interpreted earlier gender equal treatment directives. Some cautions about extrapolating the ECJ gender equal treatment jurisprudence to the FETD are then noted. The FETD’s prohibition against discrimination is not absolute. In the second part of chapter 5, I examine the limitations on the non-discrimination principle which are implied by the underlying conception of equality which informs the European project and ECJ jurisprudence, the lack of a definition of disability, the scope of the concept of discrimination, the requirement to provide reasonable accommodation and defences available to claims of discrimination. The chapter ends with a critical assessment of the potential for positive action programs to ameliorate the disadvantaged status of disabled people in light of ECJ jurisprudence.

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The second research question, “To what degree and in what ways will the FTED contribute to achieving the policy objectives of the disability rights movement?” is the subject of chapter 6. The chapter starts with some thoughts on the possible indirect influence of the FETD on domestic disability policy and the comparative acceptance of the social model among the Member States. My critique of the FETD is then set out around six general themes related to fundamental principles of Community law and specific elements of the directive. My overall conclusion respecting the FETD’s contribution to the DRM’s policy themes is that it is an important element of a comprehensive disability policy but it necessarily must be expanded in scope and supplemented with a wide variety of social welfare programming to meet the diverse needs of the disabled population.

## II. Defining and Mapping Disability

For the first three quarters of the last century the medical model was the overwhelmingly dominant conception of disability which animated national disability policies. Starting in the early 1970s the dominance of this model began to be challenged by a new conception of disability, the social model. By the beginning of this century both these models, which are explored in the first two parts of this chapter, inform the design of national disability policies in the EU and other Western countries. The first comprehensive attempt by the World Health Organisation (WHO) to devise a universal disability classifications scheme to allow for policy comparison across jurisdictions, which reflects an early version of the social model, is outlined in the third part of this chapter. Following this the most recent iteration of the WHO scheme, the result of a process of continuous revision in response to ongoing criticism by professionals, academics and disability rights activists, is briefly described. This sets the stage for the next part which describes a revised and contemporary version of social model. The chapter ends with a short overview of demographic and labour market data about the disabled population of the EU.

The models describe ways to understand disability which directly influences the definition of disability which in turn influences the parameters of disability policy. The importance of definitions is that the meaning given to a social phenomenon has a direct impact on the policy responses to that phenomenon. As Michael Oliver has observed in relation to disability, if disability is understood as a 'personal tragedy' both interpersonal relations and social policy will reflect that understanding. The result will be policies

focused on cure, rehabilitation and care. If, however, disability is understood as 'social oppression' the policy response will focus on alleviating that oppression.<sup>11</sup>

One consequence of the difficulties in defining and classifying disability is that statistical surveys and analyses of disabled populations are highly uncertain and dependent on contextual factors which are frequently not made explicit. These limitations in data collection are clearly reflected in the data on the disabled populations of EU countries which are presented in this chapter. There is a tendency for all statistical surveys of disability to conceive of disability implicitly through the lens of the medical model. They typically focus on impairment as an abnormality of function without contextualising the cultural relativity of normalcy. These definitions also tend to take the environment as a given, a backdrop upon which disability is laid instead of an integral part of the disability experience.<sup>12</sup> The consequence is to reinforce the policy responses directed at the individual of prevention, cure, and rehabilitation.

Official statistics which have the appearance of objectivity are actually dependent on the definitions used for their surveys, their methods of analysis, size of sample and fundamentally the purpose for which the statistics are devised and collected. What purports to be objective and scientifically neutral is actually subjective and politically founded.<sup>13</sup> The indeterminacy of population statistics is shown by the incredible range of percentages of the population which is disabled reported from various countries. United

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<sup>11</sup> Michael Oliver, *The Politics of Disablement: A Sociological Approach* (New York: St. Martin's Press, 1990) at 2 (Oliver, "Politics").

<sup>12</sup> *Ibid.* at pp. 4–6.

<sup>13</sup> Paul Abberly, "The Significance of the OPCS Disability Surveys" in Michael Oliver, ed. *Social Work: Disabled People and Disabling Environments* (London: Jessica Kingsley Publishers, 1991) 156-176 at 156-157. "OPCS" is the UK Office of Population Censuses and Surveys.

Nations disability statistics from 1990 report rates of disability ranging from 1% in Peru, Ethiopia, Pakistan and Sri Lanka, 11% in Australia, Britain, Canada and Spain and up to 21% in Austria.<sup>14</sup> These numbers make no sense without attaching them to cultural contexts. Even within one country, where one would expect the cultural context to remain relatively stable over a few decades, disability surveys report vastly different numbers depending on the definitions that are used. A 1971 government survey in the UK reported there were 3 million disabled people in the country; in 1981 another government survey reported there were 6 million disabled people. Three million people had become disabled as a result of a change in the definition used for the survey instruments.<sup>15</sup>

### 1. *Defining and Classifying Disability*

#### (i) *Medical model*

The medical model<sup>16</sup> of disability, which has been the dominant construct throughout most of the last century, focuses on the impairment experienced by the individual. The basic premises of this model 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. In this model, disability is individualised

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<sup>14</sup> Michael Oliver and Colin Barnes, *Disabled People and Social Policy: From Exclusion to Inclusion* (London: Longman, 1998) at 22.

<sup>15</sup> Abberly, *supra* note 13 at 160-161.

<sup>16</sup> Also called the “bio-medical model,” (Bickenbach, *supra* note 9), the “individual model” and the “personal tragedy model,” (Oliver & Barnes, *supra* note 14) and the “social welfare” model (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 & Defense Fund, [http://www.dredf.org/international/papers\\_w-d.html](http://www.dredf.org/international/papers_w-d.html)).

and becomes a problem to be solved by prevention, treatment or cure. Disabled people thus become dependent on a variety of health professionals for treatment and rehabilitation. Those who can be cured are expected to whole heartedly co-operate with their treatment, while those who cannot be cured 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 disability, the person is treated as innately different, defective, and inferior.

The medical model presumes that disability can be ascertained by neutral, scientific means and, once a diagnosis is made, that scientific medicine can be applied to cure the problem. Disability becomes an objective description of physical or mental impairments without any social context.<sup>17</sup> By locating the problem of disability in the individual and describing the nature of disability in medical terms, an appropriate and responsive disability social policy is properly directed at 'patients' and their special needs and away from the social environment. The social disadvantage experienced by disabled people flows from their biological impairment; biology determines destiny.<sup>18</sup>

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 family.<sup>19</sup>

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<sup>17</sup> Paula E. Berg,, "Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law" (1999) 18:1 Yale Law & Policy Review 1 at 5.

<sup>18</sup> Bickenbach, *supra* note 9 at 82.

<sup>19</sup> Oliver & Barnes, *supra* note 14 at 8.

With the medical model the normative basis for social policy responses to disability is charity, compassion, or a welfarist cost/benefit calculation.<sup>20</sup>

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 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 programs for disabled people which grew with the developing welfare state through the 20<sup>th</sup> century.<sup>21</sup>

Despite the more objective approach of the medical model, it retains a strong moral component<sup>22</sup> 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 programs.

(ii) *Social Model*

Despite the dominant influence of the medical model, the idea that disability is composed of both a medical and social dimension has been recognized since the early

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<sup>20</sup> Bickenbach, *supra* note 9 at 192 *et seq.*

<sup>21</sup> Some scholars, notably Bickenbach, *ibid.* note 9, distinguish an “economic model” as an extension of the medical model. The economic model focuses on the economic consequences of impairment, particularly as it impacts on the labour market. This model focuses disability social policy on the question of how to reduce and redistribute the costs of limitations due to impairments. This model supports vocational rehabilitation and other programs designed to (re)integrate the disabled person into the workforce.

<sup>22</sup> Before the advent of scientific medicine disability was frequently ascribed to divine retribution for various sins or moral turpitude: Bickenbach, *ibid.* note 9 at 62.

part of the last century. It was, however, not until the 1970s that significant progress was made in describing this complex relationship. By the end of the 1970s the WHO and disability rights activists had both reinvigorated the social dimension of disability and each independently proposed a radically different paradigm to challenge the medical model. The WHO published its proposal as the *International Classification of Impairments, Disabilities and Handicaps* (ICIDH); disability rights activists labelled their proposal the social model of disability. Over the last twenty-five years, both the ICIDH and the social model have been subject to a process of continuous revision, reconsideration, clarification and refinement, each one being influenced by the other. The social model of disability is discussed next, before the ICIDH, but historically both concepts were developed and refined concurrently.

The social model<sup>23</sup> of disability challenges the key assumption of the medical model which is that the disadvantage arising from disability inheres in the individual's biological condition. The social model argues that disability is a social construct; that it is a socially constructed attribution assigned to an individual based on an able-bodied perspective of what it must be like to have a disability which presumes not only the parameters, but also the superiority, of "normalcy."<sup>24</sup> This "ableist"<sup>25</sup> ideology

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<sup>23</sup> Many scholars use the term "social-political" model (e.g. Bickenbach, *ibid.* note 9); others use the term "social oppression" model (e.g. Oliver and Barnes, *supra* note 14) or the "civil rights" model (e.g. Waddington & Diller, *supra* note 16).

<sup>24</sup> Pothier, *supra* note 7 at 528).

<sup>25</sup> 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 centering of the non-disabled experience: *Ableist* refers to a person who believes in the inherent superiority of being non-disabled: Simi Linton,

encompasses erroneous assumptions about a disabled person's capacity to perform which magnify the consequences of impairment and consequentially diminish those who do not meet socially determined norms of capability.<sup>26</sup>

In the social model it is the social environment which has been constructed without regard for the interests of disabled people, not objective, medically described impairments which create disability.<sup>27</sup> The environmental factors which create disability include physical and architectural structures, 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.<sup>28</sup> 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

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*Claiming Disability: Knowledge and Identity* (New York: New York University Press, 1998) at 9.

<sup>26</sup> Pothier *supra* note 7 at 528. See also Asch, *supra* note 10 at 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."

<sup>27</sup> Mary Crossley, "The Disability Kaleidoscope" (1998-1999) 74 *Notre Dame L. Rev.* 621. See also Harlan Hahn, "Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective" (1996) 14 *Behavioral Sciences and the Law* 41, 45 as cited by Crossley at 654 and Oliver, *Politics*, *supra* note 11 at 87, where he distinguishes "social constructionists," who believe the problem of disability is located in the minds of non-disabled people and "social creationists" who see the problem as located in the institutionalised practices of society. Some authors take the view that all of the disadvantage associated with disability results from the social environment and that the actual impairment has no negative impact on their lives; some advocates of "deaf culture" argue for this point of view. See, for example, Harlan Lane, "Construction of Deafness" in Davis, *supra* note 6 153 -171 at 159 and Longmore, *supra* note 3 at 221-222.

<sup>28</sup> Titchkosky, *supra* note 10 at 197; Richard K. Scotch, "Models of Disability and the Americans with Disabilities Act" (2000) 21 *Berkeley Journal of Employment and Labor Law* 213 at 218; Oliver & Barnes, *supra* note 14 at 18.

consequences of biological differences and everything to do with the way people react to those differences.<sup>29</sup>

The consequences which flow from the social model of disability for the development of an appropriate and responsive disability policy are very different from those which flow from the medical model. Whereas the thrust of the medical model is to treat and rehabilitate the disabled individual, the social model seeks the fundamental transformation of the social environment. Whatever the cause of any particular impairment, the responsibility for minimising the impact of socially constructed disabilities on the individual rests with society as a whole.

Because of the emphasis on the effect of the social environment in creating disability, the social model is inherently political.<sup>30</sup> Although there is a very wide range of political content depending on individual viewpoints, the model requires policy responses which focus on collective responsibility for changing the social environment which not only creates disability but is the source of the social disadvantage experienced by disabled people.

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<sup>29</sup> Bickenbach, *supra* note 9 at 136-7.

<sup>30</sup> The political element of the social model is sometimes separated from the social construction of disability element in a "minority group" model. This model agrees that disability is a social construct but argues that the social status of disabled people reflects their minority status as the majority structures society to meet only their needs. This model draws heavily for its inspiration on the U. S. civil rights movement of the 1960s and 1970s. Harlen Hahn is a leading exponent of this approach. See Hahn, *supra* note 27, and Crossley, *supra* note 27.

(iii) *International Classification of Impairments, Disabilities and Handicaps*

In the early 1970s, the WHO began work to develop a common classification scheme to facilitate the objective evaluation of health care systems and to enable comparisons of the effectiveness and efficiency of various systems in different countries. The result of these efforts was the *International Classification of Impairments, Disabilities, and Handicaps: A Manual of Classifications Relating to the Consequences of Diseases* (ICIDH) which was adopted by the WHO in 1980 for trial purposes. The ICIDH clearly sets out the conceptual distinctions between impairment, disability and handicap, presenting them as three interrelated, but separate, elements of the disability experience.

Impairment refers to any “loss or abnormality in psychological, physiological or anatomical structure or function.”<sup>31</sup> Impairment can be temporary or permanent, serious or minor, progressive or stable. The concept of impairment includes all deviations from “established biomedical norms” which describe the physical and mental characteristics of the ideal human being. (The ICIDH does not contain any definition of these norms.) Although no person can meet the specifications of the idealized human against which impairment is assessed, the bulk of a population is clustered around that norm. The functional and social consequences of impairment are considered in the second and third levels of the system.

Disability is the term used to describe the functional consequences of an impairment. Many impairments, of course, have no disabling consequences. But where

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<sup>31</sup> ICIDH, as cited by Bickenbach, *supra* note 9 at 46.

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 is said to have a disability. Disability is then, by definition, a relational concept: it is first necessary to specify the context before making any assessment whether a person is disabled by an impairment. An impairment that does not restrict activity may not be a disability; the same impairment can result in different degrees of disability depending on the person and the environment in which the person functions. The concept of disability is inherently indeterminate as it reflects the relationship between impairments and the social environment in which they occur.

Handicap is 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."<sup>32</sup> A handicap is a socially created disadvantage based on the social reception of an impairment or disability.

The ICIDH scheme has been criticized by disability activists for its essential reliance on the medical model. The scheme is built upon the medical model's presumption that impairment can be objectively, scientifically identified and labelled. 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. This feature of the disability construct is reflected in the general suspicion, and de-legitimation, of invisible disabilities, such as

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<sup>32</sup> ICIDH, as cited by Bickenbach, *ibid.* at 48.

learning disability. If a characteristic of a person is not recognized as an impairment, the person is not labelled as disabled and will not be treated in the context of disability policy. Thus, impairment too is ideologically constituted and the less an impairment can be objectively measured and defined the more it is subject to ideological construction.<sup>33</sup> Although the scheme clearly identifies the disabling impact of the social environment, its attachment to the medical model is seen in its essential premise that disability originates in a deviation from (unstated) standards of normalcy.

Unlike impairment the ICIDH concept of disability is not value neutral. Bickenbach describes ICIDH disabilities as “deviations from what might be called norms of capability, norms that set out the abilities and behaviours customarily expected of people.”<sup>34</sup> At a high level, capability norms are not controversial. For example, the inability to walk will always be considered a disability. However, as the context becomes more particularized a capability norm takes on greater cultural relativity. The ability to walk meaning to track food animals over long distances and rough terrain will only be a capability norm in some societies. Disability is a failure of ability to perform some activity which is considered, within a cultural context, to be well within customary behaviour. Disability, then, is not a neutral concept; it is a deviation from capability norms which negatively impinges on one’s positive freedom because it restricts one from doing or becoming what one could reasonably wish to do or become within the society in

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<sup>33</sup> Titchkosky, *supra* note 10 at 14.

<sup>34</sup> Bickenbach, *supra* note 9 at 40. There is no single word in English to describe people who deviate from capability norms in a positively valued way, although “talented” or “gifted” may serve. The Olympic qualified sprinter and the Nobel prize winning physicist both in their different ways deviate from any society’s capability norms.

which the person lives. Because it is a limitation on positive freedom disability is intrinsically negatively valued.

Handicaps are disadvantages imposed on a person due to the social reception of the impairment or disability. These responses are based on emotional or attitudinal responses, often based on stereotyping or prejudice, and frequently move on to negative behavioural, legal, and political consequences. The social reception of a person is dependent on what Bickenbach calls “capability evaluations”<sup>35</sup> which are the composite of what a society expects of and from its members, taking into account their age, sex, class and other inherent or ascribed characteristics of its members. When a person is perceived as deviating from these expectations in a negatively valued way that person’s social standing is negatively affected. A handicap is a limitation on positive freedom which is caused by a society’s negative response to impairment and disability.

The distinction drawn by the ICIDH between impairment, disability and handicap highlights the different dimensions of the disability experience. These dimensions are illustrated in the Canadian Human Rights Tribunal decision in *Ward v. Canadian National Railway (CN)*.<sup>36</sup> In that case, a 21 year old man applied for a job in a CN warehouse. He had been born with the impairment of an absence of his right thumb and two fingers on his right hand (a deviation from the norm for a hand). He testified that this had not caused him any problems, had not limited his activities in any way and that he had never felt in any way disabled (an impairment without causing a disability for this

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<sup>35</sup> *Ibid.* at 54.

<sup>36</sup> *Ward v. CNR* Canadian Human Rights Tribunal, 1982, online: Canadian Human Rights Tribunal [http://www.chrt-tcdp.gc.ca/search/files/t026\\_2080de\\_01\\_19.pdf](http://www.chrt-tcdp.gc.ca/search/files/t026_2080de_01_19.pdf).

person in his cultural context). CN refused to hire him solely because of his impairment without any attempt to assess his capacity to perform the job which, at the hearing, CN admitted he could do. In that context, his impairment had become a handicap because of the social response of CN to the impairment.

(iv) *International Classification of Functioning, Disability and Health*

The ICIDH and similar classification systems used by national statistics agencies are criticized for reifying the concept of normalcy of human function and failing to adequately recognize the contextual and cultural relativity of the concept of normalcy, as well as the influence of gender, ethnicity and class. The ICIDH scheme is dependent on the concepts of capability norm and capability evaluation to establish a base range of human abilities and behaviours against which the members of a society are compared. The apparent crispness of its three categories is, however, deceptive and misleading. In the real world the relationships among impairment, disability and handicap are often uncertain and are inherently indeterminate because so much is dependent on the values of the society to which the scheme is applied.

The ICIDH was criticised for being ultimately based on the medical model and reinforcing the concept that the social disadvantage experienced by disabled people is based on that person's impairment and not the physical and social environment in which that individual lives.<sup>37</sup> Furthermore, despite its conception of handicap which links a disability to the social environment, the scheme assumes the environment as a given and

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<sup>37</sup> Oliver & Barnes, *supra* note 14 at 17.

that the appropriate policy response to handicap should focus on adapting the individual to that environment.<sup>38</sup>

In 2002 the WHO, in response to the ongoing internal and external critique of the ICIDH, published a completely revised version of the ICIDH under the title *International Classification of Functioning, Disability and Health (ICF)*.<sup>39</sup> The purpose of the ICF is to provide an international standard language and framework for the description of health and health related states which can be used in many settings. The ICF 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 ICF provides a framework for organizing health and health related information about body functions and structures, activities and participation, and environmental factors.<sup>40</sup> The ICF introduces the term functioning as an umbrella term describing the combination of all body functions, activities and participation of a person. This is intended to be a neutral term since it is to be applied to anyone in a population regardless of their health status. Disability is the umbrella term used to refer to any one or combination of impairments, activity limitations or participation restrictions. The ICF is a

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<sup>38</sup> *Ibid.* at 15.

<sup>39</sup> The description of the ICF which follows is based on *ICF Introduction and Towards a Common Language for Functioning, Disability and Health*, (Geneva: World Health Organisation, 2002): online: <http://www3.who.int/icf/intros/ICF-Eng-Intro.pdf> ["ICF, Introduction"] and <http://www3.who.int/icf/beginners/bg.pdf> ["ICF, Beginners"].

<sup>40</sup> The ICF replaces the ICIDH term "impairment" with "body functions and structures," "disability" with "activity" and "activity limitation" and "handicap" with "participation" or "participation limitation."

“components of health”<sup>41</sup> not a “consequences of disease”<sup>42</sup> classification as the ICIDH was. The ICF stresses “health and functioning”<sup>43</sup> not disability. Disability is recognized as a place on a continuum instead of a reason to separate a person into a different category. 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. But the ICF clearly identifies itself as a scheme for the classification of health and health related conditions: restrictions which people may experience because of gender, religion, ethnicity, or socio-economic factors are specifically excluded from the ICF system.<sup>44</sup>

## 2. *The Social Model Revised*

The medical model of disability focuses on impairment and its effect on the individual’s range of function. This model’s essential premise is that disability is a problem which inheres in an individual and is to be dealt with at the individual level. As the WHO was developing the ICIDH, disability activists proposed the theory that disability was the consequence of social environments which were designed to meet the needs of those deemed to be non-disabled. This social model locates disability in the social reception of impairment and argues that disability could be eliminated, or at least

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<sup>41</sup> ICF, *Introduction*, *supra* note 39 at 4.

<sup>42</sup> *Ibid.*, at 4.

<sup>43</sup> ICF, *Beginners*, *supra* note 39 at 3.

<sup>44</sup> The ICF includes as a health related outcome participation restrictions which result from existing or previous health conditions which have no current affect on body structures or functions and impose no activity limitations. The example given is discrimination by refusal of employment because of a past history of mental illness.

significantly ameliorated, if society was restructured to meet the needs of all people including those labelled disabled.

The earliest formulations of the social model asserted explicitly or implicitly that disability was completely socially constructed and biomedical issues should not be considered at all. These conceptions of the social model gave little attention to the lived experience of impairment itself and failed to acknowledge and take account of biological limitations of capacity.<sup>45</sup> Although some activists and disability scholars still argue for this conception of the social model, there is a general agreement that, in Susan Wendell's words, disability is socially constructed from biological reality.<sup>46</sup> Contemporary interpretations of the social model incorporate concepts of impairment and handicap and their interaction with the social environment including the attitudinal response to impairment and the physical structures and standard practices which form our world. The disabled experience occurs in the intersections between impairment, the individual and the social context. In this contemporary, revised conception of the social model disability is a dynamic state occurring through a complex interrelationship between body, identity, and culture.

This revised conception of the social model is reflected in the ICF which takes into account the role that both biomedical and social factors play in the disabling process. The ICF coins the term 'biopsychosocial model' to describe its conception of disability. However, the parameters of the social model are still sufficiently fluid that it makes more

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<sup>45</sup> Linton, *supra* note 25 at 138 argues that the DRM 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.

