

**THE HUMAN RIGHTS OF PERSONS WITH DISABILITIES: EXTENDING
FREEDOM TO ALL
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Disability and Age – Achieving Freedom for All...

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May I first thank Professor Gearty for his kind invitation to speak here this evening. It is particularly pleasing to speak at a Centre for Human Rights which embraces both 'over there' notions of human rights and what one may term 'on your own doorstep' notions of human rights. Discrimination falls nicely within the second category as it helps us to tackle horrors at the workplace, horrors in our society and the horrors within our own hearts. Disability however, as a broad issue neatly links the 'over there' and 'over here' worlds when we know that 500 million of the world's 600 million people with disabilities live in the developing world. For this reason, the draft UN International Convention on the Rights of Persons with Disabilities is particularly welcome as it unites the home world with the more distant world.

One of the contexts within which the UN Convention has been drafted is massive demographic change affecting both developed and developing worlds in shared and differing ways.¹ We are riding a wave of an ageing world, which has not yet crested and has started to impact on our personal lives in ways that we do not yet fully realise. We are living much longer. Our world is evolving into an older world. Despite the fact that the UN Convention does not refer, as far I could see, to demographic change, it mentions the terms *age*, *age appropriate*, *age sensitive*, or *the elderly* some nine times and this is not to mention important references to children throughout.

My task tonight is twofold 1) to establish the nexus between age and disability and 2) to situate disability among the diversity of grounds.

The first task is straightforward – it is now and has always been true that age does have an effect on *physical* capacity, in particular.² However, this effect is very highly individualised and can in no way be applied to all persons over 45 or all persons over 60 for example,³ as though they were even physically, a homogenous group. One

¹ For these shared and differing effects see H. Meenan 'The Future of Ageing and the Role of Age Discrimination in the Global Debate', in *International Journal of Aging Law and Policy*, fall, 2005 available at <http://www.law.stetson.edu/centers/AARPJournal/>

² See among others, Age Reference Group on Equality and Human Rights 'Age and multiple discrimination in older people – A discussion Paper', (October, 2005), at p. 10, available at http://policy.helptheaged.org.uk/NR/rdonlyres/evbsvcqjhovm35edcb5we52c26s6da2vd2fbtgnjqadvoaubzixefzdna4m3cxvioqrew7nvcvrgac2twq7ggmm6g/age_and_multiple_discrimination.pdf

³ Note, Finnish studies that reveal that individual differences in physical capacity vary a good deal with age within an occupational group and even among people of the same age in the same occupational group. J. Ilmarinen 'Ageing Workers in Finland and in the European Union: Their situation and the

phenomenon of age and ageing is that there are greater functional variations between workers of the same age than between workers of different ages.⁴

I would like to suggest that age can be used as a door through which we all have ownership of or an interest in disability. This is because age is potentially the most diverse ground of all it embraces all other grounds, including disability. One of the most persuasive arguments for a link between age and disability comes from the current phenomenon of an ageing population, which establishes the nexus between age and disability beyond inclusiveness. It sees the number of people aged over 60 world-wide doubling from 600 million in 2001 to 1.2 billion by 2025⁵ and the developing world already has two-thirds of the over 60s.⁶

Our longer lives mean that people with disabilities are living longer and more people are growing into disability as they reach older ages. We learn that 44.6 million or 16 per cent of the EU working age population regard themselves as having a longstanding health problem or disability (LSHPD).⁷ We also learn that in 2002, nearly 30% of people aged between 55 and 64 reported a LSHPD and that less than half disabled people in the EU are employed.⁸ But the unemployment rate for people with a severe disability is three times greater than for non-disabled people.⁹ The European Commission among others maintains that there is a strong correlation between disability and increasing age.¹⁰ As a study sponsored by the European Commission puts in 'The clearest and most consistent relationship across countries is between age and disability. Higher age groups have a higher share of disability'.¹¹

However, the United Kingdom's Age Reference Group on Equality and Human Rights has very helpfully helped us to navigate the nexus between age and other grounds by suggesting two ways in which multiple discrimination can arise with age.

Promotion of Their Working Ability, Employability and Employment', (2001) Vol. 2, No. 4 *Geneva Papers on Risk and Insurance*, pp. 623-641.

