

# The Development of Rights-based Social Policy in the European Union: The Example of Disability Rights\*

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## Abstract

This article examines the development of non-discrimination rights in the EU, with particular reference to disability. It outlines the origins of Article 13 TEC, which extended the competence of the Community institutions to combat discrimination, and traces the history of other initiatives in the disability policy area. Programmatic and juridical methods of promoting equality are described and compared. The analysis considers both the different institutional obstacles to programmatic and juridical methods, and the different consequences for the substantive content of policy of pursuing programmatic and juridical approaches.

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## Introduction

The use of the language of rights in developing the European Union's social policy competence can be dated from the Community Charter<sup>1</sup> initiative in the late 1980s. The charter addressed workers' rights; subsequently steps were taken at Amsterdam to enhance Community competence to protect citizens'

\* This article is partly based on information collected by the 'Definitions of Disability in Europe' project, funded by the European Commission (Contract Reference VC/2000/O32). Further information is available from the project website: <<http://www.brunel.ac.uk/depts/govn/research/disability.htm>>. I am very grateful to the national reporters on the project for their contributions. Thanks also to participants at a seminar at the Department of Political Science and International Studies at Birmingham University, particularly Daniel Wincott, and to Helen Bolderson, Claire Kilpatrick and two anonymous referees for their comments.

<sup>1</sup> Declaration by Council of the Community Charter of Basic Social Rights for Workers (COM(89) 568 final, 19 November 1989).

(not just workers') rights. A recurring theme in these statements of rights is that they express the common values that unite the citizens of Europe. In this sense, rights are intended to have unifying and integrating effects. These might arise from the symbolic content of European-level declarations, from the repeated affirmation of rights as part of the construction of a common identity, or from the promotion and protection of rights in political and judicial fora.

The focus of this article is on these latter processes and, specifically, on the implementation of social rights in the Member States. Rights instruments can be seen as part of the structure of multi-level governance in the Union. From this perspective, rights may be transmitted or implemented through two main processes: judicial processes which utilize the hierarchy of the legal system to create a consistent interpretation of rights, and programmatic processes in which rights express goals which political actors at different levels (primarily the national level) agree to pursue. In both senses, rights can be seen as establishing foundational standards with which the Member States are expected to comply. The aim of this article is to compare and contrast the juridical and programmatic development of rights in European institutions, to arrive at some insight into the question of whether and how rights instruments can constitute effective standards.

Judicial processes have been a powerful force for integration in the Union, creating a European economic constitution through the development of legal doctrines to promote compliance with fundamental treaty rights. One image of the future development of European social rights draws on this economic constitutionalism and expands its scope. In this view of the integrating effects of social rights, European-level social policy can be developed by the adoption of laws and their enforcement by a hierarchy of courts headed by the European Court of Justice (ECJ). The drivers of this process would be the citizens of the Union, utilizing the law to defend their rights against state authorities and employers.

Critics of this image argue that the processes for developing and enforcing social rights must be different from the processes for developing an integrated market. In Scharpf's account, a court-dominated process of integration will promote negative rights, whereas positive integration requires actions to be taken by the political institutions (Scharpf, 1999, ch. 3). Similarly, Poiares Maduro argues that social rights, as developed by the judiciary, are liable to be the 'prisoner of the values of market integration' (Poiares Maduro, 1999, p. 455). Alston and Weiler offer a different interpretation. They find 'positive' elements in the judicial construction of the single market, notably in the area of gender discrimination, 'where human rights and the objective of creating a common or single market happen to coincide' (1999, p. 11). They see the

judicial enforcement of rights as part of a positive, albeit market-conforming, process of integration.

A central issue in this debate is the capacity of the legal system to uphold social rights as effectively as civil rights. Marshall's account of rights assigns different institutions to the protection of civil and social rights: 'the institutions most directly associated with civil rights are the courts of justice' while the institutions connected with social rights are public agencies.<sup>2</sup> However, there is now an extensive literature asserting that the courts can promote positive social rights (see, e.g., Fredman, 2001), and in the European debate the equation of civil and justiciable rights, on the one hand, and social and programmatic rights, on the other, is not accepted. For example, the Simitis report suggested that '[s]ocial rights can involve straightforward justiciable rights, as the case of non-discrimination illustrates ... [o]r, they can involve "rights" that are in fact "fundamental policy purposes ..."' (Expert Group on Fundamental Rights, 1999, p. 11).

The discussion in this article centres on disabled people's right to equal treatment. Equal treatment and non-discrimination are the most developed components of the social dimension of European integration. In the area of equality between men and women, both juridical and programmatic methods have created a relatively integrated sphere of European social law and policy. However, the development of equal treatment between the sexes has some features which may make it unique, notably the presence of a specific treaty base. Furthermore, this area of policy was largely 'unclaimed territory' in the sense that it had no central place in Member States' social policy programmes prior to the development of European policy (Streeck, 1996, p. 76). National and European policies have developed in tandem. Disability, by contrast, is an area in which all Member States already have an array of social policies, often of great vintage, although most would not be described as 'equal treatment' policies.