<sup>46</sup> Susan Wendell, "Toward a Feminist Theory of Disability" in Davis, *supra* 260-278 at 265.

sense to refine the definition rather than introduce a new term to reflect the more sophisticated current understanding of disability which the model expresses. Simply put, it will be more effective and efficient for disability interests to tweak the elements of the social model than to introduce a new term to the policy arena.

The policy consequence flowing from the contemporary, comprehensive social model which incorporates both medical and environmental elements of disability is that disability policy 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 accessing EU responses to disability it is important to keep in mind that both social welfare and rights based policy responses are essential components of a complete national disability policy.

### 3. *Mapping Disabilities*

As briefly noted in chapter 1, the different ways of defining disability lead to inconsistent and uncertain statistical information about disability. These problems with disability statistics are explored in this part. National definitions of disability within the EU vary widely for the administration of various programs such as incapacity pensions, non-contributory income support, employment quotas, training allowances, travel concessions and tax relief. Definitions also vary among the member states for programs which are designed to respond to the same social need. Data on disability collected

through various population surveys are subject to uncertainty arising from methodological variation, the problems inherent with self-reporting and the relationship between self-perception and participation in (or exclusion from) national disability programs.

Because national definitions of disability are related to program administration and national disability programs vary widely in content and relationship to other social programs, it has not been possible to adopt a common EU definition of disability. The Commission's Directorate General - Employment and Social Affairs has primarily relied on EU and national surveys using a variety of definitions of disability which rely on respondent self-reporting of disability in preference to other data sources linked to disability programs in the various Member States.<sup>47</sup> Disabled people have made their way on to the EU social agenda as a group at risk of social exclusion as a result of a protracted political struggle led by the Commission and supported by national and transnational disability interest groups and the European Parliament.<sup>48</sup> That political process has also led to the EU ostensibly basing its disability policies on the social model of disability.<sup>49</sup>

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<sup>47</sup> EC, Commission, *The Employment Situation of People with Disabilities in the European Union*, (Brussels: EC, 2001) at 7 [*"Employment Situation 2001"*]. The following text is based on this report unless otherwise noted.

<sup>48</sup> Deborah Mabbett and Helen Bolderson, "A Significant Step Forward? EU Social Policy and the Development of a Rights based Strategy for Disabled People" (2001) Paper given at the Annual Social Policy Association Conference, Queen's University Belfast, 24-26 July 2001; Brunel University, Working Documents for the Project Definitions of Disability in Europe, <http://www.brunel.ac.uk/depts/govn/research/WORKING.HTM>, at pp. 14-18.

<sup>49</sup> Mabbett, *supra* note 10, at 106. See generally, EC, Commission, "Communication of the Commission on Equality of Opportunity for People with Disabilities: A New European Community Disability Strategy," COM (96) 406 final [*"Disability Strategy"*]; EC, Commission, "Towards a Barrier Free Europe for People with Disabilities" COM (2000) 284 final [*"Barrier Free"*].

However, despite the formal acceptance of the social model, the influence of the medical model is never far below the surface. For example, the Directorate General – Employment and Social Affairs and the European Expert Group on Employment for Disabled People reference the WHO’s ICIDH definition of impairment as the basic starting point for any classification of disability.<sup>50</sup>

(i) *Population Surveys*

“The Employment Situation of People with Disabilities in the European Union,”<sup>51</sup> a study by the European Expert Group on Employment for Disabled People, reports on various aspects of the disabled working age population of fourteen member states of the EU. The report relies on a combination of data from the European Community Household Panel (ECHP) survey and national survey data.<sup>52</sup> The data are compromised because the ECHP survey relies on self-reporting of disability status and the national data rely on such varied definitions that it is difficult to make any cross national comparisons.<sup>53</sup> Furthermore, there is very little data available which disaggregate the type and degree of

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<sup>50</sup> *Employment Situation 2001*, *supra* note 47 at 8.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* at 29.

<sup>53</sup> *Ibid.* The ECHP survey instrument is based on a medical model of disability. The defining questions used in the survey are “Q 158: *Do you have any chronic physical or mental health problem illness or disability? If Yes → Q 159,*” and “Q 159: *Are you hampered in your daily activities by this chronic or mental health problem, illness or disability?, Yes, severely / Yes, to some extent / No.*” *Ibid* at 33. The national data are based on definitions used for the administration of national benefits schemes or active labour market programs as well as national surveys all of which vary widely and the statistics from many of those sources reflect the population which has already had some linkage to the labour market: *Ibid.* at 33-34

disability which are important factors related to participation in the labour market.<sup>54</sup> The report, therefore, treats the disabled population as a homogenous group composed of all types and causes of disability.

Estimates suggest that the number of disabled people in the EU ranges from 7% to 15% of the total population with about half of those, or from 17 to 26 million people, of working age from 16 – 64 (before the 2004 enlargement).<sup>55</sup> The WHO estimates 5% of the European population has a serious mental health disorder including neuroses, functional psychoses and learning disability.<sup>56</sup> These aggregated data for the EU fail to disclose the wide variation in national rates. Using ECHP data Greece, Italy and Spain report disability rates less than 10%; the Netherlands and the UK report slightly more than 18%; Finland reports 23%.<sup>57</sup> Using national survey data, Austria reports 29% while Finland reports 5%.<sup>58</sup> In addition, the difference between ECHP and national survey data can be extreme: Compare, for example, France – ECHP 15.3%, national survey – 3.1%; Finland – ECHP 22.9%, national survey – 5.0%; Germany – ECHP 17.3%, national

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<sup>54</sup> The 1996 ECHP survey reported that on average in the EU 4.5% of respondents reported they were “severely hampered” in daily activities by a disability and 10% reported they were “hampered to some extent” by a disability. In the 25 – 34 age group on average 2.7% responded they were “severely hampered” and 8% that they were “moderately hampered.” For the age 55-64 groups the figures were 14% and 25% respectively: EC, Commission, *The Social Situation in the European Union 2003*, (Brussels: EC, 2003) at 102-103, online: Europa [http://europa.eu.int/comm/employment\\_social/social\\_situation/docs/SSR2003\\_en.pdf](http://europa.eu.int/comm/employment_social/social_situation/docs/SSR2003_en.pdf) [“*Social Situation 2003*”].

<sup>55</sup> *Employment Situation 2001*, *supra* note 47 at 8.

<sup>56</sup> *Social Situation 2003*, *supra* note 54 at 97.

<sup>57</sup> *Employment Situation 2001*, *supra* note 47 at 35: See Table 1 in the Appendix which contains the data from both the ECHP and national surveys for the EU-15.

<sup>58</sup> *Ibid.*

survey – 6.9%.<sup>59</sup> It is clear that differences in definition, target population, and collection techniques have a major impact on the statistics which are generated.

A 2002 survey of the accession and candidate states reported that on average 25% of the population self-declared they had some form of “long standing illness or disability, restricting their activity,” with country statistics ranging from 15% to 30%.<sup>60</sup> Caution must be exercised when comparing these data with that used by the Working Group since the survey instruments have such different designs and methodologies. Nonetheless, it is possible to make some general observations about the disabled population in the EU based on the available data and this is the data to which the EU has access when devising disability policies.

(ii) *Labour Market Surveys*

Figure 1 on the next page graphically portrays the relative attachment to the labour force of the disabled and non-disabled working-age population. The labour force participation rate of disabled people is approximately one-half that of non-disabled people. Some 40% of disabled people are employed in comparison to approximately 65% of non-disabled people.

The participation rate of disabled people is consistently significantly lower than that for non-disabled people in all the EU-15 countries. In only four countries, Finland, Greece, Italy and Spain, was the unemployment rate of disabled workers less than that of

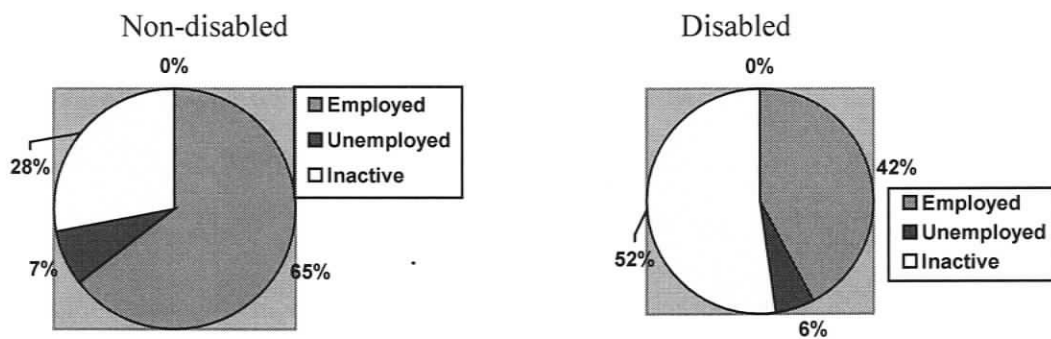
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<sup>59</sup> *Ibid.*

<sup>60</sup> *Social Situation, supra* note 54 at 106.

non-disabled workers. There is a wide range in the rates of participation and unemployment for both disabled and non-disabled workers. This variation ranges from participation rates of disabled people of 29% in Ireland and Spain to rates of 57% and 51% in Denmark and Germany respectively. The ratio of labour market participation between disabled and non-disabled people ranges from 0.44 in Spain to 0.73 in Denmark.<sup>61</sup> The data do not give any indication of the extent to which disabled people are inactive in the labour force from their own choice as opposed to because of discrimination and a barrier ridden and inhospitable social environment. In addition to issues of involuntary exclusion, it seems reasonable to conclude that these different participation rates reflect, in part, not only differences in national economies but also social policy decisions which have a direct impact on the relationship between disability and employment.

**Figure 1:** Employment status of disabled and non-disabled working-age population<sup>62</sup>



<sup>61</sup> *Ibid.* at 40: See Table 2 in the Appendix for the participation and employment rates and ratios for the EU-15.

<sup>62</sup> *Employment Situation 2001*, *supra* note 47 at 39.

General employment rates change with the economic cycle but little relative change has occurred in the employment rate of disabled people since the mid-1980s. On average the rate of employment of people with a severe disability has remained near a third of that of non-disabled people and that of moderately disabled people about half that of non-disabled people.<sup>63</sup>

The survey data show a clear association between age and disability. The percentage of the working age population who are disabled increases with age. Of the disabled population, 38% is in the age 55 – 64 cohort compared with 15% who are not disabled.<sup>64</sup> This reflects the impact of disabilities arising from work related causes as well as the general increase in disability with age. Slightly more women of the working age population than men are disabled.<sup>65</sup> The data show that the disabled population has a lower educational level than those who are not disabled.<sup>66</sup> Part of the difference in education level is a reflection of the increased prevalence of disability with age since generally older generations have less education.<sup>67</sup> Other factors which contribute to lower levels of education among the disabled population are the consequences of the disability itself, limitations in educational opportunities due to discrimination, segregated facilities and lack of services and facilities to support educational achievement.<sup>68</sup>

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<sup>63</sup> *Social Situation*, *supra* note 54 at 104.

<sup>64</sup> *Employment Situation 2001*, *supra* note 47 at 36: See Table 3 in the Appendix for demographic characteristics of the working age population.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.* at 35 and 37.

<sup>68</sup> *Ibid.* at 37.

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Models of disability are frameworks for understanding the nature of disability which necessarily oversimplify the complex nature of disability. They do not provide principles for distinguishing the disabled from the non-disabled population for the purposes of public policy formation or program administration. Using the social model to understand disability, disability cannot be defined outside the context where the definition will be applied. The question “who is disabled?” must be answered by asking “disabled for what purpose?” This indeterminacy of the definition of disability is reflected in the extreme differences in the statistical data on the disabled population of the EU among its Member States.

### **III. Policy Models and Objectives of the Disability Rights Movement**

The policy responses to disability associated with the medical model take the form of a variety of social welfare programs which traditionally have been based on charity, needs or welfare norms. With the social model policy responses to disability are based on a rights norm, with a key foundation element being legislated prohibitions against exclusion, segregation or discrimination because of disability. With the emergence of the contemporary understanding of the social model the essential role of social welfare programs in national disability policy is recognized, but the programs must be founded on the normative base of social equality.

In part one of this chapter, the early development of the United Kingdom disability rights movement is briefly outlined as an example of the rise of a national DRM. In part two, the general policy themes of the European DRM are briefly outlined. Following this the tension which arises from the concurrent implementation of social welfare and rights based approaches to disability policy is explored. The tension between these two approaches results from their presumptively different normative foundations which appear to be contradictory. This apparent contradiction provides a ready justification for resistance to the policy objectives of the DRM, both in the form of resistance to the development of rights based social welfare programming and of resistance to the judicial enforcement of non-discrimination and reasonable accommodation rights.

A key argument in support of the DRM's objectives is that they form a framework for an integrated disability policy which can bring coherence to, and thus increase the

efficiency and effectiveness of, the multitude of programs which are required to respond to the diverse population of disabled people. Some argue the only adequate normative foundation which can bring coherence to disability policy is the concept of equality.<sup>69</sup> In part four of this chapter, the tension between formal and substantive conceptions of equality is explored. This unresolved tension creates ambiguity and uncertainty for the development and implementation of disability policy. The chapter ends with a discussion of a revised equality rights paradigm which may serve to resolve the tensions between formal and substantive equality and social welfare and rights based policy norms.

### 1. *Rise of the Disability Rights Movement*

In the first half of the twentieth century most organisations which supported disabled people and advocated on their behalf were disability specific charities set up and managed by non-disabled people to provide material and emotional support to particular populations of disabled people.<sup>70</sup> With some isolated exceptions, it was not until the early 1970s that disabled people began to challenge the beliefs and values which underlay social policy responses to disability including the organisation and management of agencies providing services to disabled people.<sup>71</sup> Disabled people began to speak with their own voices and to answer the questions, “What does it mean to have a disability?”

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<sup>69</sup> Bickenbach, *supra* note 9, at 231.

<sup>70</sup> *Ibid.*, at 150; Oliver & Barnes, *supra* note 14, at 32; Ken Davis, “Disability and legislation: rights and equality” in Gerald Hales, ed., *Beyond Disability: Towards an Enabling Society* (London: Sage Publications, 1996) 124 – 133 at 125.

<sup>71</sup> Charlton, *supra* note 4 at 130.

and “What does society owe to disabled people.”<sup>72</sup> They developed a political consciousness and a sense of community.<sup>73</sup> Throughout the 1970s and 1980s disabled people became more and more organised and the number and variety of groups expanded. It is from this beginning that the disability rights movement has grown.<sup>74</sup> 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 principles of empowerment and human rights, independence and integration, and self-help and self-determination create solidarity within the DRM.<sup>75</sup>

The history of the beginning of the disability rights movement in the UK is illustrative of developments throughout the Western world. By the middle of the twentieth century residential care for disabled people in institutions of various sizes had become a standard element of disability social policy.<sup>76</sup> The disabled residents frequently chafed against the restrictions on their opportunities to exercise choice respecting their personal lifestyle and preferences and against the lack of any input into the management of the organisations which purported to serve their needs and the institutions in which they lived.<sup>77</sup> The idea that disabled people receiving the services provided or being cared for in the institution should have control over the organisation or institution flew in the

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<sup>72</sup> Bickenbach, *supra* note 9 at 9.

<sup>73</sup> *Ibid.* at 150; Charlton, *supra* note 4 at 130.

<sup>74</sup> Charlton, *ibid.*, at 19; Oliver & Barnes, *supra* note 14 at 87.

<sup>75</sup> Charlton, *ibid.* at 3.

<sup>76</sup> Vic Finkelstein, “Disability: An Administrative Challenge? (The Health and Welfare Heritage)” in Michael Oliver, ed. *Social Work: Disabled People and Disabling Environments* (London: Jessica Kingsley Publishers, 1991) at 19.

<sup>77</sup> *Ibid.*

face of the very reason they needed the service or needed to live in the institution.<sup>78</sup> Disabled people were seen as incapable of looking after themselves and being dependent on the charity of others. Since they could not manage on their own, they could neither manage the organisation looking after them nor complain if the services did not meet with their approval.<sup>79</sup>

One such charitable institution was the Le Court Cheshire Home in Hampshire, England. Since the first home was founded in 1948, Cheshire Homes has become an international charity organisation providing residential care for terminally ill and severely physically disabled adults.<sup>80</sup> In the early 1960s, led by residents Paul Hunt and Peter Wade, the residents organised themselves into a residents' committee to challenge increasingly oppressive rules governing their daily lives. Particularly objectionable were new requirements that the residents change into their pyjamas by 6:00 p.m., which was when the day shift ended, and that all TVs in their rooms be turned off by 10:00 p.m.<sup>81</sup> Management refused to respond to residents' complaints and conflict between the residents and management festered. As time went on an increasing number of outside agencies became involved in the struggle. By 1965 it was agreed that two residents would sit on the management committee.<sup>82</sup> From that initial victory, input by the residents to

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<sup>78</sup> *Ibid.* at 20.

<sup>79</sup> *Ibid.*

<sup>80</sup> Leonard Cheshire Foundation 2004, online: [www.leonard-cheshire.org/index.html](http://www.leonard-cheshire.org/index.html).

<sup>81</sup> Philip Mason, unpublished paper, personal history, Centre for Disability Studies, University of Leeds, online: University of Leeds [www.leeds.ac.uk/disability-studies/archiveuk/Mason/le%20court%20-%20philip%20mason.pdf](http://www.leeds.ac.uk/disability-studies/archiveuk/Mason/le%20court%20-%20philip%20mason.pdf) at 5.

<sup>82</sup> *Ibid.* at 6.

decisions affecting their daily lives increased in the following years to the point where Le Court came to be considered an ideal example of resident control of their home.<sup>83</sup>

As part of the struggle Paul Hunt and the residents argued for an expert study of the conditions of residential care which they believed would support their demands for greater control over their lives.<sup>84</sup> The study, conducted E.J. Miller and G.V. Gwynne, was published as *A Life Apart*<sup>85</sup> in 1972. The authors concluded that “by the very fact of committing people to institutions of this type, society is defining them as, in effect, socially dead.”<sup>86</sup> Once a person had entered such an institution and “society has effectively washed its hands of the inmates as significant social beings” then the essential task was to “manage the process from social death to actual death as effectively as possible.”<sup>87</sup> The residents felt they had been “conned!”<sup>88</sup>

Paul Hunt and other residents responded to *A Life Apart* by renewing their struggle and focused attention on the need for information about non-segregated living options.<sup>89</sup> Hunt became aware of an integrated approach to providing for the residential needs of disabled people in Sweden, called “Fokus housing,” in which disabled people have their own apartments in larger complexes which are connected by intercom to staff

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<sup>83</sup> *Ibid.* at 7.

<sup>84</sup> Paul Hunt, “Settling Accounts with the Parasite People: A Critique of ‘A Life Apart’ by E.J. Miller and G.V. Gwynne” *Disability Challenge*, 1981 V. 1 p. 37 at 38: Centre for Disability Studies, University of Leeds: online: [www.leeds.ac.uk/disability-studies/archieveuk/UPIAS/disability%20Challenge1.pdf](http://www.leeds.ac.uk/disability-studies/archieveuk/UPIAS/disability%20Challenge1.pdf).

<sup>85</sup> E.J. Miller and G.V. Gwynne, *A Life Apart* (London: Tavistock Publications, 1972).

<sup>86</sup> *Ibid.*, as cited by Finklestein, *supra* note 76 at 21.

<sup>87</sup> *Ibid.* at 21.

<sup>88</sup> Hunt, *supra* note 84 at 39.

<sup>89</sup> Finkelstein, *supra* note 76 at 22.

located in a common staff room.<sup>90</sup> He became an expert in Fokus housing and other integrated approaches to disabled housing needs. Eventually he and some other residents were able to move to their own homes in the community.<sup>91</sup>

In 1965 two disabled women established the Disablement Income Group (DIG) to lobby for a minimum disability allowance for housewives on the basis that they did not contribute to national insurance and were, therefore, not adequately provided for by the national benefits system.<sup>92</sup> As DIG grew, it was taken over by men and academics and it began to campaign for a disability allowance for all disabled people.<sup>93</sup> As its membership grew, the range of opinions about how best to deal with disability issues also grew. DIG eventually split into two major groups.

One group, the Union of the Physically Impaired Against Segregation (UPIAS), founded in 1975<sup>94</sup> from an initiative by Paul Hunt, developed proposals for the integration of disabled people based on a “social oppression” or “social barriers” theory of disability.<sup>95</sup> The objective of UPIAS was to promote the integration of disabled people into all aspects of their community. For UPIAS the means for integration existed and their continued segregation was condemning them to “social death.”<sup>96</sup> The other group

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<sup>90</sup> Adolf D. Ratzka, “Independent Living and Attendant Care in Sweden: A Consumer Perspective,” (School of Architecture, Institute of Technology, Stockholm) World Rehabilitation Fund, New York, Monograph No. 34, 1981, online: [www.independentliving.org/docs1/ar1986spr.html](http://www.independentliving.org/docs1/ar1986spr.html).

<sup>91</sup> Finkelstein, *supra* note 76 at 22.

<sup>92</sup> *Ibid.* at 23.

<sup>93</sup> *Ibid.*

<sup>94</sup> Charlton, *supra* note 4 at 131.

<sup>95</sup> Finkelstein, *supra* note 76 at 25.

<sup>96</sup> *Ibid.*

was the Disability Alliance, which believed that the failure to make a breakthrough in efforts to establish a disability allowance could be solved by more effective lobbying and by building coalitions with other social groups.<sup>97</sup> For the Disability Alliance an individual's impairment was the root cause of the social disadvantage and poverty of disabled people; for UPIAS it was the exclusionary social environment.<sup>98</sup>

Throughout the 1970s organisations controlled by disabled people were established across the UK which challenged the assumed dependency role of disabled people. It became clear that limited information was a hindrance to the development of new self-help organisations and was a barrier to further integration.<sup>99</sup> The first Disablement Information and Advice Line (DIAL) was established in 1976 by a group of residents of a residential home and day care in Derbyshire to distribute information to disabled people about services which were available and the experiences of other groups.<sup>100</sup> Today there are 139 local DIAL services.

In the international arena two events occurred which reinforced the growth of the disability movement in the UK and around the world.<sup>101</sup> First, the United Nations named 1981 as the International Year of Disabled People (IYDP) (which was followed by the UN Decade of Disabled Persons). For disabled people in many countries the IYDP was a catalyst for the formation of a range of disabled consumer controlled organisations and

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<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.* at 26.