⁴ Cliff Oswick and Patrice Rosenthal in Mike Noon & Emmanuel Ogbonna, *Equality, Diversity and Disadvantage in Employment* (Palgrave, 2001) at p. 9. Stein, Rocco and Goldenetz 'Age and the University Workplace: A Case Study of Remaining, Retiring or Returning Older Workers', *Human Resource Development Quarterly*, Vol. 11. No.1, Spring 2000, p. 61 at 73.

⁵ United Nations Committee on Economic, Social and Cultural Rights, *General comment No.6, The economic, social and cultural rights of older persons (Thirteenth session, 1995)*, U.N. Doc. E/C.12/1995/16/Rev.1 (1995).

⁶ HelpAge International *Equal treatment, equal rights Ten actions to end age discrimination*, (London, 2001) at 2.

⁷ Commission Communication 'Situation of disabled people in the enlarged European Union: the European Union Action Plan', 2006-2007 at p. 4.

⁸ *Ibid.*

⁹ European Foundation for Living and Working Conditions Information Sheet 'Illness, disability and social inclusion', available at, <http://www.eurofound.eu.int/areas/socialcohesion/illnessdisability.htm>

¹⁰ Situation of disabled people' above at 4.

¹¹ European Commission, 'Social Security and Social Integration The Employment situation of persons with disabilities in the European Union 2001 at p. 36.

- 1) multiple discrimination can occur when those who experience discrimination for other reasons grow old (a typical example of this is the gender age gap which increases with age)¹²;
- 2) age discrimination compounds other forms of inequality and disadvantage.¹³

This group specifically identifies two categories of people for whom age and disability overlap: 1) those who acquire impairment after state pension age. But these people, the group says, may not identify themselves as disabled. And 2) those who have acquired impairments earlier in life and have then grown old.¹⁴

Thus age is a door through which longstanding and newly disabled persons belong to the largest ground of all – age. Let us not forget too that age encompasses all age groups, young and old.

My second task is to situate disability among the diversity of grounds – this has already been partially done. I will use anti-discrimination law as a door through which disability finds its place among the diversity of grounds.

A few years ago, speaking of the first Article 13 Directives, Professor Christopher McCrudden expressed the view that European equality law was in the course of being subsumed within a broader human rights discourse – a more inclusive model.¹⁵ The discrimination clauses of the UN disability convention are an example of this continuing trend on the international plane.

Within the EU, as this audience will know, Article 13 EC Treaty enables the European Union to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. Arguably this on its own went a long way towards situating disability among the diversity of grounds in the European Union.

However, the Article 13 family arguably has two branches, sex and race on the one hand that enjoy protection in work and non-work life and the remaining four grounds including, disability and age that are only protected from discrimination in employment, by virtue of the Employment Framework Directive.¹⁶ Broadly speaking all Article 13 grounds share a common core of provisions in respect of discrimination in employment thanks to the Race Directive,¹⁷ the Employment Framework Directive and the amended Equal Treatment Directive¹⁸ (for sex). There can be no greater or clearer statement of belonging for disability and age than to be included in Article 13

¹² 'Age and ...multiple discrimination' above at p. 3 and 14.

¹³ Ibid.

¹⁴ Ibid at p. 4.

¹⁵ 'Theorising European Equality Law', in Costello and Barry eds. *Equality in Diversity the new Equality Directives* (Ashfield Publications, 2003) at p. 9.

¹⁶ Directive 2000/78/EC, OJ 2000 No. L303/16.

¹⁷ Directive 2000/43/EC OJ 2000 No. L180/22.

¹⁸ Directive 2002/73/EC OJ 2002 No. L269/15.

and later the Employment Framework Directive at the same time as the other grounds.¹⁹

The Framework Employment Directive provides that the concept of discrimination encompasses Direct, indirect discrimination, harassment and an instruction to discriminate for all covered grounds.²⁰ However, age and disability are treated differently in two compelling ways.

Firstly, a special provision allows Member States to justify direct age discrimination for example minimum or maximum recruitment ages in the name of a 'legitimate' employment policy, labour market or vocational training objectives so long as the means used are appropriate and necessary.²¹ It is not possible to objectively justify direct discrimination for the other grounds.²²

Secondly, the Directive contains two special provisions for disability that it does not contain for other grounds. **In addition to the possibility to objectively justify indirect discrimination for all the grounds**²³ the Directive contains a provision on disability which reads

'As regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged under national legislation, to take appropriate measures in line with the principles contained in Art 5 to eliminate disadvantages entailed by such provision, criterion or practice'.²⁴

But the reasonable accommodation provision proper is contained in Article 5. It provides that

'In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accom shall be provided. This means that employers **shall take appropriate measures, where needed in a particular case**, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by

¹⁹ Note also their inclusion (and the inclusion of genetic features) in Article 21 Non-discrimination *EU Charter of Fundamental Rights, 2000*, with other grounds going well beyond those contained in Article 13 EC.