Thus the space for the programmatic promotion of disability rights is already occupied, and initiatives at the EU level have been limited (see below). However, important juridical instruments have been promulgated. Article 13 TEC, inserted into the Treaty at Amsterdam, provides that 'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. The Commission put forward two draft directives under Article 13 in 1999, and in 2000 both were approved by Council. The Framework Equal Treatment Directive (FETD) established a general framework for equal

<sup>2</sup> 'The educational system and the social services' was Marshall's actual formulation (Marshall, 1950, p. 29).

treatment in employment and occupation and outlawed discrimination based on religion, belief, disability, age and sexual orientation.<sup>3</sup>

Since 1999, new methods of deliberation and open consultation have been developed in the course of drafting the Nice Charter of Fundamental Rights (Poiares Maduro, 2003). However, Article 13 and the FETD could not be said to be the product of a deliberative process. Section I traces the process leading from the Community Charter initiative in 1989 to the insertion of Article 13 into the Treaty at Amsterdam. The discussion stresses in particular the ambiguity of the language of rights, which facilitated opportunistic agreement between the Member States over Article 13. It proved expedient not to distinguish between civil, political and social rights; rather, it was insisted that they were 'indivisible'. This allowed links to be drawn between the promulgation of fundamental human rights, largely viewed as a constitutional issue for the Union, and the promotion of social rights, which would have more impact on Member States.<sup>4</sup>

Section II turns to the history of programmatic actions on behalf of disabled people, showing how the Commission's approach evolved in the course of the 1990s. Following setbacks in its efforts to harmonize Member States' disability policies, the Commission promoted the 'mainstreaming' of disability in social policy. Mainstreaming gives effect to the right of equal treatment and non-discrimination by enhancing procedural rights to participation or consideration in the policy process. The 'open method of co-ordination' (OMC) could, in principle, facilitate the participation of the disability policy community in a transnational process to promote programmatic exchange and convergence, but there is little sign of this happening in practice.

While the programmatic development of disability policy at the EU level has been weak, juridical methods are strongly endorsed by many disability rights' campaigners. For some commentators, access to the court system is the 'gold standard' for rights. Access to a hearing for those whose rights have been infringed is seen as promoting enforcement, '[g]iven that the most effective "watchdogs" in respect of ... human rights are their intended beneficiaries' (Cooper and Whittle, 1998, p. 3). Cooper and Whittle do not address the question of whether the courts interpret and apply rights consistently, but even on their own terms their argument is questionable. The intended beneficiaries need resources to obtain access; to obtain resources they may form

<sup>3</sup> Council Directive 2000/78/EC. The other directive was the Race Directive (Council Directive 2000/43/EC), which prohibited discrimination on the grounds of race or ethnic origin in the areas of employment, social protection, education and goods and services, including housing.

<sup>4</sup> Poiares Maduro (2003) draws attention to the continuation of this double aspect in the Charter of Fundamental Rights. 'For some, the Charter ... will promote the construction of a European identity and mobilise European citizens ... For others, the Charter is simply a constitutional guarantee that the EU will not threaten the constitutional values of the Member States' (p. 269).

groups, and the groups which are most successful may not be representative of the intended beneficiaries.

The consequences of these limitations are analysed by commentators such as Alter (2000) and Conant (2002). They also examine whether the European legal system really is integrated, in the sense of whether norms developed by the ECJ are applied consistently in Member States. Kilpatrick (2001) has shown how far this is from being the case even in the relatively well-developed area of sex equality law. It is too early to say whether disability discrimination will or will not develop into an integrated area of European law, but it is possible to apply studies from other fields to the disability case to identify some factors which point towards judicial restraint. This is done in Section III, which uses Alter's account of the 'thresholds' which must be crossed if a common interpretation of the principle of equal treatment is to be established by the European legal system. The discussion implies that the juridical development of disability rights may be constrained by the programmatic differences between the Member States. There are political and analytical difficulties in giving content to the legal right of disability non-discrimination without the substantive foundation of programmatic similarity.

## **I. The Road to Article 13**

### *Delors and Social Rights*

In the late 1980s, the President of the European Commission, Jacques Delors, called for the development of the social dimension to European integration, in parallel with the market-led process of economic integration revitalized by the Single European Act. The Community Charter was a central part of this initiative. The charter was largely framed in aspirational terms; in other words, it outlined rights as goals. For example, disabled people were the subject of Article 26, which called for 'concrete measures aimed at improving their social and professional integration'. An action programme accompanied the charter, comprising both formal instruments (mainly proposals for directives) and informal measures such as recommendations and study programmes (Lange, 1993, Table 1).

The charter can be understood as an attempt to infuse some elements of 'social citizenship' into an integration process dominated by 'economic citizenship' (Fitzpatrick, 2000, p. 316). To increase social policy-making capacity at the European level, Delors sought to extend the use of qualified majority voting (QMV) to encompass some areas of social policy. It was argued that, to correct the Community's bias towards market-led integration, it was necessary to adopt QMV in the social field to parallel its use in promulgating

internal market measures under Article 100A (now 95). One analysis of the potential effect of QMV runs as follows. Member States could not unanimously agree to harmonization measures which entailed an equalization of social costs, as this would involve low-cost states giving up a source of competitive advantage in trade. With QMV, the high-cost states could group together to impose the standards applicable in the lowest high-cost economy on the low-cost states (Lange, 1993). The result would not be any improvement in social provisions in the high-cost states, but standards would have to rise in the outvoted low-cost states (Whiteford, 1995).