<sup>99</sup> Oliver & Barnes, *supra* note 14 at 81.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.* at 115.

coalitions.<sup>102</sup> In the UK the British Council of Organisations of Disabled People, which brought together consumer controlled disability groups, was founded that year.<sup>103</sup> The Council has grown from its original six member groups to over 130.<sup>104</sup>

The second event was the proposal at the 1980 World Congress of Rehabilitation International, an international organisation of social workers and rehabilitation professionals, to adopt its own Charter on Disability. One of the proposed provisions was that “all necessary steps” be taken to “ensure the fullest possible integration of, and equal participation by, disabled people in all aspects of the life of their communities.”<sup>105</sup> The proposal by a group of disabled delegates that Rehabilitation International itself should be controlled by disabled people was rejected.<sup>106</sup> This rebuff led to the formation of Disabled Peoples’ International<sup>107</sup> which is currently composed of organisations from over 120 countries.<sup>108</sup>

In the United States the Berkeley Centre for Independent Living and the Boston Self-Help Centre had been established in 1972-73 as disabled consumer controlled organisations to provide support for disabled people to live independently.<sup>109</sup> Centres for Independent Living (CIL), an idea which has since spread around the world, typically include peer counselling, advocacy services, and training and other services which

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<sup>102</sup> Charlton, *supra* note 4 at 132.

<sup>103</sup> Oliver - *Politics*, *supra* note 11 at 115.

<sup>104</sup> British Council of Disabled People, online: [www.bcodp.org.uk/membership/index.shtml](http://www.bcodp.org.uk/membership/index.shtml).

<sup>105</sup> Oliver - *Politics*, *supra* note 11 at 116.

<sup>106</sup> *Ibid.* at 116.

<sup>107</sup> *Ibid.* at 116.

<sup>108</sup> Disabled Peoples’ International, online: <http://v1.dpi.org/lang-en/>.

<sup>109</sup> Charlton, *supra* note 4 at 131.

support independent living.<sup>110</sup> The CIL concept, in a modified form called “Centres for Integrated Living,” came to Britain in the early 1980s.<sup>111</sup> Paul Hunt had left the Le Court Cheshire Home in 1970 but his legacy remained.<sup>112</sup> In 1985 the residents established one of the first British CILs, the Hampshire Centre for Independent Living.<sup>113</sup>

In 1979 a number of British disabled activists founded the Committee on Restrictions against Disabled People which published a report in 1982 calling for legislation to prohibit discrimination on the basis of disability. Over the following fifteen years numerous bills were presented to Parliament but it was not until 1995 that the first disability discrimination act<sup>114</sup> was passed which prohibited discrimination in employment and the provision of many goods, services and facilities, required employers to make “reasonable adjustment” for disabled people, and established the National Disability Council.<sup>115</sup>

## 2. *DRM Policy Objectives*

DRM policy objectives are derived from the social model and the DRM promotes that model as the principled basis for disability policy development. The DRM, like all

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<sup>110</sup> Oliver & Barnes, *supra* note 14 at 83.

<sup>111</sup> *Ibid.* at 84

<sup>112</sup> Paul Hunt left Le Court in 1970 to marry and live in the community. He became a computer programmer. He never lost touch with his community and remained active in disability politics until his death in 1979.

<sup>113</sup> Oliver & Barnes, *supra* note 14 at 84.

<sup>114</sup> *Disability Discrimination Act 1995* (U.K.), 1995, c. 50.

<sup>115</sup> Mike Floyd and John Curtis, “An Examination of Changes in Disability and Employment Policy in the United Kingdom” in Wim van Oorschot and Bjørn Hvinden, *Disability Policies in European Countries* (The Hague: Kluwer Law International, 2001) 13 – 32 at 18-19.

social movements, is not monolithic; it is characterised by a wide range of organisations, a diverse population with different life experiences and the full range of ideological perspectives.<sup>116</sup> Identifying policy objectives of the DRM is then, of necessity, a process of generalisation, summarisation, and simplification. With this caveat, there are some overarching themes which can be properly ascribed to the DRM. These themes can be categorised or described as “autonomy,” “inclusion,” and “full citizenship” and are seen reflected in the Madrid Declaration which came out of the European Congress of People with Disabilities held in Madrid in March 2002.<sup>117</sup>

The first theme, autonomy, encompasses claims for independence, empowerment, consumer control and self-help. The theme of independence seeks to free disabled people from the oppression and paternalism exercised by parents, professionals, institutions, and welfare bureaucracies; independence is the right to control one’s own life, to choose one’s own goals and to make one’s own mistakes. Independence is the right to control one’s own life and the freedom to choose among options which minimize reliance on others in making decisions and performing daily activities.<sup>118</sup>

Empowerment and consumer control have an individual and a group dimension.<sup>119</sup> For the individual, they mean that as the consumer of services disabled people, to the extent they are able, should assume responsibility for determining the services they want,

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<sup>116</sup> Charlton, *supra* note 4 at 121; Longmore, *supra* note 3 at 111; Samuel R. Bagenstos, “The future of disability law” (2004) 114 Yale Law Journal 1 at 3.

<sup>117</sup> Madrid Declaration, European Congress on People with Disability, 2002: online: European Disability Forum [www.madriddeclaration.org/en/intro/intro.htm](http://www.madriddeclaration.org/en/intro/intro.htm).

<sup>118</sup> Charlton, *supra* note 4 at 124.

<sup>119</sup> Longmore, *supra* note 3 at 113.

who will provide them, and how they will be provided.<sup>120</sup> At a group level they mean that disabled people and their representative organisations must be centrally involved in policy development and the planning and decision making processes which affect their lives.<sup>121</sup> The principle of self-help expresses the objective of disabled people taking responsibility for advocating on their own behalf and establishing and managing service delivery organisations designed to meet their needs.

The second theme, inclusion, encompasses claims for disabled people to be fully integrated into the civil, political, social, economic, and cultural life of their communities.<sup>122</sup> Disabled people must have access to mainstream health, education, transportation, vocational and social services as well as the regular labour market and all the opportunities (and risks) which are available to non-disabled people. The interests and concerns of disabled people must be taken into account at all stages of every new initiative.

The third theme, full citizenship, promotes the vision that disabled people, instead of being objects of charity and being kept in a state of dependency upon others, have equal rights and responsibilities with other citizens.<sup>123</sup> Full citizenship for disabled people requires not only the right to be free from discrimination, but also the right to benefit from special measures which may be required to ensure their inclusion in mainstream

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<sup>120</sup> Madrid Declaration, *supra* note 117 at 3-4.

<sup>121</sup> Charlton, *supra* note 4 at 128.

<sup>122</sup> *Ibid.* at 125; Madrid Declaration, *supra* note 117 at 4.

<sup>123</sup> Madrid Declaration, *ibid.* at 2-3.

institutions. It is this combination of non-discrimination plus positive action which will lead to the inclusion of disabled people in all aspects of their communities.<sup>124</sup>

When disabled people are denied autonomy and are excluded from the mainstream institutions of society they are denied their basic right to be treated as full citizens. To be full citizens means being accepted as equals having an equal claim on the benefits and privileges, as well as the responsibilities, associated with citizenship that other members of the community take for granted. It means being treated as rights holders entitled to autonomy, independence, and respect.

### 3. *Tensions between Social Welfare and Rights Based Policy Responses to Disability*

The DRM has had widespread success in converting social policy planners to the social model of disability. The DRM's policy objectives, including their emphasis on rights and anti-discrimination legislation, derive from this model. However, the social model has not supplanted the medical model; both models animate current disability policy. The newer rights focused policy instruments based on the social model have simply been added to the range of older social welfare policy instruments based on the medical model. A tension arises because the normative bases for the two models are so different; in the one case, charity, and in the other, rights.

The policy responses which flow from the medical model have been historically implemented through various types of social welfare programs.<sup>125</sup> The characteristics of

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<sup>124</sup> *Ibid.* at 3.

these programs include that they are established and managed by agencies (or government departments) composed of various types of professional staff who are taken to know what disabled people really want and need, are provided in separate facilities, and are based on a presumption that the disabled person is different in a way that makes it necessary for the person to be served through a different system than non-disabled people. For example, in employment, the disabled may be pensioned off, segregated in sheltered employment, provided a disability allowance or offered a variety of benefits from a separate social security budget.<sup>126</sup> This exclusionary approach is “accepted as an inevitable natural consequence of medical realities.”<sup>127</sup> The more generous the package of benefits, the stricter the scrutiny is of people claiming disability to get the benefits by reference to purportedly objective medical assessments of disability.<sup>128</sup>

Disabled people object to the demeaning elements characteristic of social welfare systems, the paternalism of the helping professions and the underlying presumption that those who provide care have a moral claim to decide what care is provided.<sup>129</sup> DRM activists have objected to social welfare policy responses to disability for promoting quiescence among disabled people to accept their lot in life, as a cheap pay-off to a

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<sup>125</sup> Waddington & Diller, *supra* note 16 at 2. The definitions set out in the paper for the social welfare and civil rights models of disability correspond to the medical and social models respectively. See also Wim van Oorschot and Bjørn Hvinden, “Introduction: Towards Convergence? Disability Policies in Europe” in Wim van Oorschot and Bjørn Hvinden, *Disability Policies in European Countries* (The Hague: Kluwer Law International, 2001) 2 – 12 at 3.

<sup>126</sup> Waddington & Diller, *ibid.*, at 2.

<sup>127</sup> *Ibid.*, at 2.

<sup>128</sup> *Ibid.*, at 3.

<sup>129</sup> *Ibid.*, at 6.

potentially noisy and embarrassing group and for perpetuating a culture of dependency.<sup>130</sup> Society's apparent beneficence in providing for this group of the 'deserving poor' actually masks a deep antipathy to disabled people.<sup>131</sup>

In contrast, the social model calls for policies of inclusion which focus on the social environment and are "associated with notions of 'mainstreaming', 'equal opportunities' and 'non-discrimination'."<sup>132</sup> The normative basis for disability policy changes from charity or needs to rights and equality.<sup>133</sup> Key policy responses include legislation prohibiting discrimination because of disability and requiring that disabled people be provided with reasonable accommodation, that the physical environment be altered to remove barriers to equal access to employment, goods or services and full participation in the community, and that adequate provision be made for a sufficient and secure income. Where specific programs are established to support disabled people, those programs should be consumer designed and controlled and be delivered in as integrated a setting as possible.

This tension matters to the design of disability policy because the different messages about disabled peoples' competencies and roles engenders resistance to non-discrimination law and loss of political support for targeted disability programs. A widespread feeling develops that people who claim equality and then demand special treatment are not playing fair and are abusing the interests of the other members of

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<sup>130</sup> Bagenstos, *supra* note 116 at 7.

<sup>131</sup> *Ibid.* at 8.

<sup>132</sup> Van Oorschot & Hvinden, *supra* note 125 at 2. See also Waddington & Diller, *supra* note 16 at 4 and Mabbett & Bolderson, *supra* note 48 at 28.

<sup>133</sup> Bickenbach, *supra* note 9 at 231 et seq.

society.<sup>134</sup> These attitudes are very detrimental to non-discrimination law which relies to a great extent on voluntary compliance since enforcement, whether government monitored or individually initiated, is sporadic and the effective application of a duty to accommodate requires a fair measure of knowledge, imagination, and good will on all sides. Loss of political support for targeted social welfare programming will threaten the continued existence of programming which specifically responds to the needs of those disabled people who need special help.

The tension between the two approaches may be resolved by grounding both approaches in a common normative base.<sup>135</sup> Equality is a good candidate for such a norm since both approaches may be based on the claim for social equality or full citizenship. Equality is already a fundamental political and legal value of the EU and all its Member States. Equality, however, is a contested principle and this is the subject of the next section.

#### 4. *Equality Rights*

Equality provides a normative base for a more complex and diverse combination of policy responses that can include both liberal rights and social welfare based responses while promoting the policy themes of autonomy, inclusion and full citizenship. Despite the near universal appeal of the concept of equality, there is little consensus about the

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<sup>134</sup> Longmore, *supra* note 3 at 219. See also Mary Johnson, *Make Them Go Away: Clint Eastwood, Christopher Reeve & the Case Against Disability Rights* (Louisville: The Advocate Press, 2003) for an overview of objections to the *Americans with Disabilities Act* based on the complaint that it is contradictory to claim equal treatment and yet demand to be treated differently by requiring accommodation.

<sup>135</sup> See generally Bickenbach, *supra* note 9 at 221 – 239, particularly at 238.

meaning of equality and equal treatment in the EU context.<sup>136</sup> Two broad conceptions of equality each appearing in a variety of forms, formal equality and substantive equality,<sup>137</sup> dominate the judicial and political landscape.<sup>138</sup>

The classical liberal conception of non-discrimination and formal equality is concerned with consistency of treatment<sup>139</sup> and protecting individuals from unfair treatment based on a prohibited factor<sup>140</sup> such as race and sex. The formal equality paradigm which underpins the normative liberal community is based on the notion that each individual is interchangeable and so is entitled to the same treatment.<sup>141</sup> Its conception of equality derives from Aristotle: “Things (and persons) that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood.”<sup>142</sup> The formal equality paradigm, with its central concern for consistent treatment, permeates all the EU equality directives<sup>143</sup> and is the primary

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<sup>136</sup> Mark Bell and Lisa Waddington, “Reflecting on inequalities in European equality law” (2003) 28 E.L.Rev. 349 at 350.

<sup>137</sup> These two concepts are sometimes described as ‘liberal,’ ‘symmetrical’ or ‘individual justice’ models contrasting with ‘asymmetrical’ or ‘group justice’ models: *Ibid.* at 351.

<sup>138</sup> *Ibid.* at 350; See also Catherine Barnard and Bob Hepple, “Substantive Equality” HeinOnline (2000) 59 Cambridge L.J. 562.

<sup>139</sup> Barnard & Hepple, *ibid.* at 562.

<sup>140</sup> Bell & Waddington, *supra* note 136 at 351.

<sup>141</sup> Hester Lessard, “Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and *Trociuk v. British Columbia (Attorney General)*” (2004), 16(1) C.J.W.L. 165 at 199.

<sup>142</sup> Aristotle, *Ethica Nichomacea*, as cited by Dagmar Schiek, “A New Framework on Equal Treatment of Persons in EC Law?” (2002) 8 European Law Journal 290 at 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) (Winter) The International Journal of Comparative Labour Law and Industrial Relations 403 at 406.

<sup>143</sup> Barnard & Hepple, *supra* note 138 at 563.

orientation of Community law.<sup>144</sup> Legal formalism, “the abstraction of legal rights from social realities,”<sup>145</sup> lies at the “heart of the formal equality paradigm”<sup>146</sup> and ignores the contradictions between “formal, equally distributed legal rights and lived, social, and material inequalities.”<sup>147</sup> 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.<sup>148</sup>

With the formal equality model, a claim for equality must be based on a comparison between the claimant and someone else who can be described as similarly situated so as to contrast the treatment. A consequence of this is that the relevancy of distinctions becomes a central focus of any identification of a comparator. The choice of comparator has a determinative effect on the outcome of any equality claim.<sup>149</sup> The identification of the characteristics of the claimant and comparator is not a neutral, objective descriptive activity. The similarities and differences must be selected from the range of characteristics which actually exists, presumptions about which characteristic is the norm against which difference is assessed are made and differences are accented and

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<sup>144</sup> Bell & Waddington, *supra* note 136 at 358.

<sup>145</sup> Lessard, *supra* note 141 at 201.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> Richard F. Devlin, “Mapping Legal Theory” HeinOnline (1994) Alta. L. Rev. 602 at 610 (Devlin). See also Colleen Sheppard, “Inclusive Equality and New Forms of Social Governance” (2004), 24 S.C.L.R. (2d) 45 at 60 (Sheppard).

<sup>149</sup> Barnard & Hepple, *supra* note 138 at 563

similarities minimized.<sup>150</sup> The choice of comparator and the description of the relative similarities and differences is a highly contested feature of discrimination jurisprudence.

Formal equality seeks to prevent negative differential treatment or the imposition of disadvantage on individuals as a result of stereotypes related to irrelevant personal characteristics. “The focus of formal equality is on the individual’s situation, and on the relevance of the personal characteristics at issue.”<sup>151</sup> Formal equality models leave little room for specific measures related to specific grounds<sup>152</sup> and do not reflect the “inherently collective nature of discrimination” nor 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.”<sup>153</sup>

Substantive equality, in contrast, is concerned with the “actual distribution of resources, opportunities and choices within a society.”<sup>154</sup> It focuses “on the socially and legally constructed particulars that intersect to undermine or enhance the standing of the equality claimant within the liberal community.”<sup>155</sup> A substantive equality approach requires taking into account the impact of a challenged law, policy or practice on both those to whom it applies and those to whom it does not apply and the social and

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<sup>150</sup> William Black and Lynn Smith, “The Equality Rights” (2005), 27 S.C.L.R. (2d) 315 at 368.

<sup>151</sup> Bruce Ryder, Cidalia C. Faria and Emily Lawrence, “What’s *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions” (2004), 24 S.C.L.R. (2d) 103 at 106.

<sup>152</sup> Bell & Waddington, *supra* note 136 at 352.

<sup>153</sup> *Ibid.*, at 353. See also Waddington & Hendricks, *supra* note 142 at 407.

<sup>154</sup> Donna Greschner, “Does *Law* Advance the Cause of Equality” HeinOnline (2001-2002) 27 Queen’s L.J. 299 at 303. See also Sheppard, *supra* note 148 at 60.

<sup>155</sup> Lessard, *supra* note 141 at 201.

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 those outcomes. Its focus on the relative disadvantage of the claimant’s group applies even though not all members of the disadvantaged group are individually disadvantaged and not all members of the comparator, (relatively) advantaged group are advantaged.<sup>156</sup> Substantive equality is concerned with avoiding the imposition of further disadvantage on groups already experiencing social, political or economic disadvantage.<sup>157</sup>

This debate between formal and substantive equality most often takes place in a judicial context. In particular cases both formal and substantive interpretations of equality can lead to the same result, albeit by different routes.<sup>158</sup> There is, however, a continuing tension between the two conceptions because of their different normative bases and because they often lead to opposite conclusions. And these tensions spill over into the political arena where both conceptions of equality are appealed to in support of opposing sides of policy choices. Just as equality is sometimes promoted by social welfare policies and sometimes by rights based policies, equality may be promoted by a formal or a substantive equality analysis.

Disability presents particular concerns for legal equality theories since, as discussed in chapter 2, disability has both an impairment and a social construct aspect.

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<sup>156</sup> Black & Smith, *supra* note 150 at 367.

<sup>157</sup> Ryder *et al.*, *supra* note 151 at 106.

<sup>158</sup> *Ibid.* at 104 & 107.

Disability epitomises Martha Minow's "dilemma of difference"<sup>159</sup> which arises when it is necessary to decide whether to deal with difference by acknowledging and responding to it or by ignoring it. 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 marginalising the person.<sup>160</sup> Instead, a response which takes account of the 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. This, however, formal equality is ill-suited to do because it operates by stripping away context to focus sharply on similarity and difference. Substantive equality seeks to uncover relationships which promote or diminish equality. Formal equality, in contrast, admits only a limited range of variables in order to clearly delineate comparison groups and identify the relevance of differences between those groups with the ultimate goal of justifying similar or different treatment.

In the next section the idea of equality through social rights is introduced. Although this conception of equality is strongly influenced by the substantive equality paradigm, equality through social rights is a concept that operates throughout a polity not just in the legal arena.

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<sup>159</sup> Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, N.Y.: Cornell University Press, 1990).

<sup>160</sup> Pothier, *supra* note 7 at 542.

### 5. *Equality through Social Rights*

One emerging equality model which moves the debate beyond the tensions raised by the formal-substantive dichotomy focuses on the imposition of positive duties to actively promote participation rights.<sup>161</sup> This concept, equality through social rights,<sup>162</sup> moves beyond fault-based determinations of liability (regardless of whether the fault was intentional or a result of institutional or systemic processes) to promoting equality through active planning processes to identify and remedy barriers to equality. This approach imposes a duty to promote equality through the reorientation of all parts of a public or private organisation to “facilitate participation and choice.”<sup>163</sup> It requires those in charge of organisations to engage directly with representatives of disadvantaged groups and negotiate directly with them to devise appropriate policy responses suited to the particular circumstances of both the organisation and the groups.<sup>164</sup> This makes the approach highly context sensitive allowing plans to be devised which take into account the particular economic, cultural, social and political situation which perpetuates disadvantage.

Equality through social rights imposes positive duties on an agency to anticipate how its physical environment, policies and practises are likely to perpetuate or create

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<sup>161</sup> Bell & Waddington, *supra* note 136 at 357.

<sup>162</sup> The concept is also called “equality as a positive duty” (Bell & Waddington, *ibid.* at 357), “fourth generation duties” (Sandra Fredman, “Equality: A New Generation?” (2001) 30:2 *Industrial Law Journal* 145), and “next generation equality” and “positive equality duty” (Colm O’Cinneide, “A New Generation of Equality Legislation? Positive Duties and Disability Rights” in Anna and Gooding, eds., *Disability Rights in Europe: From Theory to Practice* (Oxford: Hart Publishing, 2005) 219 – 247).

<sup>163</sup> Sandra Fredman, “Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?” in Lawson and Gooding, *ibid.* 199 – 218 at 216 [“Fredman, Disability Equality”].

<sup>164</sup> Bell & Waddington, *supra* note 136 at 357.

barriers to equality and take pro-active steps to eliminate those barriers.<sup>165</sup> The tensions between formal and substantive equality which are evident in positive action programs and reasonable accommodation requirements are subsumed into a comprehensive equality promoting action plan which protects the rights of individuals from disadvantaged groups while balancing the various competing pressures and interests that exist in any diverse community. This approach builds on and reinforces the concept of policy mainstreaming by imposing some degree of legislative compulsion to require organisations to identify barriers to equal participation, plan to eliminate those barriers and report on the effectiveness of the plan.<sup>166</sup> The effectiveness of any action plan will be influenced by the extent that consultations with representative community organisations are taken seriously.

An example of this approach applying to public authorities has existed in Northern Ireland since 1998. Every public authority has been required to develop an equality plan to demonstrate how it will comply with the duty to “promote equality of opportunity” between persons without regard to religious belief, political opinion, race, age, marital status, sexual orientation, sex, disability or responsibility for dependants. In addition, public authorities are required in general to “have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.”<sup>167</sup> The equality plans are to be submitted to the Equality Commission of

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<sup>165</sup> O’Cinneide, *supra* note 162 at 220. This concept is similar to the requirements of s. 5 of the Canadian *Employment Equity Act 1995*, S.C. 1995, c. 44, which requires federally regulated employers to identify barriers to equality participation of designated target groups.

