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Speakers' presentations

**EU DISABILITY LAW AND
THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH
DISABILITIES**

SEMINAR FOR MEMBERS OF THE JUDICIARY

Trier, 13-15 June 2016



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the European Union

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The UN Convention on the Rights of Persons with Disabilities: Key Features

*EU DISABILITY LAW AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES
SEMINAR FOR MEMBERS OF THE JUDICIARY*

Trier, 13-15 June 2016

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THE UNCPRD

Rationale and Structure of the
UNCPRD



General Obligations and General
principles



The Monitoring System and the
Optional Protocol in a Nutshell

Rationale and Structure of the UNCRPD

The UNCRPD

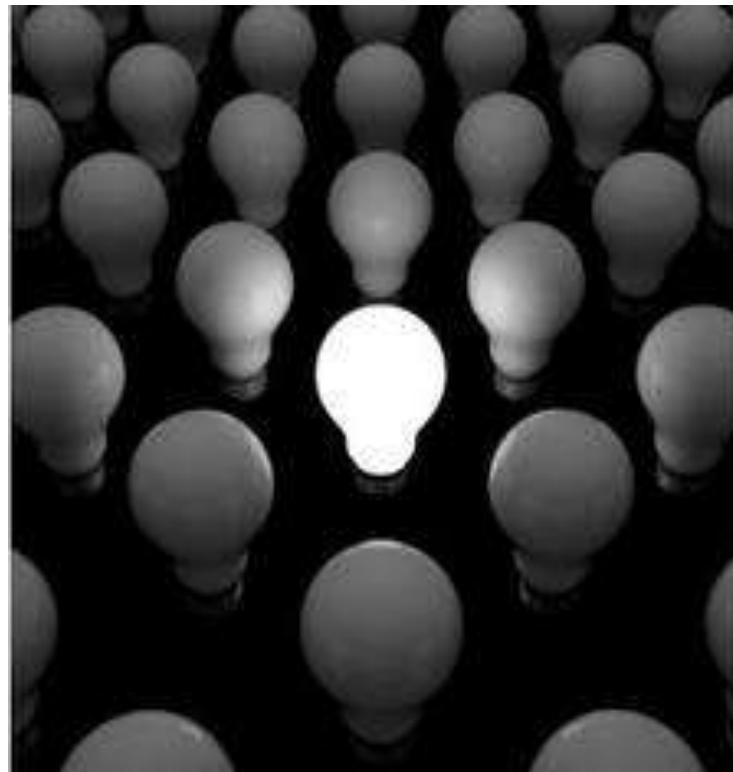
1st Human
Rights
treaty of the
21st century

- ❖ Signatories : 160
- ❖ Parties : 164



The UNCRPD

- ❖ Its goal is not to create new rights, but to **ensure**, through the use of non-discrimination principles, that all **existing rights** were made **equally effective** for persons with disabilities



Social Model of Disability

Her **impairment**
is the problem!
They should
cure her or give
her prosthetics.

The *medical model*
of disability



The **stairs** are
the problem!
They should
build a ramp.

The *social model*
of disability

Image by UAA: <http://www.uaa.alaska.edu/accessibility/topic/architecture.cfm>

Art. 1(2) UNCRPD

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

S.C. v Brazil

Communication No. 10/2013

*“...The Committee considers that the **difference between illness and disability is a difference of degree and not a difference of kind**. A health impairment which initially is conceived of as illness can develop into an impairment in the context of disability as a consequence of its duration or its chronicity. A **human rights-based model of disability** requires the **diversity** of persons with disabilities to be taken into account (preamble, para. (i)) together with the **interaction** between individuals with impairments and **attitudinal and environmental barriers** (preamble, para. (e)).”*

Art. 1 UNCRPD

**Which
obligations
arise from
Art. 1?**

Structure

Purpose (Art. 1) and **Definitions** (Art. 2)

Articles of **cross-cutting** application (Articles 3-9)

Substantive rights (Articles 10 to 30)

System of **monitoring** and **implementation** (Articles 31 to 40)

Final Provisions (Articles 41 to 50)

Art. 31 UNCRPD



- ❖ Art. 31 introduces a **new element** to human rights treaties and requires State Parties to specifically acquiring disability data and statistics to facilitate UNCRPD implementation.
- ❖ Disability data collection should **enable** Parties to **formulate, implement, monitor, evaluate** policies and programs

Art. 32 UNCRPD

The UNCRPD expressly recognizes the role that **international cooperation** and disability inclusive development can play in support of national implementation efforts.



General Obligations and General Principles

Art. 4 UNCRPD

General Obligations

Art. 4 UNCRPD *inter alia* requires Parties: to **adopt** legislative, administrative and other measures; to **abolish** or **amend** existing discriminatory laws, regulations and practices; to **refrain** from practice inconsistent with the UNCRPD; to **ensure that public authorities and institutions act in conformity with the UNCRPD**

Art. 4 UNCRPD

General Obligations

“To take all appropriate measures to **eliminate discrimination** on the basis of disability by any **person, organization or private enterprise**”