In practice, this analysis underestimated the obstacles to coalition formation even among states with similar levels of social protection. Cost was not the only dimension on which Member States' social policies differed. The cost-based analysis suggested that, because of the competitive pressures of the internal market, there must be convergence in Member States' social policies, and the only question was whether there would be convergence on a high standard or a 'race to the bottom'. In practice, much of the diversity in national social policy was of low or uncertain competitive significance. Differences in labour market institutions and social philosophies might be just as important as cost in obstructing harmonization (Scharpf, 2002, s.3).

Commission initiatives under the 1989 action programme to implement the charter became stalled in the early 1990s, as opinion in Member States moved against further integration. Szyszczak suggests that '[t]his was a blow ... to the attempt, initiated by Jacques Delors, to bring a social fundamental rights discourse into Community social policy thinking' (Szyszczak, 2000, p. 211). However, to some extent the language of rights proved adaptable to the new environment. It was still possible to conceive of European social rights as common goals. For example, the Commission's proposal for a recommendation on convergence of social protection objectives and policies (COM(91) 228) disclaimed any intention of harmonizing social policies, but suggested that they would converge in meeting common aims and responding to common problems. The difficulty lay in using this idea to form the basis of a shift of social policy-making from the national to the European level. Since the aims of social policy are generally at least partially in conflict, states were concerned to be able to choose their own trade-offs and patterns of resolution between aims.

### *Fundamental Rights*

In parallel with Delors' initiative to revive the social dimension, other moves were taking place to strengthen the Union's constitutional foundations, particularly by incorporating adequate protection of fundamental human rights and developing the concept of 'citizenship of the Union'. This rights agenda

was initially motivated by a judicial problem affecting the supremacy of Community law, as interpreted by the ECJ, over national constitutional law. In outline, the solution was to ensure that Community law could be read as incorporating fundamental rights common to all Member States. However, this initial motivation developed into a larger project. The language of rights was developed for its legitimating and integrating force. It could give moral content to Community laws and policies, emphasize the common values existing within Member States, and speak across national boundaries to individuals and groups within the Community (de Búrca, 1995, pp. 41–3).

Initially, the fundamental rights agenda developed quite autonomously of the social dimension. Initiatives were brought forward by the Justice and Home Affairs Directorate, whereas the Community Charter was the concern of Employment and Social Affairs. Proposals on fundamental rights centred on the preamble and opening articles of the Treaty, whereas the main elements of the social dimension were in the social policy chapter. The social dimension sought to co-ordinate Member States' social policies, whereas the fundamental rights debate was about Europe: insofar as the rights formulated were specific in their intended scope, they often bound the Community institutions, rather than applying to Member States themselves.

However, it did not take long for key actors to see the possibilities for linking the two strands. A *Comité des Sages*, established by the Commission in 1994 to look at the future of the Community Charter, promoted the 'indivisibility' argument that civil rights should be united with social rights, arguing that the crisis of the welfare state called for a new unified approach to rights (*Comité des Sages*, 1996). One important implication was that fundamental rights would extend to all citizens of the Union, whereas the rights declared in the Community Charter concerned workers and centred on employment.

Another move to link civil and social rights, and promote citizens' rather than workers' rights, came through the development of the elastic concept of 'social exclusion'. While unemployed job-seekers are 'workers' for the purposes of European law, those excluded from the labour market are a wider group (including people 'not in the labour force'). The concept of social exclusion found a ready connection with the language of social rights. Room noted that, whereas traditional social policy focuses on distributional issues, social exclusion shifts the focus to 'relational issues: in other words, inadequate social participation, lack of social integration and lack of power' (1997, p. 256). The European Observatory on Policies to Combat Social Exclusion<sup>5</sup> 'root[ed] its analysis of social exclusion in social rights ... [E]ach citizen has a right to a certain basic standard of living and to participate in the major

<sup>5</sup> Established under the third poverty programme (Council Decision 89/457/EC).

social and occupational institutions of the society' (p. 257). This type of rights statement could find a place in the fundamental rights discourse. However, linguistic affinity did not resolve the ambiguous nature of these rights: as Room noted, they may be legal or customary, vague or precise, declarations of policy or provisions actionable by individuals.

The concept of social exclusion also widened the traditional focus of poverty policy beyond concern with income adequacy and towards issues of access to employment, housing, health care and education. In so doing, it opened up the politics of the social dimension, moving away from the established focus on state employment protection laws and income maintenance programmes and furnishing a rationale for involving voluntary organizations and other NGOs. This was reflected in the design of a number of the action programmes put forward by the Commission. In the area of disability, successive action programmes (described in more detail in the next section) promoted cross-European networking and culminated in the creation of the European Disability Forum (EDF). These networks allowed the Commission to bypass national governments and promote a European-level social policy discourse (Cram, 1994; Wendon, 1998). This discourse was framed around potential European-level actions and reforms, notably the promotion of rights. Quinn comments that 'the HELIOS II programme [the third disability action programme] was a catalyst to the awakening of the European NGO community to the significance of EU Treaty law' (1999, p. 304). It can therefore be seen that the fundamental rights agenda and the social dimension were connected at a very basic level, because the social action programmes funded and supported the European networks of NGOs which in their turn campaigned for the development of fundamental rights.

### *Fundamental Rights in the Amsterdam Treaty Amendments*

When Member States came to the Intergovernmental Conference (IGC) leading up to Amsterdam, rights appeared on their agendas in a bewildering variety of ways. The principle of enhancing protection of fundamental rights had become lodged in the interstices of major issues about institutional reform, managing enlargement, and extending co-operation in the fields of immigration, foreign policy and security. Some states supported a measure on fundamental rights which would be binding on Community institutions, but not on Member States themselves; others supported more widely binding measures; others sought insertion of a statement or charter in the preamble to the Treaty, where it would have declaratory but not legal force (European Parliament, 1996).