<sup>166</sup> O’Cinneide, *ibid.* at 226.

<sup>167</sup> *Northern Ireland Act 1998* (U.K.), 1998, c. 47, s. 75.

Northern Ireland. The equality plans must outline generally how the public authority proposes to fulfil its equality duties and specifically how it will assess its compliance with its duties to consult with appropriate community organisations, assess the impact of policies to promote equality and monitor any adverse consequences of its policies, publish the results of all assessments and to provide staff training.<sup>168</sup>

A German example of this approach can be found in the Equal Opportunities for Disabled People Act.<sup>169</sup> This seeks to achieve barrier free environments by bringing private companies and organisations that represent disabled people together to negotiate target agreements (*Zielvereinbarungen*) which set out objectives and the steps to be taken to eliminate barriers to access. For example, a department store chain could agree with a disabled advocacy group on the objectives, steps and timelines to create a barrier free environment in the store's properties.<sup>170</sup> The law does, however, only require companies to enter into negotiations; there is no legal requirement to reach agreement.<sup>171</sup>

This new approach to conceptualising rights is compatible with the corporatist approaches on which many European countries prefer to base their disability policies.<sup>172</sup> In Denmark disability organisations have been significant players in the development of national disability policy since early in the last century. In 1980 the Danish Disability

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<sup>168</sup> *Ibid.* Sch 9, s. 4.

<sup>169</sup> *Behindertengleichstellungsgesetz (BGG)*, as cited in Martin Kock, "Disability Law in Germany: An Overview on Employment, Education and Access" 5 German Law Journal No. 11 (1 November 2004) – Public Law, online: German Law Journal <http://www.germanlawjournal.com/article.php?id=515>.

<sup>170</sup> *Ibid.* para. 20.

<sup>171</sup> *Ibid.* para. 21.

<sup>172</sup> See text, *infra*, at note 182 for a discussion of corporatist and other models of social welfare policy.

Council was established which was composed of representatives from organisations of disabled people as well as national and local governments. The Council has consistently been represented on councils, committees and boards engaged in national and local disability policy development.<sup>173</sup> Danish disability groups have participated fully in the Danish ‘negotiation society’ which is characterised by extensive networks of the social organisations representing all sectors of the society which negotiate to achieve consensus on a vast array of national policies.<sup>174</sup> Despite a period of economic restraint starting in the early 1980s, during which the power of interest groups waned and the climate of negotiation hardened,<sup>175</sup> disability organisations have clearly expressed their preference for maintaining the policy development processes inherent in the negotiating society. During the negotiations over the Treaty of Amsterdam and its proposals for increasing the rights competence of the EU<sup>176</sup> the Danish Disability Council opposed the proposals which would permit the adoption of non-discrimination Community law. The Council considered that the proposals were an “expression of American society with its extreme individualism” and that legislation which establishes rights “is irreconcilable with cooperation with the power structure on implementing concrete measures for people with disabilities.”<sup>177</sup>

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<sup>173</sup> Steen Bengtsson, “A Truly *European* Type of Disability Struggle: Disability Policy in Denmark and the EU in the 1990s” in Wim van Oorschot and Bjørn Hvinden, *Disability Policies in European Countries* (The Hague: Kluwer Law International, 2001) 73 – 87 at 75.

<sup>174</sup> *Ibid.* at 75.

<sup>175</sup> *Ibid.* at 81.

<sup>176</sup> See *infra* notes 181 and 222.

<sup>177</sup> Bengtsson, *supra* note 173 at 84.

The social rights approach transforms social welfare from a privilege or act of charity to a right and allows for social welfare policy responses to disability to fit comfortably with the rights policy approach flowing from the social model of disability. The approach goes far beyond the traditional right to be free from interference to impose a positive duty on public and private authorities to ensure that everyone has an equal opportunity to be able to positively exercise, or claim the benefit granted by, a right.<sup>178</sup> The approach may even reconcile the tensions between formal and substantive equality by refocusing the debate on identifying barriers to equality and negotiating the balancing of interests which are at stake.

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The policy objectives of the DRM may be summarized as autonomy, inclusion and full citizenship. Achieving these objectives requires continuous progress toward a fully inclusive society through a combination of social welfare responses to disability reinvigorated by the social conception of equality rights as well as traditional non-discrimination rights. One key policy objective of the DRM is the enactment of legislation to prohibit discrimination because of disability in relation to employment, residential and commercial property and the provision of services whether provided by public or private agencies. However, while non-discrimination legislation is a necessary element of any comprehensive disability policy it is clearly not sufficient to form a complete response to the needs of disabled people. A variety of social welfare programming is also essential to deal with aspects of disability that non-discrimination

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<sup>178</sup> Fredman, *Disability Equality*, *supra* note 163 at 217.

legislation does not address as well as provide assistance to those disabled people who are not able to benefit from such legislation. To avoid the oppression which has characterised social welfare programming in the past it will be necessary to ensure disabled people retain independent agency and autonomy when accessing programs. Conceptually this may be achieved through a social rights paradigm of equality because of that concept's requirement that the people who are to be subject to a policy must be engaged at all stages of its development and implementation.

#### **IV. History of the Framework Equal Treatment Directive (FETD)**

European Union disability policy has evolved over the past three decades moving from general statements of support for disabled people to legislated protection from discrimination. The first part of this chapter provides a broad overview of the range of social security schemes developed in Europe in the immediate post war period and the early history of the EU. Income support for working age disabled people was located within these various social security schemes which were based on a medical model of disability. The purpose of this section is to situate the policy shift which the EU requires of its Member States because of the adoption of the social model of disability.

The second part of this chapter briefly canvasses the evolution of the EU's human rights and social dimensions. The increasing recognition of the importance of these dimensions to the European project has led the EU, over the years, to implement a number of action programs and adopt increasingly expansive legislation as part of its efforts to combat discrimination. The increasing recognition of disability as a basis for social exclusion and discrimination is reflected in the inclusion of disability in various EU social programming initiatives and policies and, recently, legislation prohibiting discrimination. In the third part of this chapter the provisions of the equal treatment directives, including the FETD, which were based on Article 13 of the TEC and a significant amendment to the 1976 gender equal treatment directive which was based on Article 141(3) TEC are outlined.

The rationale for the EU's disability agenda has focused on protecting fundamental human rights, perfecting the market, and responding to unemployment

concerns.<sup>179</sup> Over time these soft law measures committed the EU to the social model of disability. One consequence of adopting the social model was the mainstreaming of disability issues by which consideration of disability is taken into account in all aspects of policy development as a regular part of the process.<sup>180</sup> Another consequence was an increasing pressure to promote the equality interests of disabled people by introducing EU level judicial rights protection from discrimination because of disability.<sup>181</sup> The culmination of the Commission's protracted strategy to introduce a rights based disability policy occurred with the 1997 Treaty of Amsterdam which added Article 13 to the TEC.

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<sup>179</sup> Commission, Disability Strategy, *supra* note 49; Commission, Barrier Free, *supra* note 49.

<sup>180</sup> Commission, Disability Strategy, *ibid.* See also Mabbett & Bolderson, *supra* note 48 at 14 et seq.

<sup>181</sup> The Commission was encouraged to press for a rights based EU policy in part through the vigorous advocacy of the then Executive Director of the European Disability Forum, a Commission funded transnational interest group established as part of the HELIOS II program. The Executive Director was British and urged the adoption of anti-discrimination rights based legislation such as that which existed in the UK (Interview by the author with Sir John Wall, May 12, 2005). However, not all disability organisations agreed that the EU should pursue a rights approach to disability policy. For example, disabled peoples' organisations in Scandinavia have been sceptical of anti-discrimination legislation and reluctant to embrace such initiatives. Some of the resistance is based on a fear that such legislation will introduce an "Americanisation" of the Scandinavian welfare system and threaten relatively generous and universal social security programs and a concern that such legislation will single out disabled people and increase their stigmatisation. Of note is the close relationship between the major disability organisations and the governments and a perception that government is a protector of social equality: Rune Halverson and Bjørn Hvinden, *Convergence towards a libertarian model of active citizenship? The future of anti-discrimination regulations in European disability policy*, online: [http://www.shakti.uniurb.it/Eurex/esa/PDF/ESA\\_Hvinden.pdf](http://www.shakti.uniurb.it/Eurex/esa/PDF/ESA_Hvinden.pdf), 2001, at 20 (Department of Sociology and Political Science, Norwegian University of Science and Technology, Trondheim.).

### 1. *The Early European Welfare State*

The European welfare states have distinctive social security systems which derive from their individual histories and cultural traditions. One of many typologies of welfare models in capitalist systems, proposed by Gøsta Esping-Andersen in the 1990s, posits three models.<sup>182</sup> In liberal welfare states welfare programming is selectively targeted at the poor, supplementary private provisions are available for those who can afford them, and there is a preference for the market to provide social security with the state stepping in as a last resort.<sup>183</sup> This approach is exemplified in what are referred to as the Anglo-Saxon countries which include the UK,<sup>184</sup> the US, Australia and Canada.<sup>185</sup> In the conservative corporatist model, found in countries such as Germany, Italy and Spain, social security is linked to employment based insurance schemes which evolved from the subsidiarity principle of Roman Catholic doctrine.<sup>186</sup> His third model, the social democratic model, as implemented in the Scandinavian countries, is based on social solidarity and provides universal services financed from general taxation.<sup>187</sup> Although it is possible to discern one of these models as dominant in any particular country, no

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<sup>182</sup> See, for example, a different typology proposed in the 1960s by Richard Titmuss as described in Linda Hantrais, *Social Policy in the European Union* (London: Macmillan Press Ltd., 1995) at 19.

<sup>183</sup> Joel F. Handler, *Social Citizenship and Workfare in the United States and Western Europe: The Paradox of Inclusion* (Cambridge: Cambridge University Press, 2004) at 91.

<sup>184</sup> *Ibid.* at 95 where it is explained that the immediate post war Labour government in the UK based the British welfare state on a social democratic model. The Conservative government of Margaret Thatcher from 1979 began the radical shift to a liberal welfare model.

<sup>185</sup> *Ibid.* at 92.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

model has ever appeared in its pure form; in every country, and at various times, elements of each model could be found in aspects of their social security systems

In the original six members of the EU “social protection systems were mainly derived from the Bismarckian statist corporatist model, in accordance with the principle that workers are guaranteed benefits and a substitute income related to their previous earnings through a contractual insurance scheme.”<sup>188</sup> Benefits derive from employment and the employer and employee fund the system. It was not an egalitarian system. The post war welfare schemes continued this tradition and offered different arrangements based on occupational grouping without concern for redistribution across sectors of society. Since benefits were related to past earnings, these systems perpetuated social inequality embedded in the labour market including the inequality of disabled people unable to engage fully in paid employment. The scope of these corporatist social security schemes expanded over time, increasing their coverage from industrial injury and occupational diseases, then sickness and maternity benefits, old age survivors’ and invalidity benefits and most recently unemployment benefits.<sup>189</sup> All but Italy based their national health care system on insurance contributions.<sup>190</sup> All six also had a residual non-contributory minimum social assistance funded from general revenue.<sup>191</sup> Significantly, the systems were and remain based on insurance principles financed by the social

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<sup>188</sup> Hantrais, *supra* note 182 at 32. See also Handler, *ibid.* at 91 – 92.

<sup>189</sup> Hantrais, *ibid.*

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.* at 33.

partners, as opposed to universal coverage principles financed by general taxation, and administered with state supervision decentralized to local governments.<sup>192</sup>

When the UK, Ireland and Denmark (bringing the Anglo-Saxon and Scandinavian models) entered the EU in 1973 they brought social protection schemes which fit roughly within the social democratic model.<sup>193</sup> In both the UK and the Danish schemes “the right to a pension, health care and family allowances was granted on the basis of social citizenship.”<sup>194</sup> Employment provided a wage but welfare benefits were provided through general revenue.<sup>195</sup> The schemes in these countries were distinguished from the corporatist model by their tax based financing and their universality.<sup>196</sup> While Denmark emphasised income maintenance, Ireland and the UK focused on means tested, low rate payments to provide universal basic subsistence.<sup>197</sup>

The third enlargement, in which Greece (1981), Portugal (1986) and Spain (1986) joined the EU, brought in countries with much less developed social security systems that relied heavily on family, community and the church to provide essential welfare support.<sup>198</sup> Their systems were broadly based on corporatism, with employers carrying the major contributory burden. Spain and Portugal had tax supported health care systems. Remarkably, as late as the early 1990s a high proportion of people were not covered by

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<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*

<sup>196</sup> Gøran Therborn, *European Modernity and Beyond: The Trajectory of European Societies 1945 – 2000* (London: Sage Publications, 1995) at 90 – 92.

<sup>197</sup> Hantrais, *supra* note 182 at 33.

<sup>198</sup> *Ibid.* at 34.

social insurance and in Greece and Portugal there was no general residual welfare system.<sup>199</sup>

At the end of World War II the immediate need was to rebuild. Once the Western European economies were functioning again, in response to domestic political pressures and reflecting their various historical and cultural traditions, national social security systems resumed their evolution. From soon after the end of World War II until the early 1970s, when stagflation and Euroscosis set in, the economies of Western Europe experienced steady growth with low unemployment and low inflation. It was during this “Golden Age” that the European welfare state came into being.<sup>200</sup> In 1958, the European Economic Community, with its liberal market principles, was fitted to the developing social security regimes of the founding members. With the first and second enlargements different social security models brought their philosophies and principles into the mix. It is against this background that the social dimension of the EU developed.

Initially the needs of disabled people were met within the framework of these various social security systems. The particular configuration of programs within each national scheme was complex but, in general, the programs were directed at the amelioration of the burden of impairments and the loss of income caused by disability or to the correction of the disabled workers’ productivity limitations.<sup>201</sup> The programs were

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<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.* at 90. Also referred to as “the ‘25 golden years’ of capitalism” and the “Fordist” era: Christine Cousins, *Society, Work and Welfare in Europe* (London: Macmillan Press Ltd., 1999) at 13.

<sup>201</sup> Robert H. Haveman, Victor Halberstadt and Richard V. Burkhauser, *Public Policy Toward Disabled Workers; Cross-National Analyses of Economic Impacts* (Ithaca: Cornell University Press, 1984) at 3.

derived from the medical model of disability in that eligibility was based on degree of impairment and the primary responses were directed toward pensioning disabled people out of the work force, either temporarily or permanently, or providing employment options in a variety of segregated environments or through special positive action measures. European disability policy in general was based on the belief that disabled people primarily required social security, care and assistance. At the end of the twentieth century “[m]any Europeans were proud of their generous social welfare laws ... and considered this type of approach superior to the civil rights model of disability adopted in the United States.”<sup>202</sup> Absent until the mid- to late 1970s were policies based on a social model of disability that focused on rights claims of disabled people to equal participation in their communities. In the following paragraphs the general nature of the disability policy for working age adults in six EU countries as it was from the post war period up to the mid-1970s is outlined.

The basic principle guiding disability policy in Sweden was medical rehabilitation and integration to the work force.<sup>203</sup> Eligibility for disability income support was assessed against a medical standard “with an explicit (and increasing) consideration of labour market conditions for older workers.”<sup>204</sup> The Netherlands early on developed a comprehensive, integrated and generous scheme to respond to the needs of disabled people of working age. The key to eligibility was the percentage of reduction of earning

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<sup>202</sup> Aart Hendriks, “Promoting Disability Equality after the Treaty of Amsterdam: New Legal Directions and Practical Expansion Strategies” in Lawson & Gooding, *supra* note 162 187 – 195 at 187 & 189.

<sup>203</sup> Rafael Lindquist, “Swedish Disability Policy: from Universal Welfare to Civil Rights?” in Lawson & Gooding, *ibid.* 109 – 128 at 113.

<sup>204</sup> Haveman, Halberstadt & Burkhauser, *supra* note 201 at 61.

capacity as assessed against a medical standard: “Lack of suitable employment is generally considered to be caused by someone’s handicap”<sup>205</sup> Since 1973 labour market considerations have come to play a major influence on eligibility and the disability option came to be an important part of national employment policy. The Federal Republic of Germany established a variety of income replacement and disability pension schemes, all of which provided long term support in cases where extensive rehabilitation programs were not successful in returning the person to the labour force. In addition, a federal agency was responsible for a variety of programs to assist in placing people in the labour force “to the extent residual work capacity permit[ed].”<sup>206</sup>

In France, despite the operation of a number of income replacement programs for disabled people, during the first decades after the war, “family responsibility for the disabled was in fact the primary means of support.”<sup>207</sup> Since 1975, in addition to a variety of employment related income replacement schemes, a single social assistance program has provided a basic income for those unable to work. In Italy disability policy was and remains closely connected to national employment policy. In addition to a medical capacity assessment, eligibility for the primary employment related disability programs is influenced by regional “social and economic characteristics.”<sup>208</sup> A separate, residual income support program covered those not covered by one of the employment insurance

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<sup>205</sup> *Ibid.* at 63.

<sup>206</sup> *Ibid.* at 67.

<sup>207</sup> *Ibid.* at 67.

<sup>208</sup> *Ibid.* at 70.

schemes.<sup>209</sup> In the United Kingdom a combination of employment linked national insurance and tax supported national assistance programs provided income support for workers who became disabled or disabled people who had never joined the labour force.<sup>210</sup> The disability scheme in the UK was characterised by a large number of diverse programs administered by various levels of government plus businesses and charities, with a significant degree of discretion intentionally built in their administration.<sup>211</sup>

In addition to programs to provide income to disabled adults, national disability policies encompass a range of programs to increase the capacity to earn income. The public policy objectives of these programs are to reduce the aggregate costs of disability to the national economy as opposed to distributing its burden more evenly which animates the income support programs.<sup>212</sup> These programs include vocational rehabilitation and training programs, operating or funding sheltered and semi-sheltered workshops to provide permanent or temporary alternatives to mainstream employment, a variety of subsidizes for equipment, training or wages and legislated employment quota systems. The design of all of these programs takes into account the particular segment of the disabled population to be served, the balance between wage and social assistance payments, the types of goods that will be made and the methods for sale, and the degree to which government or a private agency manage the operation.<sup>213</sup>

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<sup>209</sup> *Ibid.* at 71.

<sup>210</sup> *Ibid.* at 75.

<sup>211</sup> *Ibid.* at 78.

<sup>212</sup> *Ibid.* at 135.

<sup>213</sup> *Ibid.* at 137.

Regulatory employment quota systems were and remain a major labour force policy response to disability in most of the Member States. The essential feature of all the quota systems is to require all employers over a certain size to employ a set percentage of employees who are registered as disabled or meet some other qualifying criteria. There are three major types of legislated quota schemes: voluntary compliance, obligatory compliance without sanction, and obligatory compliance with sanction. None of these systems has been especially effective in responding to the employment needs of disabled people.<sup>214</sup>

## 2. *Development of the Human Rights and Social Dimensions of the EU*

The end of the Second World War was a watershed in European state relations. As the first step in a grand plan to promote closer cooperation among the Western European countries, six countries agreed to an ambitious program to develop a common market in the coal and steel industries in order to rationalise the development of those industries in all the Member States.<sup>215</sup> At Messina, Sicily, in June 1955 these six countries met to discuss proposals for further progress toward a united Europe based on development of common institutions, creation of a common market and merging of their

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<sup>214</sup> Lisa Waddington, "Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws" (1996) 18 *Comparative Labor Law Journal* 62 (Waddington, "Quotas").

<sup>215</sup> This was the first of the European Communities, the European Coal and Steel Community. Belgium, France, Italy, Luxembourg, the Netherlands and West Germany were the founding members. In 2002 this organisation was merged into the European Community.

economies, and gradual harmonisation of social policies.<sup>216</sup> From this initiative, in 1957, the six countries signed the Treaty of Rome establishing the European Economic Community (EEC). The policy objectives of the EEC were the establishment of a common market, the progressive approximation of economic policies of the Member States, the promotion of harmonious economic growth, and the promotion of closer relations between its members.

(i) *The Social Charter*

The June 1985 Milan European Council meeting agreed to a program to complete the internal market envisaged in the EEC treaty by 31 December 1992. The desire to ameliorate the social consequences of the economic liberalisation program which this would entail and to counter criticism that the EEC only benefited business raised the profile of the social dimension of Europe. This led to the declaration of the *Community Charter of the Fundamental Social Rights of Workers* (Social Charter)<sup>217</sup> at the Strasbourg summit in December 1989.<sup>218</sup> The Social Charter included as fundamental workers' social rights the equal treatment of men and women and the protection of

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<sup>216</sup> For an overview of the origins of the European Union see, for example, Neill Nugent, *The Government and Politics of the European Union*, 5<sup>th</sup> ed., (Durham: Duke University Press, 2003) and Desmond Dinan, *Ever Closer Union*, 2<sup>nd</sup> ed., (London: Lynne Rienner Publishers, 1999).

<sup>217</sup> EC, Council, *Conclusions of the Presidency*, Strasbourg (Brussels: General Secretariat of the Council, 1989).

<sup>218</sup> Nugent, *supra* note 216 at 424; Anthony Wallace, "Completing the Single Market: The Lisbon Strategy" in Maria Green Cowles and Desmond Dinan, eds., *Developments in the European Union* (Palgrave MacMillan, Basingstoke, 2004) 100 at 111; Brain Bercusson, "The European Community's Charter of Fundamental Social Rights of Workers" (1990) 53 *The Modern Law Review* 624, online: <http://www.jstor.org.ezproxy.library.uvic.ca/cgi> .

disabled persons. The Social Charter became a Protocol attached to the 1992 Treaty of Maastricht which established the European Union's current three pillar structure:<sup>219</sup> the European Communities,<sup>220</sup> the Common Foreign Security Policy and Cooperation in the Spheres of Justice and Home Affairs. The European Economic Community was renamed the European Community and its treaty was renamed the Treaty establishing the European Community (TEC).<sup>221</sup>

(ii) *Discrimination Based on Disability*

The 1996 Intergovernmental Conference proposed a new article giving the Council discretionary power to take action to combat discrimination. This proposal became Article 13 of the TEC which reads:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination

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<sup>219</sup> The 1992 Treaty of Maastricht made numerous changes to the structure of what was up until then the European Economic Community. As a result of Maastricht, the Treaty on European Union, *Consolidated Version of the Treaty on European Union* (2002) O.J. C. 325/5 [TEU], established the European Union structured in three "Pillars." The newly named European Community, formed by the Treaty establishing the European Community, *Consolidated Version of the Treaty establishing the European Community* (2002) O.J. C. 325/33 [TEC], is Pillar I.