²⁰ Article 2.

²¹ Article 6. Note the judgement in the first EC age discrimination case, Case C- 144/04 *Mangold v Helm* was delivered by the European Court of Justice on 22 November. The ECJ declared that the principle of non-discrimination on grounds of age is a general principle of European law, (para. 75). The source of the actual principle underlying the prohibition of discrimination on the grounds in the Employment Framework Directive, is the various international instruments and the constitutional traditions common to the Member States, (para 74). All the stronger for a European principle of non-discrimination on grounds of disability, if all EU Member States sign the UN Convention on the Human Rights of Persons with Disabilities.

²² Save the very limited possibility to justify a genuine occupational requirement contained in Article 4.

²³ Article 2 (b) (i).

²⁴ Article 2 (b) (ii).

measures existing within the framework of the disability policy of the Member State concerned’.

The obligation on the employer to take appropriate action where needed in a particular case, implies a specific response to a particular disabled employee. This leads us back to consider age and the increase in prevalence of disability with age. More particularly also age related conditions that may not yet fall within the definition of disability in national law (as there is no definition of disability in either the Directive or as yet in the draft UN Convention).²⁵

In 1999, Professor Gerard Quinn opined that the classic anti-discrimination model does not work or at least, not optimally well for age or disability. He could see no reason why reasonable accommodation should not be used for age as well as disability.²⁶ More recently in 2002, Marie-Ange Moreau has suggested that adjustment measures for disabled people be extended to all underrepresented groups. It is difficult to see why this cannot be the case especially for age.²⁷

Applying reasonable accommodation to age deals with those situations where there is a real need that can be met. This is especially important as an alternative to the lazy use of chronological age limits in the workplace. When these are based on the idea of a generalised physical decline after a certain age, they fail to acknowledge and address the wide-range of functional variations between workers of the same age even in the same sector.²⁸

In 2002 the Equality Authority in Ireland published a report *Implementing Equality for Older People*, which stated that multiple identities of older people meant the eight other protected grounds in Ireland include older people and suggested that

- a) equality strategies for older people must take into account in their design and implementation – different groups of older men and older women and equally,
- b) equality strategies for other groups must take into account the specific situation, experience and identity of older persons within that group.²⁹

I would like to suggest that we have moved on and disability and other grounds should take into account the situation of all people of all ages, including childrennot just older people.

²⁵ Note however, European Commission, Social Security and Social Integration, ‘Definitions of Disability in Europe A Comparative Analysis A study prepared by Brunel University’, (2002).

²⁶ Gerard Quinn’s paper ‘Non-discrimination in the context of age and disability sometimes requires reasonable accommodation to the difference’, *European Conference on Independent Living of Older Persons and Persons with Disabilities*, Helsinki, 6-7 October 1999.

²⁷ At the Stockholm regional European Congress on Labour Law, 2002.

²⁸ Reasonable accommodation for older workers may additionally have usefulness beyond the need to adjust the environment to any physical decline. It may also rely on part-time work or flexible work more than for some other groups to help older workers cope with work-related stress, caring responsibilities and the need to work up to or beyond retirement age.

²⁹ At p. 5.

And I commend this approach to this house. It is essential that all movements whether for disability, age, gender, race, and others, start (or continue) examining their communities for intersection with other grounds that may produce sub-groups within them. In this way above all, each covered ground will find not only that it is part of the rich diversity of grounds but weaves through all other grounds in ways that may be neglected at the moment. It is only in this way that we can truly work towards a common commitment to freedom for all.

I hope these few arguments would support the idea that the UN Convention ought to emphasise the need to incorporate an age perspective as well as a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities.³⁰

Finally, to paraphrase William Butler Yeats – let no one be able to say of our countries –

That is no country for old men³¹ or for persons with disabilities.

³⁰ At present recital (q) refers only (but importantly) to the need to incorporate “a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities”.

³¹ William Butler Yeats *Sailing to Byzantium*.