It was the task of a Reflection Group, chaired by Carlos Westendorp of Spain, to develop these diverse interests into a set of proposals on reforms to

the Treaty for the IGC. The group considered several proposals to ‘embody ... European common values’ under the heading of non-discrimination. One proposal was to add a general clause prohibiting discrimination on a range of grounds to Article 6 (now 12), which prohibits discrimination on the grounds of nationality (Reflection Group, 1995, para. 39). This provision would bind the Community institutions, but commentators at the time thought that it would not bind Member States in the conduct of their own social policies. There was no history of providing rights for individuals against their own state under Article 6. For example, the EDF’s legal group advised its members that no new competences would be created by the measure and that only activities with a transnational or Community element would be affected. National disability groups could be reassured that primary responsibility for combating disability discrimination would remain with Member States (EDF, 1996, p. 2).

Intergovernmental negotiations resulted in a substantially revised version of the Westendorp proposal to extend Article 6. Compared with the original proposal to guide and provide remedies against Community action, Article 6A (now 13) reads instead as a grant of competence to the institutions of the Community (Barnard, 1999, p. 382). The Article does not itself provide a basis for judicial development of principles of non-discrimination; it does not create a directly effective right not to be discriminated against, and it envisages ‘action to combat’ discrimination rather than prohibiting discrimination. At the time, it was thought that the Article would be largely symbolic: ‘the Commission might invoke Article 13 as moral, political, and perhaps legal support for initiatives under different aspects of the Treaties’ (Quinn, 1999, p. 315). Locating the new Article in the first section of the Treaty meant that it was not expressly limited to the employment sphere, nor designated as ‘social policy’. It also meant that any measure required unanimity in Council to be approved, and this was seen as an important obstacle by commentators who had come to focus on the extension of QMV as central to the progressive development of social policy in Europe.

Mazey and Richardson (1997, p. 113) characterize the 1996 IGC as a ‘fluid and unpredictable decision situation’ in which the way that problems were framed assumed high significance. The language of rights provided a frame around which a diverse array of actors took up their positions. To borrow the expression of Garrett and Weingast (1993, p. 316), from a different context, rights came to serve as a ‘constructed focal point’. One of the attractions of rights was their ambiguity. There was uncertainty about the scope and application of rights in the different proposals, and the extent to which they were intended to be declarations of policy intentions, restatements of established positions, or provisions for additional protection for individuals. The rights

frame also proved to be very accommodating of different interests, allowing different concerns to be linked together. The diversity of the political forces which led to the incorporation of Article 13 in the Treaty is reflected in the diversity of grounds on which discrimination may be combated. The sex ground can be seen as extending the scope of a well-established area of Community law from workers to citizens. Race and ethnicity, and religion and belief, were grounds of particular relevance to human rights in the acceding states. The inclusion of disability, age and sexual orientation, by contrast, reflected the idea that a new generation of civil and social rights should be developed in the course of modernizing and restructuring the way that European welfare states regulate the life courses and family arrangements of their citizens. The fashionable insistence on the 'indivisibility' of civil and social rights served to link interests in resolving legal and constitutional questions of human rights with much more radical interests based in identity politics. 'One of the lessons of Article 13 was the ability of more controversial grounds of discrimination to make unexpected progress through seeking inclusion in a broad anti-discrimination instrument' (Bell, 2000, pp. 168–9).

For the European disability movement, Article 13 was the highlight of the Amsterdam Treaty. There were two other important measures, but in both the lobbyists were disappointed. First, an amendment had been sought to Article 100A (now 95) on single market harmonization which would ensure that harmonized standards took account of the needs of disabled people. In the end, a declaration was appended to Article 100A instead. Second, Article 118 (now 137) specified the fields in which the Community 'shall support and complement the activities of Member States'. These included 'the integration of persons excluded from the labour market' and 'opportunities and treatment at work', but there was no specific mention of disability in the final version of the Treaty, although there had been in the penultimate text (EDF, 1998, p. 18).

## II. Policies to Promote the Equal Treatment of Disabled People

This section describes how the Commission has sought to promote disability policy in Europe, and examines how various programmatic initiatives have fared. By tracing the evolution of disability policy at the European level, it is possible to see how the Commission came to frame its work in terms of the promotion of disability rights, and what the consequences were for the development of EU-level social policy.

The Commission promoted the development of a European disability policy through a succession of action programmes. The first programme<sup>6</sup> created

<sup>6</sup> Community Social Action Programme on the Social Integration of Handicapped People, 1983–88, [1981] OJ C 347/1.

a network for sharing experience and good practice primarily in the area of vocational rehabilitation of handicapped people and their preparation for employment, while the second programme<sup>7</sup> adopted a somewhat wider remit across social integration and employment. Both programmes had a fairly traditional social policy orientation: they promoted networking among professionals involved in particular disability policy sectors such as rehabilitation and education. They focused on special services and facilities rather than rights and equal opportunities, and were criticized for allowing professionals to dominate rather than involving disabled people themselves (Lovelock and Powell, 1994, pp.187–95).