<sup>220</sup> The term "European Communities" refers to the European Community, the European Coal and Steel Community and Euratom, each established by a separate treaty.

<sup>221</sup> Given the complex nature of the EU structure, there is a question whether to use the term "EU law" or "Community law." Since not much beyond the TEC is subject to the jurisdiction of the ECJ, lawyers generally prefer to use "Community law." Nugent, *supra* note 216 at 237.

based on sex, racial or ethnic origin, religion or belief, disability,<sup>222</sup> age or sexual orientation.<sup>223</sup>

The Treaty of Amsterdam incorporated the Social Charter into the TEC.<sup>224</sup> To promote those social rights the Community was directed to “support and complement” Member State programs dealing with, among other things, the “integration of persons excluded from the labour market,” combating “social exclusion,” and the “modernisation of social protection systems.”<sup>225</sup>

(iii) *The Charter of Fundamental Right*

The 1999 Cologne European Council decided to consolidate the various references to “fundamental rights” into a charter to make them more evident. The result was the Charter of Fundamental Rights of the European Union.<sup>226</sup> The Charter covers a wide range of rights including rights related to dignity, solidarity, citizens’ rights, justice and equality. Specifically regarding disability, Article 21 prohibits “any discrimination”

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<sup>222</sup> Although the practice of specifically referring to disability when referring to types of discrimination had become common in the 1990s, its inclusion in Article 13 was not inevitable. The Dutch Presidency had tried to have it removed: Mabbett & Bolderson, *supra* note 48 at 14. The diversity of seemingly unrelated grounds combined in Article 13 reflects the diversity of political forces in play. The sex ground extended the scope of a well established jurisprudence from worker to citizen; the grounds of race and ethnic origin and religion and belief reflected concerns about human rights in the Central and Eastern European Countries which were soon to be admitted to the EU; and the disability, age, and sexual orientation grounds reflected an interest in modernizing social policy: Mabbett, *supra* note 10 at 105.

<sup>223</sup> A second paragraph was added by the 2000 Treaty of Nice, (2001) O.J. C. 80/1, providing that the Article 251 co-decision procedure would apply to the adoption of “incentive measures” in support of the objectives of Article 13.

<sup>224</sup> TEC, *supra* note 219, Title XI, Chapter I, Social Provisions (referred to as the “Social Charter”).

<sup>225</sup> *Ibid.* Article 137 (h), (j), and (k), as amended by the Treaty of Nice, *supra* note 223.

<sup>226</sup> EC, Council, *Charter of Fundamental Rights of the European Union* (2000) O.J. C. 364/1.

based on disability, among other grounds; Article 26 affirms the principle of the integration of disabled people in the life of the community.<sup>227</sup>

### 3. *Overview of the Post-Amsterdam Equal Treatment Directives*

Currently there are two directives<sup>228</sup> based upon Article 13 and one based on Article 141(3) which prohibit various forms of discrimination because of personal characteristics. These are the FETD,<sup>229</sup> the Racial Equal Treatment Directive (RET D),<sup>230</sup> and the amended Gender Equal Treatment Directive (GETD).<sup>231</sup> The RETD covers the grounds of race and ethnic origin, the GETD covers gender, described as “men and

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<sup>227</sup> Article 21: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.” Article 26: “The Union recognizes 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.”

<sup>228</sup> Directives are one form of EU secondary legislation. Directives “shall be binding, as to the result to be achieved,... but shall leave to the national authorities the choice of form and methods.” TEC, *supra* note 219 Article 249.

<sup>229</sup> FETD, *supra* note 2. The member states of the European Economic Area bound themselves to implementing the FTED in 2001.

<sup>230</sup> EC, *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, [2000] O.J. L. 180/22 [RET D].

<sup>231</sup> EC, *Council Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and work condition*, [2002] O.J. L. 269/15 [GETD], amending EC, *Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and work condition*, [1976] O.J. L. 039 [1976 GED]. This directive is based on Articles 141(3) and 307 of the TEC, *supra* note 219, rather than Article 13. It updates the original 1976 directive which was based on the Community’s residual power to legislate where required to achieve the purposes of the community and aligns its wording with the RETD and FETD.

women” and sex discrimination which may occur indirectly through marital or family status, and the FETD covers “religion or belief, disability, age or sexual orientation.”

All of the directives recite that the EU is founded on the “principles of liberty, democracy, respect for human rights and fundamental freedoms” and that the “right to equality before the law and protection from discrimination” are universal human rights recognised by various international treaties.<sup>232</sup> All include reference to the United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women. The RETD and GETD refer to the UN Convention on the Elimination of All Forms of Racial Discrimination while the FETD mentions Convention No. 111 of the International Labour Organisation, prohibiting discrimination in employment. The RETD and FETD both declare that discrimination “may undermine the achievement” of the objectives of the Community, specifically “the attainment of a high level of employment and of social protection.”

Each of the directives recites different particular objectives of the European Community. The GETD refers to the treaty provisions which make equality between men and women a “task” and an “aim” of the Community and “impose a positive obligation” on the Community to promote such equality. The FETD makes particular mention of the

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<sup>232</sup> All the Member States of the EU are signatories of the European Convention on Human Rights (ECHR). The ECJ has in effect incorporated all the fundamental human rights protections set out in the ECHR into Community law even though the EU itself has not acceded to the treaty. While the ECHR prohibits discrimination because of sex, race, disability and the other grounds listed in Article 13, the ECJ seldom makes any reference to the ECHR and does not refer to any ECHR jurisprudence in support of its interpretation of key equal treatment concepts which are found in the directives.

free movement of persons while the RETD refers to the EU as an “area of freedom, security and justice.”

The GETD and the FETD apply to all persons and to both the public and the private sectors in relation to access to employment, self-employment, or occupation, vocational guidance and training including practical work experience, dismissals and pay, and membership in any employer, employee, or professional organisation. The RETD is more expansive as, in addition to the various aspects of employment, it applies to “social protection, including social security and healthcare, social advantage, education,” and goods and services available to the public, including housing.<sup>233</sup>

The purpose of the three directives is to “put into effect ... the principle of equal treatment” which is defined as the absence of “direct or indirect discrimination.” Direct and indirect discrimination are defined in essentially the same words in each of the directives. Direct discrimination occurs “where one person is treated less favourably than another is, has been or would be treated in a comparable situation.” Indirect discrimination occurs “where an apparently neutral provision, criterion or practice would put persons [identified by one of the grounds of discrimination] ... at a particular disadvantage compared with other persons.” Harassment is included in the definition of discrimination in all three directives. The common definition of harassment refers to

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<sup>233</sup> In 2003 the Commission presented a proposal to implement the principle of equal treatment between men and women in the access to and supply of goods and services, in response to a call by the European Council in Nice, 2000, to reinforce equality in areas other than employment: EC, Commission, COM (2003) 657 final. In 2003 the Disability Intergroup of the European Parliament introduced a proposal for a disability specific directive which would expand the scope of non-discrimination to include the areas of social protection, healthcare, social advantages, education, access to goods, facilities and services, the portrayal of disability in the media, and the design of all products.

“unwanted conduct...with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.” The RETD and FETD continue with a provision that “the concept of harassment may be defined in accordance with national laws and practice.” In contrast, the GETD makes no provision for national variation in definition and adds a specific reference prohibiting sexual harassment. All three directives deem an “instruction to discriminate” to be discrimination.

Only the GETD has a provision “encouraging” Member States and employers and vocational trainers to “take measures to prevent all forms of discrimination on the grounds of sex, in particular harassment and sexual harassment.” The GETD also specifies that it “shall be without prejudice” to national provisions for the “protection of women, particularly as regards pregnancy and maternity,” the framework agreement on parental leave<sup>234</sup> and the right of Member States to “recognize distinct rights to paternity and/or adoption leave.”

Each of the directives provides for a general exemption which can be applied to “employment” (GETD) or “occupation” (RETD and FETD). The exemption clause provides that Member States “may” provide that “a difference in treatment” “shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, [the prohibited

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<sup>234</sup> EC, Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (1996) O.J. L. 145.

ground] constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.”<sup>235</sup>

The FETD, which deals with religion or belief, disability, age and sexual orientation, is the only one which specifies, in Article 2(5), it is “without prejudice” to national legislation which is “necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.”

All of the directives incorporate provisions for “positive action” to promote equality, although each contains slightly different wording. The GETD incorporates positive action by referencing Article 141(4) TEC which permits measures which provide for “specific advantages” benefiting the underrepresented sex.<sup>236</sup> The RETD and the FETD each contains its own positive action clause which provides: “the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantage linked” to one of the grounds. The FETD, only in relation to disability, specifies that equal treatment is not offended by provisions for the “protection of health and safety at work” or for “measures

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<sup>235</sup> The FETD also includes specific exemptions related to religion and the rights of churches to use religious criteria in employment decisions, provisions permitting differential treatment on the basis of age, and specific provisions permitting differences in treatment where authorized by national legislation on the basis of religion in the Northern Ireland police and education services.

<sup>236</sup> TEC, *supra* note 219, Article 141(4): “With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall 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.”

aimed at creating or maintaining provisions or facilities for safeguarding or promoting [disabled persons'] integration into the working environment."<sup>237</sup>

All of the directives require the Member States to "take adequate measures to promote dialogue between the social partners (representatives of workers and employers) with a view to fostering equal treatment" including monitoring of workplace practices and collective agreements and sharing research and best practices. Further, the Member States are to "encourage dialogue with appropriate non-governmental organisations" which have a "legitimate interest in contributing to the fight against discrimination."

The Member States must ensure that there are appropriate national administrative and judicial procedures for the enforcement of the directives by persons who believe themselves to have been discriminated against and that domestic organisations which have a legitimate interest in ensuring the implementation of the directives "may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial or administrative procedure" to enforce the directive. Sanctions must be "effective, proportionate and dissuasive."

The GETD and RETD, but not the FETD, require the Member States to "designate a body or bodies for the promotion of equal treatment" of persons covered by the directives. These organisations, which may be part of national human rights agencies, must have the authority to provide independent assistance to persons complaining they have been discriminated against, conduct independent surveys, and produce independent reports which may include recommendations on any issues relating to discrimination.

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<sup>237</sup> FETD, *supra* note 2, Article 7(2).

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The origins of the welfare state are found in nineteenth century Europe. After a hesitant beginning, the range of social security measures slowly increased. After a period of basic reconstruction following World War II, social security programs began to develop rapidly in the founding members of the EU and many other Western European countries. For disabled people of working age a variety of income replacement and workforce integration programs were established within the broader social security schemes. The programs were based on the medical model of disability which focuses attention on the individual's impairment and how that impairment reduces the person's productive capacity. In many countries, the concept of disability in an employment context was manipulated to serve national employment policy objectives. The EU, in its original configuration as the EEC, began to exert its influence on domestic social security policies from the coming into force of the Treaty of Rome in 1958.

The European Union's competence respecting a range of social and human rights concerns has increased rapidly in recent years. There is a growing recognition that the economic objectives of the EU are directly tied to its social objectives. A variety of policy instruments are utilised in relation to these social objectives including declarations of rights in the sense of social citizenship rights to economic and social security through social welfare programming as well as legislation implementing rights in their classical liberal sense of economic and property rights and freedom from discrimination. With the 1997 Treaty of Amsterdam, the EU assumed increased competence to respond to issues of discrimination because of sex, race, ethnic origin, religion and belief, disability, age,

and sexual orientation. By 2000, two directives had been adopted to respond to discrimination because of all the new grounds and by 2002, the Gender Equal Treatment Directive had been substantially amended. As discussed in chapter 3, the different normative bases for these various conceptions of rights create tensions between liberal non-discrimination rights and social rights. These tensions are reflected in the political struggles which led first to the adoption of Article 13 TEC in the Treaty of Amsterdam and then the equal treatment directives based on that provision.

This chapter has provided a general overview of the directives and noted commonalities and differences. The fact that disability is treated differently from the other grounds suggests that the Council was hesitant to wholeheartedly adopt a rights based policy. This may reflect scepticism about the rights approach to disability policy or even a concern that guaranteeing such rights would lead to judicially imposed remedies to complaints of discrimination which might involve high costs for public or private entities. More positively, the hesitation may well have been caused by a fear of jeopardizing the viability and legality of the wide variety of social welfare programs which are the mainstay of disability policy in all the Member States. In the next chapter, the FETD's substantive provisions are examined in detail particularly as they relate to disability in further response to the first research question, "What protection from discrimination does the FETD offer disabled people?"

## V. Disability Provisions of the FETD

Many of the provisions of the FETD are common to all the grounds but, with the exception of sexual orientation, each ground also has its specific provisions. The concepts “equal treatment” and “discrimination,” and other concepts in the FETD specifically related to disability, are capable of supporting a variety of interpretations. In this chapter, I examine the substantive provisions related to disability in order to respond to the first of the research question which asks “What protection from discrimination does the FETD offer disabled people?” This will set the stage for the next chapter in which I discuss the second research question which deals with the contribution of the FETD to achieving the policy objectives of the DRM.

My review of the substantive provisions related to disability begins, in the second part of this chapter, with the possible consequences of the absence of a definition of disability in the directive. The meaning of the key concepts of discrimination and reasonable accommodation are then explored before considering the defences to a complaint of discrimination - in the case of direct discrimination the occupational requirement defence and in the case of indirect discrimination the defence of objective justification. My review of the substantive provisions of the FETD concludes with the provision allowing positive action programs linked to any of the grounds.

The limited scope of the FETD, covering as it does only employment, vocational training, and membership and involvement in organisations of workers and employers and professional bodies,<sup>238</sup> should be kept in mind when considering the possible

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<sup>238</sup> FETD, *supra* note 2, Article 3.

interpretations of its various components since those interpretations may well be influenced by its limited scope. It is conceivable that the interpretation of some concepts such as, for example, the definition of disability or reasonable accommodation, will be influenced by its application only to employment. Additional factors might be brought into play when applying such concepts to areas such as public transportation or education.

The methodology for this chapter consists of reviewing the text of the directive, academic commentary and ECJ gender equal treatment jurisprudence.<sup>239</sup> Two cautions about extrapolating from this jurisprudence should be noted: First, most of the gender equality cases were heard before the principle of subsidiarity entered Community law and, second, the historical context has changed.

Article 5 of the TEC,<sup>240</sup> setting out the principle of subsidiarity, provides that in areas of shared competence the Community can only act “if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”<sup>241</sup> In practice, subsidiarity requires the Commission to show that legislation is necessary because the matter cannot be adequately regulated at the national

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<sup>239</sup> This jurisprudence relates to the 1975 Equal Pay Directive, EC, *Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women*, O.J. L. 045 [Equal Pay Directive] and the 1976 Equal Treatment between Men and Women Directive [1976 GED], *supra* note 231.

<sup>240</sup> Treaty establishing the European Community, *supra* note 219.

<sup>241</sup> *Ibid.*

level and Community action would be of clear benefit.<sup>242</sup> For the RETD and the FETD the Commission explained that these requirements were met because, although most Member States had either constitutional or statutory non-discrimination provisions, these provisions varied widely. The directives were to provide certainty as to the common level of protection from discrimination and such common standards could only be achieved by co-ordinated action at the Community level.<sup>243</sup> During an extensive consultation process the Member States and non-governmental organisations (NGOs) noted the importance of respecting their different traditions to enable flexibility in implementation and to avoid interfering with beneficial, targeted programs in some Member States. The Commission's proposals for the FETD were, therefore, couched in terms of general principles, allowing the Member States considerable discretion in implementation:<sup>244</sup> "The wording is sufficiently broad to accommodate the different circumstances of Member States, in particular their different policy preferences and priorities."<sup>245</sup> The areas of vagueness in the directive were intended to be vague.

It is also worth noting that the purpose of the FETD is declared to be "to lay down a general framework for combating discrimination ... with a view to putting into effect

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<sup>242</sup> EC, Commission, *General Report 2003: The European Union in 2003* (Brussels: EC, 2003) at para. 31, online: Europa <http://europa.eu.int/abc/doc/off/rg/en/2003/pt0031.htm>.

<sup>243</sup> EC, Commission, *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination*, COM (1999) 564 final [*"Measures to combat"*].

<sup>244</sup> *Ibid.* at 10.

<sup>245</sup> EC, Commission, *Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation*, COM (1999) 565 final at 8 [*"Proposal"*].

... the principle of equal treatment.”<sup>246</sup> One would expect there to be more scope for national variation with a framework directive than a directive such as the 1976 GED which declares its purpose to be “to put into effect” the principle of equal treatment between women and men.<sup>247</sup>

Each Member State has an extensive range of disability policies which are integrated into their various social welfare systems. The subsidiarity principle combined with the stated purpose of the directive will likely cause the Court to be quite deferential to the policy choices the Member States. The Court will also be conscious of the tension between the objectives of ensuring a common minimum level of protection from discrimination and preserving national identity and distinctiveness which the principle of subsidiarity reflects.

When the Court delivered its early gender equality judgements the Community was just forming and the Court wanted to advance European integration by establishing that “Community law gave rise to legal rights and obligations between people, not just between governments. This principle is now well established ...”<sup>248</sup> With the tensions between the supranational and state-centric European integration paradigms always in the background,<sup>249</sup> it is likely that in the current climate the Court will be strongly influenced by a desire to defer to national disability policy.

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<sup>246</sup> FETD, *supra* note 2, Article 1.

<sup>247</sup> *Supra* note 231, Article 1(1).

<sup>248</sup> Mabbett & Bolderson, *supra* note 48 at 23.

<sup>249</sup> Constantin Stefanou and Helen Xanthaki, “The Principle of the Effective Protection of the Individual in EC Law and the Dialectic of European Integration Theory” *HeinOnline* (1999) 50 *Northern Ireland Legal Quarterly* 212 at 212.

A directive is a type of Community law which “shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”<sup>250</sup> In principle a directive does not have direct effect in domestic law since it is binding only with respect to the “result to be achieved” which means that domestic legislation is required to operationalise a directive.<sup>251</sup> The process of converting the objectives of a directive into effective national law is called transposition. Although the Member States have a wide discretion about how to implement a directive, the fundamental obligation imposed by the TEC to transpose directives requires Member States to adopt effective measures to ensure the objectives are fully implemented.<sup>252</sup> As well, when applying national legislation, courts must always interpret their national law in light of EU directives and their objectives.<sup>253</sup>

When a domestic court refers questions about Community law to the ECJ the answers the Court gives are formulated as general interpretative principles which are then

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<sup>250</sup> TEC, *supra* note 219, Article 249.

<sup>251</sup> After the time period allowed for transposition, if the directive is “unconditional and sufficiently precise” it may be relied upon by an individual against the state (which is interpreted broadly to include most forms of public authority) but not against an individual if the state has failed to implement the directive in national law or has failed to implement it correctly: *Marshall v. Southampton and South-West Hampshire Area Health Authority*, (1986) C-152/84 at para. 46. In this case a dietician had been compulsorily retired as she was eligible for the state pension for women. The eligibility age for the state pension for women was 60 and for men 65.

<sup>252</sup> *von Colson & Kamann v. Land Nordrhein-Westfalen*, (1994) C- 14/83, at para. 15. The case involved two female social workers who were not hired to work at a state prison; two less qualified men were hired instead. The reference to the ECJ dealt with questions about the adequacy of remedy in cases of sex discrimination in the relevant German law.

<sup>253</sup> *Ibid.*, at para. 26. See also *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, (1990) C-106/89 at para. 8, where the ECJ held that the Spanish courts had to interpret Spanish company law “as far as possible” in light of the objectives of the directive even though Spain had not transposed the directive.

applied by the referring court which, in all cases, has the sole jurisdiction to assess the facts, interpret and apply national legislation, and apply the principles enunciated by the ECJ to the specifics of the case.<sup>254</sup> Because so many of the practical applications of the non-discrimination provisions are fact specific, it is easily conceivable that widely divergent standards of equal treatment will evolve within the EU as national courts apply the Court's general principles to the facts which they find. For example, the judgements which a domestic court will make about the reasonableness of an accommodation are likely to be influenced by its general attitude toward, and its experience, with disability issues.<sup>255</sup>

As noted above, the purpose of the FETD is to "lay down a general framework for combating discrimination ... with a view to putting into effect ... the principle of equal treatment."<sup>256</sup> ECJ equality jurisprudence reflects almost exclusively the formal equality paradigm which was discussed in chapter 3. The Court has clearly and consistently held

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<sup>254</sup> See, for example, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, C-222/84, [1986] 3 CMLR 240 ["*Johnston*"] at para. 39; *Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG.*, C-171/88, [1993] 2 CMLR 932 ["*Rinner-Kühn*"] at para. 15; *Bilka-Kaufhaus GmbH v. von Hartz*, C-170/84, [1986] 2 CMLR 701 ["*Bilka*"] at para. 36. This has been described by the Court as the "power to provide the national court with aids to interpretation based on community law which may guide the said court in its assessment of the effects of this law:" *Frilli v Belgian State*, C-72/1, [1973] CMLR 386.

<sup>255</sup> Theresia Degener, "Disability Discrimination Law: A Global Comparative Approach" in Lawson & Gooding, *supra* note 162 87 – 106 at 94-95: After noting that Germany has "no history of civil rights," Degener refers to a 1996 case in which the German Federal Constitutional Court decided that a school had not discriminated against a child who used a wheelchair by denying her admission to a mainstream school (because it was not physically accessible) on the basis that the separate disabled education facilities were equal to those provided in the regular school system. There was no requirement to consider any accommodation for the child. (*Bundesverfassungsgericht, Urteil vom 8 October 1996, Europäische Grundrechtszeitschrift 1997, s 586.*)

<sup>256</sup> *Supra* note 2, Article 1.

that “the principle of equal treatment, when considered as a general principle of Community law, requires that similar situations should not be treated differently and different situations should not be treated identically unless such a differentiation is objectively justified.”<sup>257</sup> As will be seen in the discussion that follows the formal equality paradigm permeates the jurisprudence. The ECJ, like the Commission,<sup>258</sup> considers positive action an exception to the principle of equal treatment and, because it is an exception, narrowly construes the range of actions which are permissible.