The 1980s also saw a vigorous debate about the possibility of a European policy to adopt quotas to promote the employment of disabled people. The Commission advocated the adoption of quotas across Europe,<sup>8</sup> and the European Parliament strongly backed this position, resolving that a directive should be brought forward if Member States failed to introduce quota systems within a specified time-frame (Daunt, 1991, pp. 22–3). However, this failed to obtain the agreement of Council, which eventually approved a much watered-down recommendation advocating the adoption of ‘positive action’ in general terms.<sup>9</sup>

The quota proposal can be understood as an attempt to develop a common social policy programme across the European states, and its fate shows the difficulties of promoting programmatic action in this field at the European level. One rationale for a common programme would be that all employers should face similar social responsibilities and costs. Consistent with the argument of Lange (1993) discussed above, it was a high-cost state, Germany, which backed the quota proposal most strongly. However, the high-cost states did not demonstrate a common interest in the proposal, because of non-cost differences in their institutions and philosophies. As it happened, France revived its quota system in the late 1980s, but with a financing structure and administrative basis quite different to that in Germany (Doyle, 1995, pp. 66–8). The UK, in the meantime, was running down its quota system, not primarily because of its cost but because of ineffectiveness (pp. 258–67). Across Europe, the quota proposal encountered a crowded and contended policy space, and this prevented any agreement at the European level.

<sup>7</sup> HELIOS I (Second) Community Social Action Programme for Disabled People (1988) OJ L104/38.

<sup>8</sup> Memorandum of the Commission to the Council concerning the employment of disabled people in the European Community (COM 86(9) of 24 January 1986).

<sup>9</sup> Council Recommendation 86/379 OJ 1986 L225/43.

*Mainstreaming and the Social Model*

The design of the third disability action programme (HELIOS II)<sup>10</sup> showed a significant evolution in the Commission's approach. The aims of the third programme were stated in wider terms than in previous programmes, as being 'to promote equal opportunities for and the integration of disabled people'. There was more emphasis on the political mobilization of disabled people. One aspiration of those involved in disability policy at the European level was that disability NGOs might have a role in consultation over policy to parallel that created for the social partners (Daunt, 1991). The EDF was formed as a result of HELIOS II; its institutionalized roles include providing the secretariat to the Disability Intergroup of the European Parliament.

The equal opportunities theme was developed in a 1996 communication,<sup>11</sup> setting out the new equality of opportunity approach. The strongest recommendations in the 1996 document concerned 'mainstreaming'. This concept had been introduced in the 1993 Social Policy Green Paper, where it was defined as 'acceptance of people as full members of society, with opportunities for integrated education, training and employment, and to lead their lives independently' (Commission, 1993, p. 48). Mainstreaming in this sense is an idea about how social programmes should be organized. It implies, for example, that education in ordinary schools should be preferred to separate special education, that institutionalization should be avoided whenever possible, and that facilitating employment in the open labour market is preferable to employment in sheltered workshops. Member States have broadly accepted these principles, although there is no Community legislation on the subject.

The 1996 paper extended the concept of mainstreaming from social provision into the policy process. Fredman describes this as follows: 'Mainstreaming means that equality is not just an add-on or after-thought to policy, but is one of the factors taken into account in every policy and executive decision' (Fredman, 2001, p. 165). In this sense, mainstreaming develops non-discrimination as a programmatic rather than a justiciable right, aiming for engagement in the sphere of policy-making rather than seeking remedies for individuals. However, mainstreaming into the policy process changes the nature of the programmatic right, as it involves the promotion of a procedural right to participate (or at least, receive due consideration) in policy-making, rather than the adoption of substantive social goals.

The Commission and European-level disability lobby groups had strong institutional incentives for endorsing mainstreaming, because it allows for the introduction of a 'disability perspective' across a whole range of social

<sup>10</sup> HELIOS II (Third) Community Action Programme to Assist Disabled People (1993) OJ L56/30.

<sup>11</sup> Communication of the Commission on Equality of Opportunity for People with Disabilities, COM (96) 406 final of 30 July 1996.

programmes, and thereby functions as an umbrella for extending rights of representation and participation and other forms of empire-building.<sup>12</sup> Furthermore, Member States could be persuaded to accept the general principle of non-discriminatory practice in the development of social policies where they would not accept disability-specific initiatives which encroached on their existing policies. However, states accepted mainstreaming only at a general, rhetorical level. Several concrete attempts to mainstream non-discrimination in national social policy have been rejected. For example, non-discrimination clauses were included in the draft parental leave and part-time work directives, but were dropped at the insistence of the Council (Waddington, 1999, p. 143). Many examples of mainstreaming are confined to the Commission's own practices and services (p. 145).

Since 1997, the open method of co-ordination (OMC) in employment and social inclusion has become a central part of European social policy. It is open to question whether the employment and social inclusion processes should be seen as part of the programmatic development of rights: Sciarra describes them as creating 'a new and vague category of non-rights' since there is no obligation to legislate to achieve the common aims (Sciarra, 1999, p. 316). The OMC also includes guidelines on participation by the social partners and NGOs which could be seen as promoting procedural rights. However, these are weakly formulated, with no obligation to consider the impact of policies on particular groups or to consult their representative organizations. Defying the rights-based analysis of social exclusion (Section I above), Member States have resisted attempts to link non-discrimination rights to the social inclusion process and designate priority groups for social inclusion policy at the European level (Mabbett, 2004). Despite its permissive nature, Member States have constrained the application of the OMC and avoided laying foundational aspects of their social policies, such as the definition of disability, open to scrutiny.