For the European Commission too the formal equality paradigm informs its understanding of “equality” as “equal opportunity.”<sup>259</sup> The Commission’s interpretation of equal opportunity requires equal treatment of individuals combined with, at the option of national authorities, a variety of “positive action” programs and initiatives to compensate individuals for the effects of long standing social inequality.<sup>260</sup> The essential

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<sup>257</sup> *Spain v Commission*, C-217/91 at para. 37. The case was an action for the annulment of a directive dealing with the labeling and presentation of liqueurs; *Spain v. Commission*, C-304/01 at para. 31, a case dealing with a directive setting out different rules for different lengths of fishing boats; *Swedish Match v. Secretary of State for Health*, C-210/03 at para. 70, a case dealing with a directive prohibiting advertising of oral tobacco products. See also *A. v Commission of the European Communities* Case T-10/93 [1994] 3 C.M.L.R. 242 at para. 42, where the Court said: “According to a consistent line of case-law, the principle of equal treatment is breached when two categories of persons whose factual and legal circumstances disclose no essential difference are treated differently or where situations which are different are treated in an identical manner.” In this case an applicant for a position as an agricultural development officer was refused employment because of disability. The Court dismissed his equality claim holding that his position, an applicant who had voluntarily declared his serpositive status, was “in no way comparable to that of another candidate who did not make such a voluntary declaration.” See generally Schiek, *supra* note 142 at 293.

<sup>258</sup> EC, *Proposal*, *supra* note 245 at 12.

<sup>259</sup> EC, Commission, “Communication of the Commission on Equality of Opportunity for People with Disabilities: A New European Community Disability Strategy,” COM (96) 406 final [“*Disability Strategy*”].

<sup>260</sup> EC, *Measures to combat*, *supra* note 243 at 7.

underpinning of the Commission's view of equal treatment for disabled people is the removal of barriers which prevent disabled people from being considered on their merits in competition with other people in the labour market. In this context reasonable accommodation is a tool for levelling the playing field, for making the competitive process fair, not a free standing right.

### *1. Definition of Disability*

Disability, as was discussed in chapter 2, is located in a complex relationship between impairment and the social environment and cannot be defined in isolation from the purpose for which the definition is to be used. As has been noted, the Commission intended that the FETD be broadly worded in order to respect the different traditions of the Member States. As a result, the directive contains no definition of disability which means that each Member State may adopt its own definition subject to whatever constraints the EJC may impose. National definitions for anti-discrimination legislation will be influenced by the scope and objectives of the legislation and the model of disability which informs the design of that legislation (which may or may not extend to other areas of national disability policy). The Member States have adopted a wide range of definitions with the result that there is a significant difference in the scope of protection provided in different parts of the EU.

In the UK, disability is defined as an impairment, whether physical or mental, that has a "substantial and long-term" impact on a person's ability to carry out "normal day-

to-day activities.”<sup>261</sup> In Ireland, disability means a loss or impairment of physical or mental functions and the presence of disease organisms “which presently exists, or which may exist in the future or which is imputed to a person.”<sup>262</sup> In Sweden, the definition covers “enduring physical, mental or learning limitations” but those limitations do not have to be substantial.<sup>263</sup> The Belgium and Dutch implementing legislation ‘deals’ with the problem of defining disability by not providing any definition.<sup>264</sup> A proposal in the Belgium Parliament to include a definition was rejected on the basis that any definition would be underinclusive.<sup>265</sup> The result, of course, is that program administrators and the courts are handed the responsibility for formulating definitions, a task which more properly rests with the legislature. In extreme contrast, the German implementing legislation contains a definition of disability even more restrictive than that found in the UK legislation. The German legislation only protects those who are “severely disabled” which is defined as a “disability grade” of fifty percent or, “at the discretion of the registration office,” a disability grade of thirty percent if the disability “hampers their

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<sup>261</sup> This basic definition is extensively supplemented by a lengthy schedule and regulations: *Disability Discrimination Act 1995*, 1995 Chapter 50 s. 1 and Schedules 1 and 2, Statutory Instrument 1996 No. 1455, *The Disability Discrimination (Meaning of Disability) Regulations 1996*, and the *Disability Discrimination Act 2005*, 2005 Chapter 13, s. 18.

<sup>262</sup> EC, Commission, *Definitions of Disability in Europe: A Comparative Analysis* (Brussels: EC, 2002) at 71 [“Definitions”].

<sup>263</sup> *Ibid.* at 71.

<sup>264</sup> Lisa Waddington, “Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion” in Lawson & Gooding, *supra* note 162 107-134 at 119.

<sup>265</sup> *Ibid.*

opportunity to obtain employment.”<sup>266</sup> Each of these approaches, of course, extends the protection from discrimination to different groups of people.

The approach the ECJ will take when called upon to determine whether a Member State’s definition of disability (whether legislatively or judicially derived) meets the requirements of the FETD is not known. The FETD appears to allow the greatest range of definitions. The Court may, however, want to use its authority to promote a European standard of protection against discrimination. The general objectives of the EU, to promote the free movement of persons and to prevent distortions in competition among the Member States, would tend to support pressures for similarity in the scope of national legislation. By contrast, the text of the FETD and the growing impact of the governing principle of subsidiarity suggest that diversity among Member States in disability policy is to be expected and protected.

## 2. *Discrimination*

The ECJ’s interpretation of the concept of discrimination has been informed by the formal equality paradigm which it applies to other areas of Community law. This formal equality paradigm focuses on consistency of treatment among people deemed to be alike.<sup>267</sup> Within this paradigm both direct and indirect discrimination involve a comparison of treatment between persons or groups, one of whom, for the purposes of the comparison, is characterised in relation to a prohibited ground of discrimination and the

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<sup>266</sup> *Ibid.*

<sup>267</sup> Barnard & Hepple, *supra* note 138 at 562.

other who does not have that characterization but is otherwise “similarly situated.” For example, one may compare women to men or a disabled person to a non-disabled person or people characterised by a combination of grounds to those characterised by different combinations of grounds. However the comparison groups are described, there must always be some linkage to the prohibited grounds of discrimination and the impugned treatment must be in contrast to how someone without that characteristic would be treated.<sup>268</sup> There is no requirement to show how another person was actually treated, only how a person without the characteristic would have been treated in the same set of circumstances had there been such a person.<sup>269</sup> The identification of the comparator, either as an individual or as a group, is an essential component of any allegation of discrimination.

The defining of the relevant comparator groups has a direct impact on whether a difference in treatment can be described as improper discrimination. The selection of the comparator can illuminate the discriminatory different treatment or make the

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<sup>268</sup> The comparison may be between persons having different types of disability as well as between persons having some kind of disability and other not having a disability. But there is a strong implication that the impugned treatment must have been based on some impairment based conception of disability. This would leave to the discretion of the Member States whether to also prohibit discrimination based on a (wrongly held) perception that a person had a disability or on a disability that no longer affects a person.

<sup>269</sup> Lisa Waddington and Mark Bell, "More Equal Than Others: Distinguishing European Union Equality Directives" (2001) 38:3 *Common Market Law Review* 587 at 592. The problem of identifying a suitable comparator has arisen under sex discrimination law. The Court has accepted comparisons between a woman and a previous male employee for an equal pay case and women with a hypothetical man but only in relation to discrimination because of pregnancy. See also Richard Whittle, "The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective" (2002) 27 *E.L. Rev.* 303 at 306.

discrimination disappear.<sup>270</sup> Identifying the comparator group is not a neutral activity. It requires selection of criteria which delineate both the claimant and comparator groups (including groups of one member). It also involves deciding which group represents the norm and which is different.<sup>271</sup> It happens that most of the time it is the disadvantaged claimant who is seen as different which means that the claimant has to show why an apparent difference should not justify or excuse different and adverse treatment.

In keeping with the formal equality paradigm the grounds of discrimination are interpreted neutrally or symmetrically without regard to the asymmetrical experience of disadvantage. Differential treatment of either men or women is capable of supporting a discrimination claim despite the socially prescribed power differential between women and men. Both racialised and Caucasian individuals can complain of race discrimination despite the social reality that Caucasian people in Europe are not subject to systematic disadvantage because of their race.

The FETD prohibits both direct and indirect discrimination.<sup>272</sup> Direct discrimination “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...”<sup>273</sup> on any one of the prohibited grounds of discrimination. This definition reflects ECJ jurisprudence that direct discrimination may be shown where “the fundamental reason for the refusal of employment [or other differential treatment] is one which applies without distinction to

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<sup>270</sup> Barnard & Hepple, *supra* note 138 at 563.

<sup>271</sup> William Black and Lynn Smith, “The Equality Rights” (2005) 27 S.C.L.R. (2d) 315 at 368.

<sup>272</sup> Both harassment and an instruction to discriminate are deemed to be forms of discrimination: FETD, *supra* note 2, Article 2(3) & (4).

<sup>273</sup> *Ibid.*, Article 2(2)(a).

workers of either sex or, conversely, whether it applies exclusively to one sex.”<sup>274</sup> In a complaint involving a refusal to hire, a woman was the successful candidate in a competition for which no men applied. At the time she was selected the employer had been advised that she was three months pregnant. Under the applicable domestic law employers were required to pay maternity benefits which were usually covered by an insurance scheme. However, the scheme would not pay where the new hire went on leave less than six months after hiring. The respondent refused to hire the woman, arguing that it would not have been able to afford to hire her replacement while she was on leave and would be short staffed. It was agreed that the sole reason the woman was not hired was because she was pregnant.<sup>275</sup> The respondent’s argument that there could be no discrimination where all candidates were women was rejected with the Court saying “[if the] reason is to be found in the fact that the person concerned is pregnant, then the decision is directly linked to the sex of the candidate.”<sup>276</sup>

Indirect discrimination “shall be taken to occur where an apparently neutral provision, criterion, or practice would put persons having a particular ... disability ... at a particular disadvantage compared with other persons...”<sup>277</sup> Indirect discrimination is characterised by an apparently neutral rule which has a disparate impact on an individual because of the person’s membership in a group protected from discrimination “compared

<sup>274</sup> *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, (Training Centre for Young Adults), C-177/88 at para. 10 [“Dekker”]. See also *Barber v. Guardian Royal Exchange Assurance Group*, C- 262/88, [1990] 2 CMLR 513, *Webb v. EMO Air Cargo (UK) Ltd.*, C-32/93 and *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening*, C-179/88 at paras 17 & 18..

<sup>275</sup> *Dekker, ibid.* at para. 16.

<sup>276</sup> *Ibid.* at para. 17.

<sup>277</sup> *Ibid.*, Article 2(2)(b).

with other persons.”<sup>278</sup> In *O’Flynn v. Adjudication Officer*,<sup>279</sup> a case dealing with state payments for funeral expenses which would only be paid if the funeral took place in the UK, the Court defined indirect discrimination as a provision of national law or a policy or practice which is “inherently liable” to affect the protected class more than others with the “consequent risk that it will place the former at a particular disadvantage.”<sup>280</sup> In this case, the Court observed, the neutral rule, that state funeral benefits would only be paid if the funeral took place in the UK, logically would have a disparate impact on migrant workers who had retained close relations with their homelands, since it was to be expected that they would want the funeral to take place in their homelands.

Where the Court concludes there are objectively rational explanations for differences in treatment those explanations go to the relevance of the basis for differential treatment. For example, in *Birds Eye Walls Limited v. Roberts*,<sup>281</sup> different pension

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<sup>278</sup> There was no definition of discrimination applicable to the various sex equal treatment directives until the 1997 Burden of Proof Directive, EC, *Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex*, [1997] O.J. L. 14/6, which defined only indirect discrimination in Article 2(2). Indirect discrimination meant a neutral provision which disadvantaged a “substantially higher proportion of the members of one sex” unless the provision “is appropriate and necessary and can be justified by objective factors unrelated to sex.” Before then the ECJ had defined indirect discrimination and its justification without legislative guidance. Note the addition of the phrase “compared with” in the FETD.

<sup>279</sup> *O’Flynn v. Adjudication Officer* C-237/94 (*O’Flynn*). A traditional way of demonstrating indirect discrimination has been the use of statistics. To avoid confusing and restrictive ECJ jurisprudence on the use of statistics in sex equality cases, the definition of indirect discrimination in the three post-Amsterdam directives was based on the interpretation of the prohibition against discrimination because of nationality in *O’Flynn*: Sandra Fredman, “Equality: A New Generation?” (2001) 30:2 *Industrial Law Journal* 145. See also Schiek, *supra* note 142 at 296.

<sup>280</sup> *O’Flynn*, *ibid*, para. 20.

<sup>281</sup> *Birds Eye Walls Limited v. Roberts*, C- 132/92, [1993] 3 CMLR 822 [*“Birds Eye Walls”*]. See also *Jenkins v. Kingsgate (Clothing Productions) Ltd.*, C- 96/80, [1981] 2 CMLR 24 [*“Jenkins”*].

payments from the private employer plan for women and men were the result of sex differences in the operation of a state pension plan. The Court found that having different eligibility requirements for the state pension was an objective justification for the different treatment.<sup>282</sup> The Court observed that the principle of equal treatment, as with the more general principle of non-discrimination, “presupposes that the men and women to whom it applies are in identical situations.”<sup>283</sup> Since the difference in treatment was the result of an “objective premise,”<sup>284</sup> it could not be considered discriminatory. In other cases the Court has allowed that differences based on “economic grounds which may be objectively justified, to encourage full-time work irrespective of the sex of the worker,”<sup>285</sup> or where the employer can show there was a “real need” for the policy and that the means chosen were “appropriate” and “necessary” to achieve the objective<sup>286</sup> are not to be considered discriminatory differential treatment.

The symmetrical interpretation of the grounds of discrimination fails to adequately account for the asymmetry of the daily experience of discrimination. Moreover, the symmetrical interpretation of discrimination within the formal equality paradigm opens the way to challenge positive action programs which respond to the

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<sup>282</sup> A detail was that Roberts had opted out of the state pension plan for employees and so received nothing from that source. But she did receive the state pension for widows which was the same amount of money. Had she won her case she would have received more than a man in a comparable situation for the years between ages 60 and 65 when only women received a state pension.

<sup>283</sup> *Birds Eye Walls, supra*, note 281 at para. 17.

<sup>284</sup> *Ibid.* at para. 20.

<sup>285</sup> *Jenkins, supra* note 281 at para. 12.

<sup>286</sup> *Bilka, supra* note 254 at para. 36. See also *Union of Commercial and Clerical Employees v. Danish Employers' Association ex parte Danfoss*: C- 109/88, [1991] 1 CMLR 8 [“*Danfoss*”] in which the Court accepted as a justifying criterion that the indirectly discriminatory provision was “important to the performance of specific tasks.”

asymmetrical nature of disadvantage. Even where the Court rejects the argument that any difference in treatment flowing from a positive action program violates the equal treatment principle, the symmetrical conception of equal treatment leads to a restrictive interpretation of what measures may be included in such programs. The symmetrical interpretation of the prohibited grounds of discrimination limits the effectiveness of the FETD in responding to persistent patterns of inequality associated with those grounds because it prevents adequate program responses to the reality of the experience of discrimination.

For the ground of disability, it is clear that some account must be taken of the difference imposed by the disability before there can be any meaningful comparison with a non-disabled person. This occurs through the application of the principle of reasonable accommodation, which will be discussed in more detail in the next section. For now it is sufficient to say that the disabled person's position is to be compared with that of a comparator after the disabled person has been reasonably accommodated. This theoretically removes the objective difference caused by disability and allows a fair comparison of relevant factors such as qualifications and abilities.

### ***3. Reasonable Accommodation***

In order to create the level playing field upon which disabled and non-disabled people are to compete as equals it is frequently necessary that reasonable allowance be made in response to a disability so that the person's abilities can be properly assessed and utilised. In its Proposal for the FETD the European Commission argued that equal

treatment as applied to disability “entails an identification and removal of barriers in the way of persons with disabilities who, with reasonable accommodation, are able to perform the essential functions of a job.”<sup>287</sup> There is no obligation to those who cannot, even after reasonable accommodation, perform the “essential functions” of any particular job. The purpose of the concept of reasonable accommodation is to mediate the “legitimate demands” of disabled people for inclusion and “the costs to society and business which this could imply.”<sup>288</sup>

Article 5 of the FETD establishes the duty to provide reasonable accommodation “[i]n order to guarantee compliance with the principle of equal treatment” for disabled people. This duty to accommodate requires employers to “take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment ... unless such measures would impose a disproportionate burden on the employer.” A burden is not disproportionate if it is “sufficiently remedied” by existing state programs.

In theory the duty to accommodate could be an approach to promote substantive equality since it might encompass a positive duty to eliminate barriers to equality. It is more likely, however, that the qualifications that any accommodation be “reasonable,” not impose a “disproportionate burden” on the employer and be provided only “where needed in a particular case” mean that the principle will be more likely to be shaped by the formal equality paradigm which animates Community jurisprudence.

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<sup>287</sup> EC, *Proposal*, *supra* note 245 at 9.

<sup>288</sup> *Ibid.* at 9.

Accommodation's role may be to erase minor differences between the disabled applicant and others so that the disability is no longer deemed relevant to the decision making process. But where the accommodation need not be provided the disability will be the objective difference which will justify adverse differential treatment.

Reasonable accommodation is conceptually distinguished from positive action on the basis that reasonable accommodation "enables" a particular disabled person who can then participate in the employment context without distinction with non-disabled people. A participant in a positive action program targeted to disabled people, on the other hand, retains the distinction of the status of disabled person who is the beneficiary of a group based program to, in the words of FETD Article 7, "prevent or compensate for disadvantages" based on disability. One might say that reasonable accommodation focuses on individual needs while positive action programs focus on group needs.

It is important also that the duty to accommodate not be conceived as a positive action measure since, as discussed below, the Court has consistently interpreted positive action as an exception to the principle of equal treatment. In some situations this "exceptional" characterisation can be avoided by accommodations which respond to the needs of as many people in addition to the claimant as possible. For example, instead of installing a segregating ramp to accommodate a wheelchair user it would be preferable to provide an integrating level entrance for everyone. Instead of accommodating a disabled employee by changing that person's hours of work it would be preferable to implement a flexible hours of work policy for everyone. As much as possible policies and procedures should be designed inclusively while still allowing for individual accommodations when

the need arises.<sup>289</sup> Applied in this manner, the doctrine of accommodation can achieve small but significant changes in the practices and structures that underpin ableist norms.

Some parameters of the scope of reasonable accommodation are suggested in the Recitals to the FETD which, however, do not bind the Court in any way.<sup>290</sup> Measures which are reasonable and appropriate may include adaptations to the “premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.” In considering what would amount to a disproportionate burden on the employer account may be taken of the financial and other costs of the proposed accommodation, the size and financial resources of the employer, and the availability of public funding or other assistance.<sup>291</sup>

The purpose of reasonable accommodation, expressed in the first sentence of Article 5, is to “guarantee compliance with the principle of equal treatment” of disabled people. Article 2(1) defines equal treatment as the absence of direct or indirect discrimination. Reasonable accommodation is required so that those barriers to equal treatment which are created by the social environment are taken into account in order that disabled and non-disabled candidates can be assessed competitively on criteria which are deemed relevant. Reasonable accommodation is subsumed into the concepts of direct and indirect discrimination, it is not a free standing right.

In a case of direct discrimination, when determining whether the complainant is “in a comparable situation” to a non-disabled person, the complainant’s situation is

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<sup>289</sup> Black & Smith, *supra* note 271 at 368.

<sup>290</sup> Lisa Waddington, *supra* note 264 at 110

<sup>291</sup> FETD, *supra* note 2, Recitals 20 and 21.

assessed after reasonable accommodation has been made. The focus of any reference to the ECJ should be on whether the action of the employer met the duty to accommodate. The Court would respond to such a question by setting out the principles which the domestic court needed to apply to the facts for determining whether a proposed accommodation was reasonable. In a case of indirect discrimination, however, reasonable accommodation plays a different role. An apparently neutral criterion which puts a disabled person at a particular disadvantage is deemed not to be indirectly discriminatory if the employer “is obliged, under national legislation” to reasonably accommodate a disabled person.<sup>292</sup> In other words, the FETD definition of indirect discrimination excludes a policy or practice which disproportionately disadvantages a person because of disability if domestic legislation imposes a duty to reasonably accommodate. This suggests that the focus of any reference to the ECJ in a case of indirect discrimination would be on whether domestic legislation had adequately transposed the concept of reasonable accommodation, not on whether any particular action by an employer had fulfilled that obligation. A possible explanation for this rather remarkable derogation is that the principle of equal treatment for disabled people can be met if, in every case where an apparently neutral requirement disproportionately disadvantaged a disabled person, the effect of the requirement was mitigated by reasonably accommodating the person.

Reasonable accommodation, as formulated in the FETD, is an individual response to barriers to equal treatment which reflects the formal equality paradigm. Article 5

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<sup>292</sup> *Ibid.* Article 2(b)(ii).

specifies that employers must provide reasonable accommodation when “needed in a particular case.” The duty is reactive. Its objective is to accommodate particular needs of individual disabled people and, therefore, it is neither designed for, nor capable of, responding to deep structural barriers to employment.<sup>293</sup> The FETD prohibits discrimination against “qualified” people, those who meet the requirements of the position with or without accommodation. Reasonable accommodation does not, and is not intended to, respond to the barriers to disabled people becoming qualified or being able to participate in society and employment due to a history of discriminatory education services or a lack of personal-assistance services, assistive technology and accessible transportation and other structural barriers.<sup>294</sup> The limited scope of reasonable accommodation means that it is inherently incapable of significantly changing the general employment patterns of people with disabilities: its potential to promote substantive equality outcomes is severely limited.

On the positive side, for those disabled people who have been excluded from the workforce because of ableist assumptions about their capabilities, by prejudice and stereotyping, by architectural barriers and failure to provide assistive technology, the principle of reasonable accommodation is potentially capable of opening new opportunities to enter and remain in the workforce.

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<sup>293</sup> Samuel R. Bagenstos, "The future of disability law" (2004) 114 Yale Law Journal 84. See generally Paula E. Berg, *supra* note 17 at 13, Mark C. Weber, "Disability and the Law of Welfare: A Post-Integrationist Examination" (2000) 3 U. Ill. L. Rev. 889 at 905 and Ian B. McKenna, "Legal Rights for Persons with Disabilities in Canada: Can the Impasse be Resolved?" (1997-98) 29 Ottawa Law Review 153 at 176.

<sup>294</sup> *Ibid.* at 90.

#### 4. *Occupational requirements*

FETD Article 4 provides that Member States “may provide that a difference of treatment which is based on a [prohibited ground of discrimination] shall not constitute discrimination where, by reason of the nature of the particular occupational activities [that characteristic is a] genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.” A similar general exception is provided for in the 1976 GED by which Member States retained the right to “exclude from its field of application those occupational activities ... for which, by reason of their nature ... the sex of the worker constitutes a determining factor.”<sup>295</sup> Member States are under an obligation to periodically review any occupational exclusions under this provision “to decide, in light of social developments,” whether the exclusion remains justified.<sup>296</sup> As a derogation from individual rights guaranteed by the FETD, the occupational requirement defence “must be interpreted strictly and applied in accordance with the principle of proportionality.”<sup>297</sup>

Occupational requirements are to be assessed in relation to specific tasks, not broadly defined occupations, to avoid going beyond the lawful objective of the exception.<sup>298</sup> A specific task focus was applied in the recent case of *Sirdar v. The Army Board and Secretary of State for Defence*. In that case the UK’s Royal Marines relied on

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<sup>295</sup> 1976 GED, *supra* note 231, Article 2(2).

<sup>296</sup> *Ibid.* Article 9(2).

<sup>297</sup> *Johnston*, *supra* note 254 at para.4. See also *Sirdar v. The Army Board and Secretary of State for Defence*, C- 273/97, [1999] 3 CMLR 558 at para. 23 [“Sirdar“], and *Kreil v. Bundesrepublik Deutschland*, C-285-98 at para. 20 [“Kreil“].

<sup>298</sup> *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, C-165/82, [1984] 1 CMLR 44. See generally *Johnson*, *ibid.*

the occupational requirement defence to exclude women on the basis that every member had to be ready to operate within a commando unit regardless of their occupational specialisation. Sirdar, an army cook, had requested transfer to the Royal Marines upon her redundancy. The ECJ decided that in the specific context of a front line assault force, subject to the requirement to review the derogation, the exclusion of women was justified.<sup>299</sup>

The ECJ was more deferential to a French civil service recruitment scheme in which the percentage of new male and female employees for certain classifications was established by decree.<sup>300</sup> The Commission and France agreed that for the prison warder classification gender was relevant for those positions which directly interacted with prisoners but the Commission argued that the position of head warder was purely managerial and the recruitment system for that position discriminated against women. France argued that, since the selection pool from which head warders could be appointed was the warder classification and since it was agreed that gender was a relevant selection criterion for warders, the derogation had to apply to the whole of the classification. Although the Court recognised that France could easily have avoided the problem simply by reorganising its staffing structure, it deferred to the French government's view that its staffing structure was reasonable and its collateral discriminatory effect in relation to

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<sup>299</sup> *Sirdar*, *supra* note 297 at para. 26. In a case objecting to a provision of the German constitution that women could not be armed and, therefore, could not join the armed forces, *Kreil*, *supra* note 297, the Court found the exclusion overbroad and thus in contravention of the directive.

<sup>300</sup> *Commission of the European Communities v. French Republic*, C-318/86, [1989] 3 CMLR 663.

head warder positions was justified since sex was a “determining factor” in relation to the whole classification.<sup>301</sup>

There are three possible ways that Member States may transpose the occupational requirement defence. It is possible that medical or physical capacity standards could be prescribed which would make various types of disabilities incompatible with the performance of certain occupational activities. Employers would be able to rely on those standards to justify their refusal to hire a person. This approach means employers would not have to justify their own standards and it would bring uniformity to the assessment of occupational activities. The disadvantages of this approach are that such regulations are inevitably over broad or under inclusive and that individuals will not be individually assessed for their own ability to perform a job. Alternatively, national legislation may reproduce the constituent elements of the defence and individual employers will be required to apply them to their own situations. A third option would be a combination of both approaches.

It is likely that any common Community law norm respecting this defence will be stated in quite general terms. In cases where standards are set in the guise of the protection of health and safety the Court is likely to show deference to the judgement of national authorities. This, combined with the general derogation found in Article 2(5) which provides that the FETD is without prejudice to legislation which is necessary for

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<sup>301</sup> In the same case, *ibid.*, a similar scheme for the police service was found to violate the equal treatment directive, but on the basis that the scheme was not sufficiently transparent since the fixing of the gender percentage was not governed by any objective criterion and it was thus impossible to assess whether the percentages had any relation to the number of managerial positions to be filled. The Court did not give any satisfactory explanation why a similar result should not have occurred regarding the prison warden positions.

public security, the protection of health and the protection of the rights and freedoms of others, leaves ample scope for an overly cautious interpretation of what is a genuine and determining occupational requirement related to disability. There is a great risk that the implementation of this defence will disguise, under a veneer of objectivity, common biases and stereotypes and actually perpetuate social inequality.

### 5. *Objectively justified criteria*

Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons having a particular characteristic at a disadvantage unless that provision “is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary...” or there is a domestic statutory requirement for reasonable accommodation.<sup>302</sup> In the absence of any defence to indirect discrimination in the 1976 GED the ECJ devised an objective justification defense. The wording used in the FETD is based on that jurisprudence<sup>303</sup> which is heavily biased in favour of employer interests in market responsiveness rather than social equality interests of workers.

In *Bilka*,<sup>304</sup> which involved an indirectly discriminatory non-contributory occupational pension, the justification offered by the employer was that its objective was to employ as few part time workers as possible. It argued that its policy was objectively justified on economic grounds because the employment of part time workers was more

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<sup>302</sup> FETD, *supra* note 2 Article 2(b)(i) & (ii).

<sup>303</sup> The Burden of Proof Directive, *supra* note 278, Article 2(2), excepted indirectly discriminatory standards which were “appropriate and necessary and can be justified by objective factors.”

<sup>304</sup> *Bilka*, *supra* note 254.

expensive than full time workers. The Court described the components of an objective economic justification as those which correspond to a “genuine need,” are “appropriate with a view to achieving the objectives” and “are necessary” to meet that need.<sup>305</sup> In a Danish case, involving an industry wide collective agreement, the employer paid different rates depending on factors such as mobility, training and length of service.<sup>306</sup> The Court said that if the mobility criterion meant adaptability to hours and places of work women may be disadvantaged by reason of their domestic duties in which case the employer would have to justify the use of the factor by showing that it was “of importance to the performance of specific tasks.”<sup>307</sup> Similarly the criterion of training, if it was shown to be indirectly discriminatory, might be justified if it was shown to be important to the “performance of specific tasks.”<sup>308</sup> However, the criterion of length of service did not have to be justified since it equated with experience which was simply understood as enabling employees to perform their duties better.

There is an argument that the Court has applied an even “looser standard” of justification for Member State social policy by allowing them “considerable discretion in shaping their social policy” even if the result is discriminatory.<sup>309</sup> With regard to cases involving social programs, the Court has said that a provision which disadvantages one sex is not permitted unless it is objectively justified by a showing that it reflects “a

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<sup>305</sup> *Ibid.* at para. 36. Schiek, *supra* note 142 at 297, refers to the appropriateness and necessity elements as a “strict proportionality test.”

<sup>306</sup> *Danfoss*, *supra* note 286.

<sup>307</sup> *Ibid.* at para. 22.

<sup>308</sup> *Ibid.* at para. 23.

<sup>309</sup> Schiek, *supra* note 142 at 297.

legitimate social policy aim,” is “appropriate to achieve that aim” and “is necessary” to achieve that aim.<sup>310</sup> The Court has not specified what a legitimate social aim might be nor has it provided further guidance on the proportionality requirements of “appropriate” and “necessary.”

The ECJ has developed a very deferential measure to assess whether an indirectly discriminatory provision is “objectively justified.” The general approach set out in *Bilka* has been consistently applied. All that an employer need do is show that there was a “real need,” or a relevant objective, to which the impugned policy was addressed and that the policy was both appropriate and necessary to achieving that justified objective. The Court has not indicated the type, or sufficiency, of evidence which is needed for the employer to prevail on these tests. With respect to government social programs the Court requires only that a legitimate social policy aim be pursued by measures which are appropriate and necessary to achieve the objective. Something more than broad generalizations will be required and budgetary objectives alone will not suffice, but overall it appears the Court will not impose a strict test of justification.

The apparent willingness of the Court to accept vaguely stated economic objectives of employers as objective justifications for discriminatory treatment is likely to perpetuate stereotypes of disabled workers as inefficient and not challenge unwarranted concerns about the possible costs of accommodations. The implications for disabled people of the failure of these sex equality decisions to really challenge policies and

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<sup>310</sup> *De Weerd v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen*, C- 343/92, at paras. 33 & 34. See also *Scheffel v. Innungskrankenkasse Vorderpfalz*, C- 444/93 at para. 29 and *Rinner-Kühn supra* note 254 at para. 15.

practices which perpetuate women's substantive inequality are discouraging. Judicial institutions are as susceptible to stereotypes about the economic implications of employing disabled people as any other institution. The justifications which will almost certainly be offered relate to safety, business necessity, the costs of accommodation and the rights of others. If the Court does not insist on a sufficiency of evidence to seriously look behind these justifications and challenge the accuracy of the assumptions upon which they depend the effectiveness of the FETD will be considerably reduced even within the narrow scope of its intended reach.

#### 6. *Positive action*

Article 7 of the FETD provides that “the principle of equal treatment shall not prevent any Member State from maintaining or adopting special measures to prevent or compensate for disadvantages ....” This contrasts with the equivalent provision in the 1976 GED which allows for positive action “providing for specific advantages” for the underrepresented sex to pursue vocational activity “or to prevent or compensate for disadvantage in professional careers.”<sup>311</sup> Despite the traditional role that positive action programs have played in the disability policies of all the Member States they sit uneasily with a rights based approach to equality which gives primacy to the formal equality paradigm. This uneasiness is likely to be exacerbated in situations where such programs are informed by social or substantive equality principles. The Court takes the view that positive action programs are exceptions to the principle of equal treatment not a tool to

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<sup>311</sup> *Supra* note 231, Article 2(8), referencing TEC, *supra* note 219, Article 141(4).

promote equal treatment.<sup>312</sup> This understanding of the nature of positive action programs flows from its application of the formal equality paradigm throughout its equality jurisprudence. The result of the Court's interpretation of positive action programs is that the jurisprudence may actually stand in the way of national programs which are intended to ameliorate conditions of disadvantage experienced by disabled people.

In *Kalanke v. Freie Hansestadt Bremen*<sup>313</sup> the court considered an employment system in which, in classifications where women represented less than fifty percent of the employees, a woman candidate would be given an automatic priority over a male candidate where both were otherwise found to be equally qualified. The Court held that positive action programs were only permitted to promote equal opportunities by removing barriers to equal treatment. Since, in this case, the priority only applied if a male and female candidate had equivalent qualifications, it must be that the two candidates had had an equal opportunity to compete. The employment system aimed to achieve "equality of result," not just "equality of opportunity," and, therefore, exceeded that which was authorised by the FETD.<sup>314</sup> The Court held that "in so far as it 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

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<sup>312</sup> *Commission of the European Communities v French Republic*, C-312/86, [1989] 1 CMLR 408.

<sup>313</sup> *Kalanke v. Freie Hansestadt Bremen*, C- 450/93, [1996] 1 CMLR 175 (*Kalanke*).

<sup>314</sup> Opinion of Mr. Advocate General Tesauro delivered on 6 April 1995, *Kalanke v Freie Hansestadt Bremen*, C-450/93. *Ibid*, at paras. 12 & 13.

opportunity.”<sup>315</sup> The Court concluded that the absolute priority given women candidates for promotion overstepped the objective of the derogation and violated the 1976 GED.

In its next case dealing with positive action the Court considered a similar scheme which, however, did not accord an automatic priority to an equally qualified woman candidate. In this system, where a male and female candidate were equally qualified an “objective assessment” was to be undertaken which would consider their individual circumstances and which could override the priority given to women. The Court found that this scheme which provided for individual assessment of candidates to break ties in the competition process met the requirements for a valid positive action program.<sup>316</sup>

As a result of concerns that these decisions jeopardised a wide range of positive action programs, the 1997 Treaty of Amsterdam added a provision to the TEC which specified that the principle of equal treatment did not prohibit “measures providing for specific advantages” directed to the benefit of the underrepresented sex.<sup>317</sup> The Court has considered the effect of this change in *Abrahamsson v. Elisabet Fogelqvist*,<sup>318</sup> another challenge to a positive action program which gave preference to women candidates. In spite of the change in the treaty’s provision the Court affirmed, in substantially the same words, its previous decisions that a program which gave absolute priority to women

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<sup>315</sup> *Kalanke*, *supra* note 313 at para. 23.

<sup>316</sup> *Marschall v Land Nordrhein-Westfalen*, C-409/95, [1997] 1 CMLR 547 [“*Marschall*”].

<sup>317</sup> TEC, *supra* note 219, Article 141(4); 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.

<sup>318</sup> *Abrahamsson v. Elisabet Fogelqvist*, C- 407/98.

would violate the FETD but not one which required a second level individual assessment of individual circumstances after candidates had been found equally qualified.<sup>319</sup>

The Court's restrictive interpretation of the legitimate scope of positive action programs suggested that the use of employment quotas and special employment programs for disabled people who are not competitive in the labour market might be disallowed. There was sufficient concern that national disability job quota systems would be found to violate the equal treatment principle that the Netherlands insisted on a provision in the FETD to protect them from challenge.<sup>320</sup> Article 7(2) provides that the principle of equal treatment does not prejudice the right of Member States to pursue programs which promote or safeguard the integration of disabled people into the workplace. This article is intended to cover both sheltered and semi-sheltered employment programs.

The potential for positive action programs to significantly advance the integration of disabled people into the European workforce is further limited since the provision is permissive not mandatory and the choice whether to implement such programs remains with the Member States. Moreover, the provision is a defence against challenges to positive action programs and cannot be used to challenge the lack, or inadequacy, of any program.

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In interpreting the provisions of the FETD the ECJ is likely to be influenced by the deliberate lack of precision in many of its provisions, such as the absence of a

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<sup>319</sup> *Ibid.* at para. 44.

<sup>320</sup> Whittle, *supra* note 269 at 319.

definition of disability and the imprecision of the concept of reasonable accommodation. When the principle of subsidiarity, the historical context and the expressed objective of the FETD to be a “framework” for Community non-discrimination norms are also taken into account, there is ample reason to believe the Court will allow an extremely generous margin of discretion in the way in which the Member States transpose the FETD. It is likely that, in the near future, the Court’s expected deference to the policy choices of the various national authorities will mean that the degree of protection from discrimination because of disability will vary quite widely among the various Member States. Over the longer term, however, one would expect a degree of convergence among the Member States as European integration deepens in all policy areas.

The Court’s interpretation of the FETD will be informed by the formal equality paradigm which it applies to other aspects of Community law. Equal treatment is defined by the FETD as the absence of discrimination. At the heart of the concept of discrimination in Community law is the requirement to compare the treatment of a claimant with the treatment of a person who is in a comparable position but for the prohibited ground, the need to identify the relevance of factors which may be used to distinguish individuals and the presumption that the protection from discrimination applies equally to everyone, whether a member of an advantaged or disadvantaged social group. The potential of the FETD to significantly transform the workplace to eliminate barriers to equality is likely to be limited by these aspects of the Court’s jurisprudence, all of which can be traced to the Court’s uncritical adoption of the formal equality paradigm. More troubling is the possibility that the Court’s interpretation of equal treatment will

lead it to disallow positive action programs which are directed at ameliorating conditions of disadvantage of disabled people, thus thwarting efforts to infuse legislative, administrative and other policy initiatives with social equality values.

## **VI. The FETD and the Policy Objectives of the DRM**

In the previous chapter, I examined the provisions of the FETD with a view to suggesting how the various elements of the FETD are likely to be interpreted in Community law and what protection the various provisions of the FETD related to disability are likely to provide to disabled people entering and moving through the labour market. In this chapter, my aim, in response to the second research question, is to explore how the FETD disability provisions may contribute to the achievement of the policy objectives of the disability rights movement in Europe as outlined in chapter 3.

The critique of the FETD presented in this chapter focuses on six issues. The first issue relates to the jurisdictional limits and the market orientated conception of EU citizenship within which the FETD operates. The following two issues relate to the institutional limits of the directive, including the limitations imposed by its litigation/adjudication focus and the roles of the ECJ and domestic courts in the implementation of Community law, and its failure to define disability. The dominance of the formal equality paradigm in Community law and the dangers that judicial attitudes to positive action programs pose for disability programming are then examined. The final issue relates to the possibility of promoting equality for disabled people through some conception of social rights.

The disability provisions of the FETD reflect the DRM's rights based policy objectives and are derived from the social model of disability. The rights promise of the directive cannot be fulfilled in a policy environment which is founded on the medical model. The degree to which the social model informs Community and Member State

domestic disability policy is directly relevant to the critique of the FETD and its potential impact on the daily lives of disabled people. Therefore, before beginning my critique of the directive, a few words about the acceptance of the social model within the EU are in order.

Officially, EU institutions have adopted the social model of disability and base disability policy initiatives on that model. The influence of the social model is reflected in the commitment to mainstreaming. Having adopted the social model with its rights based policy orientation to guide the design of EU disability policy, the Commission and the European Parliament, supported by a variety of disability rights organisations, pressed for the inclusion of disability as a prohibited ground of discrimination in Article 13 TEC. The social model is also reflected in the political pressure which led to the inclusion of disability in the FETD. Commission documents, however, make no reference to sites of resistance to the adoption of the social model and its rights based policy imperative, but such resistance does exist in all member states and is found among governments, businesses and various disability interest groups.<sup>321</sup> Tensions among the Member States and EU institutions arising from this resistance can be expected to hamper efforts by the EU to become more active in disability policy or to expand its competence claims over disability policy.

While the Commission and EU institutions have at a formal level adopted the social model, the degree of acceptance of that model in the Member States is more complex. The Commission believes that, although not fully implemented in EU-15

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<sup>321</sup> See examples, *supra* at notes 177, 181 and 222.

countries, the policy approach based on a social model of disability has been accepted by those member states. Of course, the effectiveness of any strategy of mainstreaming deriving from the social model depends on what happens when disability is considered in the development and implementation of policy. It is in this regard that the Commission notes that “several obstacles remain, notably those relating to physical barriers, legal and administrative barriers, new technologies and attitudes, where much more effort is still needed.”<sup>322</sup>

The situation in the new Member States (of the 2004 enlargement) is markedly different. Generally disability policy in those countries reflects a traditional medical model characterised by segregation, institutionalisation, and social exclusion. Transforming their disability policies is a cumbersome process which will take many years and change in the daily lives of disabled people which result from these policy changes will take longer. Employment quota systems have been even more ineffective in these countries than in EU-15 states in achieving employment results for disabled people and the movement away from sheltered employment programs has not been accompanied by new policies to provide support and assistance to enable disabled people to enter mainstream employment. The result has been rising levels of already disproportionately high unemployment. The concepts of non-discrimination and reasonable accommodation

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<sup>322</sup> EC, Commission, *The Social Situation in the European Union 2004*, (Brussels: EC, 2004), online: Europa [http://europa.eu.int/comm/employment\\_social/social\\_situation/docs/SSR2004\\_en.pdf](http://europa.eu.int/comm/employment_social/social_situation/docs/SSR2004_en.pdf) at 142.

set out in the FETD have yet to be reflected in the policies and practices of the new Member States.<sup>323</sup>

### 1. *Jurisdictional Limits and the Market Oriented Conception of Citizenship*

The FETD, along with the race and gender equality directives, is a cornerstone of the EU economic constitution which is directed at securing access to the market place by supporting a market oriented conception of EU citizenship.<sup>324</sup> Community law only requires equal treatment of people once they enter the market place. The equal treatment directives are “another institutionalization of a market-oriented conception of citizenship, ensuring a civil society which is inclusive and progressive.”<sup>325</sup> Interpretation of the FETD’s jurisdictional limits will take place against the background of this market oriented understanding of the principle of equal treatment. This conception of the citizen as worker is, of course, problematic for the great number of disabled people who do not participate in the labour market and are, by implication, not full citizens.

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<sup>323</sup> *Ibid.*

<sup>324</sup> Schiek, *supra* note 142 at 293-94. See generally Ulrich Haltern, “Integration Through Law” in Antje Wiener & Thomas Diez, eds. *European Integration Theory* (Oxford: Oxford University Press, 2004) pp. 177-196.

<sup>325</sup> Schiek, *ibid.* at 294. See also Richard Whittle, “European Communities and EEA: Disability Discrimination and the Amsterdam Treaty” (1998) 23 *European Law Review* 50 at 51-52 where he links the concept of European citizenship to economic activities. But see Siobhan McInerney, “Equal treatment between persons irrespective of racial or ethnic origin: a comment” (2000) 25 *European Law Review* 317 at 323 where she argues that, in addition to the traditional market orientation of EU rights instruments, the RETD is based on “a harmonious, schematic understanding of human rights and market rationales operating in tandem” and Izolda Bulvinaite, “Union Citizenship and its Role in the Free Movement of Persons Regimes” [2003] 5 *Web Journal of Current Legal Issues*: online, <http://webjcli.ncl.ac.uk/2003/issue5/bulvinaite5.html>, in which she argues that the ECJ has begun to develop a jurisprudence which expands on the traditional market orientation of EU citizenship.

Even within the relatively narrow role that anti-discrimination legislation can play in responding to persistent patterns of social disadvantage, the FETD is further limited by its scope which is restricted to employment, vocational training, and membership and involvement in organisations of workers and employers and professional bodies.<sup>326</sup> The material scope of the FETD by no means exhausts the legislative potential offered by Article 13 TEC as shown by the Racial Equal Treatment Directive which, unlike the FETD, covers “social protection, including social security and healthcare ... social advantages ... education [and] access to and supply of goods and services which are available to the public, including housing.”<sup>327</sup> Expanding the material scope of the FETD to cover discrimination in public services, transportation, and infrastructure would promote equality.

However, for the various reasons outlined in the next section, this type of legislation is not well designed to respond to these social policy concerns which involve balancing demands for equality and inclusion with all the other needs of society. For these issues a strong programmatic response to implementing disability rights is required. The significant jurisdictional limitations of the FETD are somewhat mitigated by the operation of other policy responses which have an essential role to play in a comprehensive national disability policy. The Commission pursues a variety of program initiatives to support the efforts of the Member States to promote disability rights through

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<sup>326</sup> FETD, *supra* note 2, Article 3.

<sup>327</sup> RETD, *supra* note 230, Article 3.

mainstreaming and a variety of initiatives to increase policy co-ordination, develop programs to combat social exclusion, and engage the social partners and civil society.