If a transnational disability NGO community were to participate in the formulation of each state's national action plans with a common set of ideas about how non-discriminating social policy should be developed, then participatory rights could have powerful integrative effects. However, as is discussed further in the next section, NGOs in each state are strongly influenced by the structure and traditions of their own social policy. It would be wrong to say that there has been no transnational convergence of opinion: facilitating access of disabled people to mainstream public services is a goal, which can be framed in the language of non-discrimination rights, which Member States

<sup>12</sup> Similar arguments have been put forward about gender mainstreaming. Geyer suggests that the mainstreaming of gender policy 'promoted a broader interpretation of EU gender policy and brought it into the agenda-setting level of major EU policies' (Geyer, 2000, p.122).

have shown some willingness to accept. However, there is little agreement on how to take non-discrimination further in areas such as employment policy and social security.

### III. The FETD: An Opportunity for Juridical Integration?

The previous section has shown that disability policy had rather chequered fortunes in the 1990s. However, these setbacks were countered by the rapid progress of the two directives brought forward under Article 13. The momentum for formulating directives under this article seems to have built up primarily around the issue of racism and xenophobia, particularly its manifestations on the eastern borders. More generally, Member States may have felt some urgency in putting measures in place before enlargement. Ellis suggests that the expansion of the Union was 'the backdrop, and to some extent the *raison d'être*' of the measures (Ellis, 2002, p. 291). For present purposes, these political pressures are significant because they help to explain how the FETD could proceed while programmatic measures were stalled. The decision to use Article 13, rather than Article 137, further heightens the impression that the directive evaded the constraints of social policy processes by being framed in terms of fundamental rights (Bell, 2002, p. 394).

The process of agreeing the FETD does not reveal how the Member States understood its significance and what they anticipated would be the main issues in its transposition. Little information on the negotiations that led to the Employment and Social Affairs Council unanimously agreeing a text at its meeting on 17 October 2000 is publicly available, although some insight can be gleaned from the House of Lords' report on the directive. While the account given by UK government ministers of the negotiations emphasizes their 'hard won and significant concessions' (Select Committee on European Union, 2000, para. 15), the apparent level of commitment of all states to reaching agreement in Council is most striking. Peters has emphasized that states' willingness to use their veto in routine Council decisions is limited by the desire of the participants to preserve the forum and maintain its potential for taking decisive action. '[P]laying the policy game and having continued access to the game may be more important than winning each iteration of the game' (Peters, 1997, p. 25). On this view, the key question to ask about the progress of the FETD through the Council is not: 'why did they agree to it', but 'why did no state see it as worthwhile to use up political capital to obstruct it?' By formulating the question in this way, we can see that Member States may have agreed to the directive without holding a clear view of the nature of the rights it contained and how they would be implemented.

At first sight, the FETD appears to require Member States to pass high-profile anti-discrimination legislation along the lines of the Americans with Disabilities Act (ADA, 1990) or the British Disability Discrimination Act (DDA, 1995). Since only Britain, Sweden and Ireland had such measures on their statute books in 2001, it follows that the directive must bring about the creation of a new right which could then be developed and promoted through the European legal system. However, it seems that some states do not consider high-profile legislation to be necessary, preferring to rely on small changes to their labour codes and related laws. The deadline for transposition was 2 December 2003, so 'there should, in theory, now exist a rich body of European national disability non-discrimination legislation ... Reality presents a somewhat different picture' (Waddington, 2005, p. 5). Some states have failed to adopt any legislation, and some have passed legislation incorporating the wording of the directive with no consideration of national implementation issues and possible conflicts of laws. In yet other states there is continuing legal argument about whether transposition has been correctly done and whether measures adopted are consistent with the directive.

Following Alter's (2000) analysis, we can identify the thresholds that have to be crossed to develop non-discrimination on grounds of disability as a European legal principle. 'First, there must be a point of European law on which domestic actors can draw ... Second, litigants must embrace EU law to advance their policy objectives.. Third, national courts must support the efforts of litigants by referring cases to the ECJ ...' (2000, p. 489).<sup>13</sup>

At the first threshold, some matters covered by the directive are already the subject of a body of European case law, notably the concept of indirect discrimination. However, there are two major areas where the directive is not specific and no case law exists, and where it is questionable whether a European body of law will develop. The first area is 'reasonable accommodation'. Article 5 provides that employers shall provide accommodation for people with disabilities, 'unless such measures would impose a disproportionate burden on the employer'. It continues: 'This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned'. States' disability policies may be directed towards sharing and distributing the burden of providing accommodation in a variety of ways, including the provision of financial assistance for adaptations, subsidy arrangements for employment of disabled people, or the use of quotas. One reading of Article 5 is that Member States retain competence to address the problem of burden-sharing through policies of their choice. This in turn might be taken to imply that the ECJ will not endeavour to enforce a certain level of reasonable accommodation as part

<sup>13</sup> Alter also discusses a fourth threshold, whereby legal victories lead to changes in public policy.

of the fundamental right of non-discrimination. The Court could instead take the view that subsidiarity should govern the determination of levels of accommodation: in other words, that what is reasonable or proportionate has to be determined within each state in the light of its social policies.

The second matter on which the directive is silent is the definition of disability. Here again there is potential for decisions to be affected by national social policies. For example, in a situation where a disabled person can reasonably be accommodated with the aid of a public financial contribution to the costs of workplace adaptations, the definition of disability will need to correspond to the administrative definition used to allocate public funding. Another example might arise in states with a quota system. If the definition of disability in discrimination law is the same as that used to administer a quota system, then the quota may be used to monitor employers' compliance with anti-discriminatory practice, and disabled people might be expected to take their grievances to the authorities charged with administering the quota.

These examples suggest that it is possible that the development of European disability discrimination law will be limited, essentially because of the close relationship between the operation of the law and domestic social policies. However, it is possible that the ECJ will not defer to national social policies in the ways outlined above. The case law on equal treatment of men and women gives mixed messages. On one hand, cases such as *Abrahamsson*<sup>14</sup> might be taken to show that the ECJ is willing to scrutinize states' social policies for compliance with equal treatment (Caruso, 2002, p. 11). On the other hand, states have not always submitted when justiciable European rights have conflicted with their social programmes. Fitzpatrick argues that Member States have defended their programmatic competence in social policy with some tenacity. '[T]he Court is less autonomous in this field than might otherwise be anticipated, even in relation to a fundamental social right such as equality irrespective of sex' (Fitzpatrick, 2000, p. 322).

Alter's second threshold concerns the choice of strategy of potential litigants. Here the central question is whether (some or any) disability organizations are interested in exploring the full potential of European law in this area. Their first challenge is to get the directive transposed in a way which both allows its use at national level and retains sufficient European content to leave open at least the possibility of referral to the ECJ on some aspect of interpretation. Alternatively, the European legal system could be brought to bear to challenge inadequacies in transposition.

There are certainly some organizations which have a strong interest in the development of international legal instruments in disability discrimination, and which might possibly carry forward a strategy of litigation. The 'social

<sup>14</sup> *Abrahamsson et al. v. Fogelqvist*, Case C-407/98, 2000 ECR I-5539.

model' of disability has served as a transnational focus for the political mobilization of the international disability movement. The social model asserts that disability is a product of disabling environments, rather than an inherent attribute of a person (Oliver, 1990; Oliver and Barnes, 1998). The model uses the language of rights but does not state that juridical methods should be preferred to social policies to combat disabling environments. The international language of disability rights is 'pre-legal': it furnishes statements which can attract wide support and mobilize political participation, rather than providing a precise definition of what is entailed in the rights claimed. Such statements attract support based on affinity and identification rather than on a careful calculation by supporters of whether their interests are promoted by the rights being advocated. When rights move from the pre-legal to the legal stage, interest calculations may come to the fore.

One variant of the social model argues for the rejection of 'welfare' in favour of the promotion of 'rights'. This analysis characterizes traditional social policies as a negation of rights: 'disabled people were ... the objects of welfare, health and charity programs [which were based on an approach] that segregates and excludes people with disabilities from mainstream society' (Degener and Quinn, 2002, p. 1). In this formulation, existing social policies are rejected as incorporating the 'medical model' of disability. At its limit, this view implies that a strategy of litigation might be used to challenge existing social policies (such as quota systems), which themselves incorporate discriminatory practices which stigmatize disabled people.<sup>15</sup>

For reasons discussed above, it is very doubtful whether the ECJ would allow itself to be drawn into this strategy, and some deference to administrative practices might also be expected of national courts. There must also be some doubt about the extent to which disability organizations within Member States would wish to challenge national social policy in this way. Research on the promotion of equal treatment for men and women in Member States provides some general hypotheses about the situations in which domestic actors will pursue a litigation strategy. Alter and Vargas suggest two aspects of interest group structure which affect their decisions about whether to turn to litigation. One is the breadth of their mandate and constituency: those with a narrow constituency are more likely to adopt litigation. The second aspect concerns the influence and access to policy-making enjoyed by the interest group. Participation in policy-making is a less risky way of pursuing objectives than litigation, where there is a risk of ending up with a worse policy than before initiating the court action (Alter, 2000, p. 498).

<sup>15</sup>Waddington (2001, p. 152) discusses quotas from a disability rights perspective, and notes that disability NGOs have often supported such schemes, whereas those adopting a rights approach are more critical.

In a number of Member States, disability organizations have institutionalized social policy roles and a degree of structural interdependence with the government. For example, impairment-based organizations often operate specialist sheltered workshops and rehabilitation facilities, and state funding may be channelled to these activities. In the terms of Marks and McAdam's account of the political opportunities of social movements in the EU, such organizations may be 'wedded to the existing political order, that is, oriented to a national system of law, a national system of membership incentives or belief structures, etc.' (1996, p. 258). In states with relatively well-financed and robust social policy institutions, one would expect to find considerable caution about using the courts, and a preference for working within established social policy structures. However, alongside these traditional disability organizations, more radical groups can also be found which seek major changes in social policy and might be drawn to use the law to gain leverage in domestic politics.