Furthermore, it is clearly understood that anti-discrimination legislation is only one element in a coordinated and comprehensive disability strategy. While the EU must utilize the full range of policy instruments at its disposal in support of equality for disabled people, there are many essential elements of a comprehensive strategy which are not within EU competence. As the Commission aptly observed:

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.<sup>328</sup>

The FETD's direct contribution to the DRM's policy objectives is restricted by the scope of its coverage to those objectives which are related to the participation of disabled people in the labour market. Indirectly, however, the prohibition of discrimination in the FETD is likely to have spillover effects into other areas of EU/Member State shared policy competence and, in addition, areas of purely domestic policy competence. In the first case, this is because the disability provisions of the FETD are only part of a multifaceted EU program addressing the needs of disabled people set out in an action program which the Council adopted in 2000 for the years 2001-2006 to combat direct or indirect discrimination based on racial or ethnic origin, religion or

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<sup>328</sup> *Social Situation*, *supra* note 54 at 103.

belief, disability, age or sexual orientation.<sup>329</sup> The key concept of mainstreaming of disability issues is an integral part of this program.<sup>330</sup> Mainstreaming is defined as the inclusion of a disability perspective in the development of all policy initiatives regardless of subject matter: “Mainstreaming 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.”<sup>331</sup>

The second proposition is based on a domestic application of the neofunctional principle of spillover to national disability policy.<sup>332</sup> If an anti-discrimination, rights based disability policy response is required by Community law then it seems likely that the idea of equal treatment based on a non-discrimination norm may well “spillover” from anti-discrimination law to permeate other areas of domestic disability policy. For example, it may lead to a “right to inclusion” based education policy to integrate disabled children into the regular school system where that is not already the norm. Rights based

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<sup>329</sup> EC, *Council Decision of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006)*, (2000/750/EC), Annex, Article 1(g).

<sup>330</sup> *Ibid.* at Annex, Article 1(g).

<sup>331</sup> EC, Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Equal opportunities for people with disabilities: A European Action Plan, 2003, COM(2003) 650 final at 6.

<sup>332</sup> Neill Nugent, *The Government and Politics of the European Union*, 5<sup>th</sup> ed., (Duke University Press, Durham, 2003) at 479. Nugent describes the classic formulation of neofunctionalism, as a theory of European integration, as revolving around the concept of spillover which takes two forms – functional spillover and political spillover. The first derives from the interconnected nature of modern economies which promotes a tendency for integration in one area to spill over and drive integration in related areas. The second form describes the tendency for economic integration to drive political integration characterised by a transfer of authority to supranational institutions through which common interests can be better pursued.

policy developments need not supplant any social welfare programming but may have an impact on the normative basis for the entitlement to such benefits – a move from a charity based claim to a rights based claim to the benefit. Basing social welfare programs on an equality norm is one way to minimize the oppressive characteristics of such programs.

## 2. *Institutional Limits*

The complaint based, reactive and remedial process embodied in anti-discrimination legislation such as the FETD is, in many cases, not the best and certainly not the only way to pursue an equality agenda for disabled people.<sup>333</sup> The experience of disabled people cannot always be fitted into legal concepts of discrimination. Much of the social disadvantage experienced by many disabled people is the consequence of barriers to their equal participation in the full life of their communities 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 FETD's contribution is to establish a minimum anti-discrimination norm in Community law: it does not purport to respond to inequality caused by distributive injustice. As such, the rights based policy response to disability implemented through anti-discrimination legislation must be seen "as playing an essential, but limited, role in the equality agenda."<sup>334</sup>

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<sup>333</sup> Jerome Bickenbach, "Disability and Equality" HeinOnline, (2003) 2. J.L. & Equality 7 at 12. See also Schiek, *supra* note 142 at 299 and Bell & Waddington, *supra* note 136 at 351

<sup>334</sup> Bickenbach, *ibid.* at 13.

Compounding the conceptual insufficiency of an individual complaint driven enforcement mechanism, another significant weakness of the FETD relates to the lack of any requirement for publicly supported enforcement agencies or publicly funded assistance for those individuals who do attempt to enforce their rights once they are transposed into national law. Enforcement depends entirely on individuals initiating litigation.<sup>335</sup> There are many barriers to any individual embarking on litigation including “problems in evidence-gathering and proof, the financial and emotional costs of litigating, the need to identify an appropriate comparator, and the fear of victimisation and future disadvantage in the labour market.”<sup>336</sup> It may be even more of a barrier for disabled people than some others since many disabled people do not have the necessary resources and financial or other support to make a complaint on their own.<sup>337</sup>

The FETD does, however, require, as do the Racial Equal Treatment and Gender Equal Treatment Directives, that national law “ensure that associations, organisations or other legal entities which have ... a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainants (sic), with his or her approval, in any judicial and/or administrative procedure provided for the enforcement” of the FETD.<sup>338</sup> This requirement goes some

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<sup>335</sup> Although the FETD does not require the state to provide assistance to individuals attempting to enforce their rights, Member States may choose to set up public bodies to provide such assistance.

<sup>336</sup> Bell & Waddington, *supra* note 136 at 351.

<sup>337</sup> Whittle, *supra* note 269 at 317.

<sup>338</sup> FETD, *supra* note 2, Article 9(2); GETD, *supra* note 231, Article 6; RETD, *supra*, note 230, Article 7(2).

way, but by no means a sufficient way, to mitigating the individual litigation barriers to accessing justice.

The institutional structure of Community law with its unique distribution of authority between the supranational ECJ and the domestic courts must also be considered when considering the contribution of the FETD to advancing the policy objectives of the DRM. Because so many of the practical applications of the non-discrimination provisions are fact specific, it is easily conceivable that widely divergent standards of equal treatment will evolve within the EU as national courts apply the Court's general principles to the facts as they are found by the national courts. For example, the judgements which a domestic court will make about the reasonableness of an accommodation or the legitimacy of a justification for an indirectly discriminatory rule are going to be influenced by its general attitude to disability equality issues and the experience that domestic court has had with disability issues.<sup>339</sup>

### 3. *Failure to Define Disability*

As was seen in chapter 2, the definition of disability is dependent on the context in which it is to be applied. The definition of disability in anti-discrimination law directly

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<sup>339</sup> Theresia Degener, "Disability Discrimination Law: A Global Comparative Approach" in Lawson & Gooding, *supra* note 162 87-106 at 94-95: After noting that Germany has "no history of civil rights," Degener refers to a 1996 case in which the German Federal Constitutional Court decided that a school had not discriminated against a child who used a wheelchair by denying her admission to a mainstream school (because it was not physically accessible) on the basis that the separate disabled education facilities were equal to those provided in the regular school system. There was no requirement to consider any accommodation for the child. (*Bundesverfassungsgericht, Urteil vom 8 October 1996, Europaeische Grundrechtszeitschrift 1997, s 586.*)

affects its objectives; or the objectives of the law will be a reflection of the definition. The failure of the FETD to define disability, or even to give guidance on the scope of the definition of disability which national authorities must adopt, significantly increases the likelihood that the types of disability which are covered by domestic anti-discrimination legislation will vary among the Member States. One consequence of this failure will likely be that the FETD will be unevenly applied within the EU which will undermine its claim to provide a common minimum level of protection from discrimination.

It seems likely that a narrowly circumscribed, impairment based definition would meet the minimum requirements of the FETD. Any Community norm which does develop is probably going to reflect a minimalist conception of disability and focus on impairment based disabling conditions. It seems too much to extrapolate from the theoretical purpose of anti-discrimination legislation, to protect individuals from bias and stereotyping related to disability, to claim that the FETD requires the broadest conception of impairment, including past disability which no longer is present or factually incorrect perceptions of the presence of impairment. However, although the scope of the anti-discrimination protection which the FETD provides may be narrower than desired, even relatively narrow definitions will encompass a wide range of disabilities which have kept people out of the labour market due to bias, stereotyping and failure to reasonably accommodate.

Narrow definitions mean that fewer people will be able to benefit from the protection of the law and fewer types of barriers to equality can be challenged and eliminated. The less inclusive the definition of disability in national legislation must be

the less potential the FETD has for bringing about any significant transformation in the way that the work environment is built or the way work is organised. Without that significant transformation in the social environment of work, the DRM policy objectives of inclusion and equality in the world of work cannot be significantly advanced.

#### **4. *Dominance of the Formal Equality Paradigm***

As was seen in chapter 5 community equal treatment law is built upon a formal model of equality which “focuses on equality for individuals... [and] centres on protecting individuals from unfair treatment by reason of a prohibited ground.”<sup>340</sup> The policy objectives which flow from the social model focus on the promotion of the inclusion and full citizenship of disabled people in all aspects of their communities. These objectives are best advanced by the application of a substantive conception of equality. EU soft law disability initiatives reflect this substantive equality agenda of inclusion. However, despite the official adoption of the social model, when the non-discrimination objective was incorporated into Community law by the FETD it was made to fit the formal, equal opportunities conception of equality which animates that law. A consequence of particular concern is the very restricted scope the ECJ has allowed for positive action programs to tackle persistent patterns of social disadvantage, a subject which will be taken up again in the next section. However, even acknowledging the limitations of the formal equality analysis, the FETD does require implementation of

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<sup>340</sup> Bell & Waddington, *supra* note 136 at 351.

valuable legal protection from discrimination which will benefit many disabled people in their efforts to be full participants in the labour force.

If the first major contribution the FETD makes to the employment options of disabled people is the prohibition against discrimination based on bias against, and stereotypes about, disabled people, the second is the principle of reasonable accommodation set out in Article 5. As discussed in chapter 5, there are significant limitations inherent in the way the concept is understood in the FETD. Nevertheless, in the majority of Member States which had no such requirement before and no expectation that disabled people should be able to claim accommodation as of right, the duty to accommodate will make a significant improvement in the employability of disabled people. However, once the idea of the duty to accommodate becomes widespread and most employers are used to providing a minimum level of accommodation, the continuing utility of the principle is likely to diminish. This is because it is likely that the duty to accommodate will not be interpreted by the ECJ as requiring more than modest adjustments to the physical and social environment. This likelihood follows from the ECJ's commitment to the formal equality paradigm and the malleability of the duty to accommodate as a mechanism for responding to the reality of difference which disability presents. Since formal equality relies so strongly on identifying comparators and submerging difference before an equality claim can succeed, the requirement for accommodation can easily be reinterpreted to highlight difference and justify adverse treatment. This possibility arises because the reasonableness factor of accommodation analysis may be shaped to respond to employer concerns rather than claimant's concern,

thereby justifying rather than challenging exclusion on the basis of “relevant” distinctions. The experience of Canada and the United States with the application of the duty to accommodate over the past 20 years suggests that where the claim of right requires only a minor adjustment in how society is structured (or how a business is run), or where the benefit to non-disabled people of a particular accommodation is clear, a disabled claimant is likely to be successful. However, the more that structures, policies and practices would have to be adjusted to accommodate a disabled claimant the less likely it is that the claim will be successful.<sup>341</sup>

The FETD concept of reasonable accommodation as an individual right “leaves unchallenged and unaffected the underlying discriminatory policy which resulted in the initial exclusion.”<sup>342</sup> The principle of reasonable accommodation does not challenge the imbalance of power between worker and employer or the construction of the social environment to ableist norms which exclude disabled people; by itself it cannot, and does not seek to, transform society to welcome the diversity represented by disability. Notwithstanding significant benefits to individual persons, the duty to accommodate does not permit anti-discrimination legislation to significantly change the overall employment rate of disabled people.<sup>343</sup> The policy objectives of the DRM as they relate to the field of employment seek fundamental transformation of the structure and organisation of the

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<sup>341</sup> Asch, *supra* note 10 at 401; McKenna, *supra* note 293 at 223; Berg, *supra* note 17 at 27.

<sup>342</sup> Waddington & Hendriks, *supra* note 142 at 414-415.

<sup>343</sup> Bagenstos, *supra* note 293 at 102. The European Expert Group on Employment for Disabled People estimates the number of disabled individuals of working age who could, because of FETD based anti-discrimination legislation, potentially gain access to the labour market is between 2.5 and 3 million in the pre-enlargement EU or about ten percent of the disabled population: *Employment Situation*, *supra* note 47 at 53.

workplace which are necessary to achieve an inclusive society and full citizenship rights for disabled people. The reasonable accommodation provisions of the FETD fall far short of what is required to effect that change. They do not require any significant change to the status quo, only the provision of relatively minor special or exceptional treatment of disabled people who would otherwise be excluded from or disadvantaged in the labour market.<sup>344</sup>

Another objection to the formal equality paradigm, with its focus on fair and consistent treatment of individuals based on their personal merits, upon which Community law conceptions of equal treatment are based, is that it is particularly poorly equipped to respond to issues of intersectionality. Intersectionality refers to experiences of disadvantage which are the function of overlapping dimensions of inequalities such as disability and gender. Even if the various grounds were to be combined in a single equal treatment directive, the law would deal with multiple grounds of discrimination consecutively without considering “whether the cumulative effects of multiple discrimination are different in nature to the sum of each individual form of discrimination.”<sup>345</sup>

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<sup>344</sup> 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.” HeinOnline (2000-2001) 46 McGill L. J. 533 at 550 et seq. for a discussion of reasonable accommodation as an agent for institutional change.

<sup>345</sup> Bell & Waddington, *supra* note 136 at 352.

### 5. *Judicial Attitudes to Positive Action*

As discussed in chapter 5, the ECJ takes a very restrictive approach to the operation of positive action programs by interpreting them as derogations from the concept of equal treatment rather than as a means of achieving true equality. The Court's approach to these programs poses a potential threat to domestic initiatives to respond to persistent patterns of inequality associated with the prohibited grounds of discrimination. The FETD has attempted to increase the scope for national positive action programs by adopting particular wording which might incline the ECJ to relax its hostility to these equality enhancing initiatives. The FETD makes provision for positive action programs in Article 7(1) which provides that "[w]ith a view to ensuring full equality in practice, the principle of equal treatment shall not prevent ... [the adoption of] specific measures to prevent or compensate for disadvantages linked to any of the grounds" This wording, in light of the restrictive ECJ positive action jurisprudence, strongly suggests that positive action programs are not to be seen as exceptions to the non-discrimination norm, but actually as a way to combat discrimination. It is, however, more likely that these provisions in the FETD will also be interpreted as derogations from the equality norm and be strictly interpreted. This bleak prognosis is based on the deeply entrenched formal equality approach to equal treatment which animates Community law and the Court's response to the attempt to expand the scope for positive action programs by the amendments in the Treaty of Amsterdam<sup>346</sup>

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<sup>346</sup> See text above at note 317.

Some hope that the Court will take a more progressive line on positive action for disabled people is afforded by an additional article specifically related to disability which seems to be directed at protecting particular types of positive action program. Article 7(2) provides that “[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.” The particularised focus on positive action targeted at disability may provide a stronger statement that these programs are not to be treated or understood as exceptions to the non-discrimination norm but as policy options which are available at the discretion of the Member State. Even if these programs are treated as derogations from the equal treatment principle it is possible that narrowly tailored programs which respond to particular aspects of disability in the labour market will be deemed sufficiently contained without the Court feeling it has to impose further limits.

Nevertheless, the effectiveness of similar positive action provisions in the 1976 GED has been severely hampered by the ECJ’s restrictive interpretation of these provisions as derogations from the concept of equal treatment rather than as a means of achieving true equality. Given the essential role positive action programs play in advancing the policy objectives of the DRM, the FETD’s cautious support of them and the Court’s inability to properly integrate them into a substantive conception of equal treatment combine to form one of the most significant weaknesses in Community law protection from discrimination because of disability.

### 6. *Social Right to Equality.*

For those disabled people who are otherwise qualified but have been kept out of the labour market because of bias, stereotyping or the lack of accommodation the FETD, despite its limitations, holds significant promise for advancing their interests. Another large segment of the disabled working-age population needs special assistance, which could be provided through positive action programs, to break into the job market. Once there they would likely have sufficient competitiveness to stay in the workforce with reasonable accommodation and the other protections provided by the FETD. There are, however, even more disabled people who have been sufficiently marginalised that they are not likely to be competitive in the regular labour market with only the narrowly tailored positive action initiatives contemplated by the FETD. For this group of people progress toward social equality requires a comprehensive, integrated disability policy which is responsive to the changes in their needs throughout their lives and a broader conception of citizenship, one not so tightly oriented to the marketplace.

If the DRM policy objectives of autonomy, inclusion and full citizenship are to be achieved for all disabled people a stronger conception of equality than that provided by the ECJ is required. One possible conception of a more responsive version of equality is equality through social rights which was introduced at the end of chapter 3. This conception of equality imposes a positive duty to anticipate how the physical environment and policies and practises which inform daily activities are likely to perpetuate or create barriers to equality and to take pro-active steps to eliminate those

barriers. A basic component of such an approach would be a means to monitor and report on the state of equality in a country.

A faint glimmer of an “equality through social rights” approach is seen in provisions of both the GETD and RETD which require the establishment of publicly supported national institutions to oversee the implementation of the directives. The GETD requires that the Member States establish national institutions “for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex.”<sup>347</sup> These institutions may be combined with other agencies “charged at [the] national level with the defence of human rights or the safeguard[ing] of individuals’ rights.”<sup>348</sup> These institutions must be authorized to provide independent assistance to victims of discrimination to pursue their complaints, to conduct independent surveys and to publish “independent reports and make recommendations on any issue relating to such discrimination.”<sup>349</sup> The RETD requires the establishment of similar national institutions with a similar scope of independent action to focus on “the promotion of equal treatment of all persons without discrimination on the grounds of racial and ethnic origin.”<sup>350</sup> Whether the “support” must include publicly funded assistance to individuals for, or active support of, individual litigation is unclear. The FETD has no such requirement which means it is left to the Member States to determine whether they will establish any national program to assist victims of discrimination or

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<sup>347</sup> GETD, *supra* note 231, Article 7.

<sup>348</sup> *Ibid.*

<sup>349</sup> *Ibid.*

<sup>350</sup> RETD, *supra* note 230, Article 13.

any independent monitoring agency. Despite the absence of any such requirement in the FETD it seems likely that such agencies will be established in the not too distant future as a result of pressures coming from other Member States for convergence of national anti-discrimination policies.

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Although the disability provisions of the FETD reflect elements of the DRM rights agenda, with the prohibition of discrimination because of disability, the imposition of a duty to accommodate on employers and the clear authority for national positive action programs, they do so imperfectly because they fail to implement a substantive equality approach to remedying the persistent patterns of disadvantage experienced by disabled people.<sup>351</sup>

The impact the disability provisions of the FETD are likely to have on the achievement of the policy objectives of the DRM in the near term will vary depending on the Member State in question. In those countries which have had a history of legislation prohibiting discrimination because of disability the impact is likely to be minimal. The ECJ is not likely to interpret the various provisions more substantially than they already are interpreted in those countries. Where, however, there is very little history of such legislation the impact will likely be much more significant even given the restrictive interpretation which I think the Court will give to the various provisions of the FETD. In

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<sup>351</sup> The same objection can be made regarding the other grounds listed in the FETD. The Racial Equal Treatment Directive, *supra* note 230, and the Gender Equal Treatment Directive, *supra* note 231, are equally deficient in their failure to implement a substantive conception of equality.

those countries, the FETD has the potential to significantly benefit disabled people who want and are able to join and remain in the labour force.

The key enabling concept in the FETD is the duty to accommodate. This duty can effect the elimination of the multitude of relatively minor barriers which have prevented otherwise competitive disabled people from fully participating in the labour market. The domestic non-discrimination legislation will also provide a mechanism to begin breaking down the attitudes which have marginalised disabled people as a group and which hold that disabled people are incapable of looking after themselves, unproductive, and unable to work. This process will accelerate as the presence of disabled people becomes more common in the work environment and starts to challenge those deep seated social attitudes. I am optimistic that the influence of the FETD will extend beyond its legal context as the large variety of disability interest groups draw upon the FETD, along with other EU and international policy instruments, for support as they press their policy agendas in their domestic political arenas.

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## Appendix

**Table 1:** Percentage of persons (aged 16-64 years) with self-reported disability according to national surveys and ECHP 1996 (EU-average 14.3, ECHP)<sup>352</sup>

	A	B	DK	FIN	F	D	EL	IRL	I	L	NL	P	E	S	UK
Surveys	29.0	17.0	7.0	5.0	3.1	6.9	2.2		1.6	8.0	16.4		5.8	17.1	18.8
ECHP	12.5	12.9	17.4	22.9	15.3	17.3	8.2	10.9	7.8	16.5	18.6	18.4	9.9		18.8

Source: National surveys (various years) and ECHP (1996).

**Table 2:** Participation and unemployment rates of disabled and non-disabled people<sup>353</sup>

	Disabled population		Non-disabled population		Ratios Dis./Non-dis.	
	Part. Rate	Unemp. Rate	Part. Rate	Unemp. Rate	Ratio part.	Ratio unemp.
A	49.9	6.8	75.0	4.2	0.67	1.62
B	38.6	14.9	66.6	11.4	0.58	1.30
D	57.6	10.7	78.4	5.4	0.73	1.99
DK	51.1	9.1	86.0	5.6	0.59	1.63
E	29.5	16.4	66.3	22.7	0.44	0.72
EL	32.7	10.0	65.7	11.0	0.50	0.91
F	53.0	14.1	73.1	10.7	0.72	1.33
FIN	52.3	16.6	76.5	17.3	0.68	0.96
I	29.6	11.4	58.7	14.3	0.50	0.79
IRL	32.9	18.3	67.9	10.6	0.48	1.72
L	44.0	11.5	66.0	2.6	0.67	4.50
NL	49.9	9.6	75.8	5.6	0.66	1.70
P	51.3	6.3	74.4	5.3	0.69	1.21
UK	46.4	11.2	82.6	7.1	0.56	1.58

Source: Malo and Garcia-Serrano (2001), based on ECHP, 1996.

<sup>352</sup> *Employment Situation 2001*, supra note 47 at 35.

<sup>353</sup> *Ibid.*, at 40.

**Table 3:** Demographic characteristics of disabled and non-disabled working-age population (%)<sup>354</sup>

	Disabled	Non-disabled
Age (years)		
16-24	6.4	17.0
25-34	12.6	25.5
35-44	17.7	23.6
45-54	24.9	19.0
55-64	38.4	14.9
Gender		
Male	47.3	48.9
Female	52.7	51.1
Educational level		
Low	52.7	42.7
Medium	34.5	39.2
High	12.8	18.1

Source: ECHP, 1996.

<sup>354</sup> *Ibid.*, at 36.