One national organization has publicly expressed reservations about the role of anti-discrimination litigation. The Danish national disability organization (*De Samvirkende Invalideorganisationer*, DSI) has instead promoted Denmark's own version of mainstreaming, called 'sector responsibility'. Briefly, this is a method for bringing a disability perspective into a wide range of policy areas, with clearly institutionalized roles for disability organizations in each area. An Equal Opportunities Centre for disabled people was created in 1993; it seeks to influence legislation and takes up problems with the administration of social programmes. However it responds to individual cases only with advice, and does not itself pursue litigation (Bengtsson, 2002).<sup>16</sup>

Alter's third threshold addresses the relationship between the ECJ and the national adjudication and enforcement system for equal treatment and non-discrimination. Article 9(1) of the directive requires that states establish 'judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures' for aggrieved individuals. The Race Directive also requires the establishment of an independent body to provide information about and monitor compliance with anti-discrimination legislation. This is not a requirement in the FETD, but some states are adopting unified equality bodies which fulfil a monitoring and campaigning role in relation to other grounds as well.

<sup>16</sup> In the campaign leading up to the Amsterdam Treaty, it was with some satisfaction that the EDF was able to report that 'Danish NGOs were sufficiently committed to the non-discrimination clause to temporarily mute their national policy stance on mainstreaming, and promote neutrality, if not active support, among their government representatives on the issue' (EDF, 1998, p.17, emphasis added).

States are adopting a great variety of institutional structures to promote equality.<sup>17</sup> Several states have Equality or Equal Treatment Commissions; some have powers to adjudicate on individual cases, some may support individual cases, and some are solely advisory. In some countries, complaints must first be taken up by trade unions; in others, complaints are first dealt with by ombudsmen or heard by lay tribunals rather than courts. These bodies may not see themselves as fulfilling judicial functions and as part of the European legal system. Alter found that 'in the Netherlands and Ireland, the legal bodies that deal with equality cases in the first instance do not see themselves as authorized to refer cases to the ECJ' (2000, p. 504). Kilpatrick (2001) has shown that labour courts participate in the European legal system in different ways in different states, resulting in an uneven development and application of sex discrimination law.

In summary, the development of an integrated set of European legal principles around non-discrimination on the grounds of disability faces several substantial obstacles. First and foremost, long-established national social policies may have an impact on this area of the law. Second, it is not clear that national interest groups are committed to a juridical strategy; and, third, there are institutional barriers in the way of building up an integrated body of European law on the basis of the FETD.

## Conclusion

This article has shown that there are considerable obstacles to the programmatic co-ordination, let alone harmonization, of disability policies in the European states. This is not to say that cross-national policy borrowing has not or will not take place, but the assumption that there must be social policy convergence (whether upwards or downwards) is not borne out. This is one of the key conclusions reached by moving the level of analysis from broad generalizations about the welfare state into the detail of operation of particular social policy sectors.

Putting this another way, it appears that Member States preserve considerable autonomy in some areas of social policy, and they show determination to preserve this autonomy. Fitzpatrick argues that 'Member States will strive to retain competence over areas of policy which are central to their own national hierarchies (or pyramids) of values'; conversely, they cede competence in areas seen as central to European integration (2000, p. 303). Questions about who counts as disabled and what duties society owes in responding to disability

<sup>17</sup> See, e.g., Member States' Legislation – Race Equality Directive: State of Play 2003, available from <[http://www.europa.eu.int/comm/employment\\_social/fundamental\\_rights/legis/msleglnraceequal\\_en.htm](http://www.europa.eu.int/comm/employment_social/fundamental_rights/legis/msleglnraceequal_en.htm)>.

have been addressed over many years, producing lots of fine distinctions but also maintaining the basis of solidarity and redistribution. Some commentators argue that rights are the basis of solidarity: 'equal protection of the law is an essential ingredient in upholding inter-citizen solidarity' (Bell, 2000, p. 161), but legal equality is not the basis of the thick solidarity of the welfare state.

Indeed, one of the potential dangers of trying to shape social policy through formal declarations of equality rights is that the Courts will apply the principle of equality in ways which equalize down rather than up, by striking down positive action measures. More generally, social rights developed at the European level may conflict with the social policies of some Member States, with potentially corrosive effects (Wincott, 2003, p. 291). In practice, it seems more likely that the European legal system will not develop a jurisprudence of disability rights. There are several reasons why cases may not come before the ECJ and, if they do, subsidiarity may govern both the definition of disability and the determination of reasonable accommodation. Because existing social policies create specific national practices in defining disability and financing accommodation, the transnational juridical development of disability rights may be constrained by programmatic differences between Member States.

Many commentators who are broadly in favour of a rights-based approach have reservations about reliance on judicial modes of implementation. Alston and Weiler suggest that the Community approach to human rights has been 'excessively judicially-focused' and that 'too much faith is placed by the Community in the power of legal prohibitions and judicial enforcement' (1999, p. 13). 'Mainstreaming' is one possible response, but widening participation in the policy process will have integrative effects only if some degree of transnational consensus can be developed in the policy community. This article has argued that the broad acceptability of the principle of equal treatment is not accompanied by consensus about what it means in practice and how it might best be pursued.

Section I showed that the fundamental rights agenda had its origins in attempts to govern the conduct of Community institutions, but it was subsequently transmuted to affect national social policy. Barnard highlights the paradox that 'rights intended to foster a commitment to the *Union* are actually being exercised against the *Member States*' (1999, p. 384, emphasis in the original). This distinction is important, because it relates to a basic question about the legitimacy of rights-based claims. The judicial enforcement of rights can be criticized for failing to respect the methods by which different interests are heard and mediated through political processes. So long as the Community's political system is largely undemocratic, this objection has little force against rights-based scrutiny of Community measures. It is a different matter

when European rights are exercised against societal choices made within the political systems of the Member States.

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