General Principles

Respect for inherent dignity, individual autonomy

Non-discrimination

Participation and inclusion in society

Respect for difference

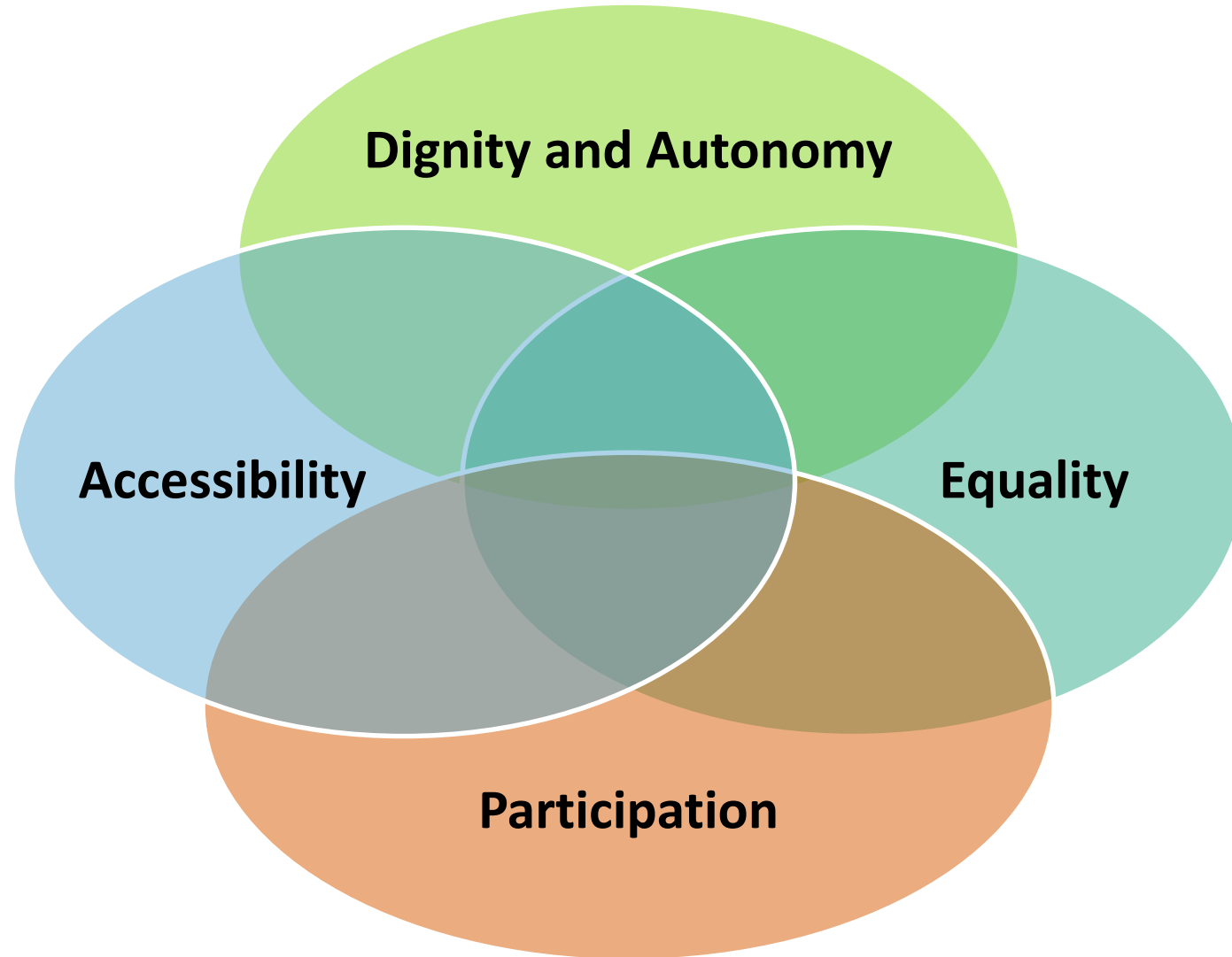
Equality of opportunity

Accessibility

Equality between men and women

Respect for children with disabilities

General Principles



Dignity and Autonomy

- ❖ Art. 12 (Equal recognition before the law)
- ❖ Art. 23 (Respect for family and home)
- ❖ Art. 18 (Liberty of movement and nationality)
- ❖ Art. 19 (Living Independently)

Legal Capacity

*“Legal capacity includes the capacity to be both a holder of rights and an actor under the law.[...] Legal capacity is an **inherent right accorded to all people**, including persons with disabilities [...] States parties must **refrain from denying** persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the **support** necessary to enable them to make decisions that have legal effect”* (CRPD Committee, General Comment No. 1 -2014)

Equality



Discrimination on the Grounds of Disability

*“... any **distinction, exclusion or restriction** on the basis of disability which has the **purpose or effect** of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, **including denial of reasonable accommodation**” (Art. 2 UN CRPD)*

Non-Discrimination and Equality

Parties are required:

- ❖ To **combat any form of discrimination** (as defined by Art. 2), including **multiple discrimination**
- ❖ To ensure **equality of opportunity**, either by adopting a range of measures usually referred to as “**positive actions**” to compensate for disadvantages, or by providing for specific measures to **remove individual and environmental (physical) barriers** which inhibit participation in society (Art. 5)
- ❖ To ensure that **reasonable accommodation** is provided

Reasonable Accommodation

*“Reasonable accommodation” means **necessary and appropriate** modification and adjustments **not imposing a disproportionate or undue burden**, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”*

Reasonable Accommodation

Individual-oriented nature
of the duty

Ex nunc duty

It is relevant with regards
to all substantive rights

Effectiveness of the
modifications or
adjustments in
removing the
disadvantage

Reasonable Accommodation

Article 14 - Liberty and security of the person

Article 24 - Education

Article 27 - Work and employment



H.M. v Sweden

Communication No. 3/2011

*“The author’s health condition is critical and access to a hydrotherapy pool at home is essential... Appropriate modification and adjustments would thus require a **departure from the development plan**, in order to allow the building of a hydrotherapy pool...”*

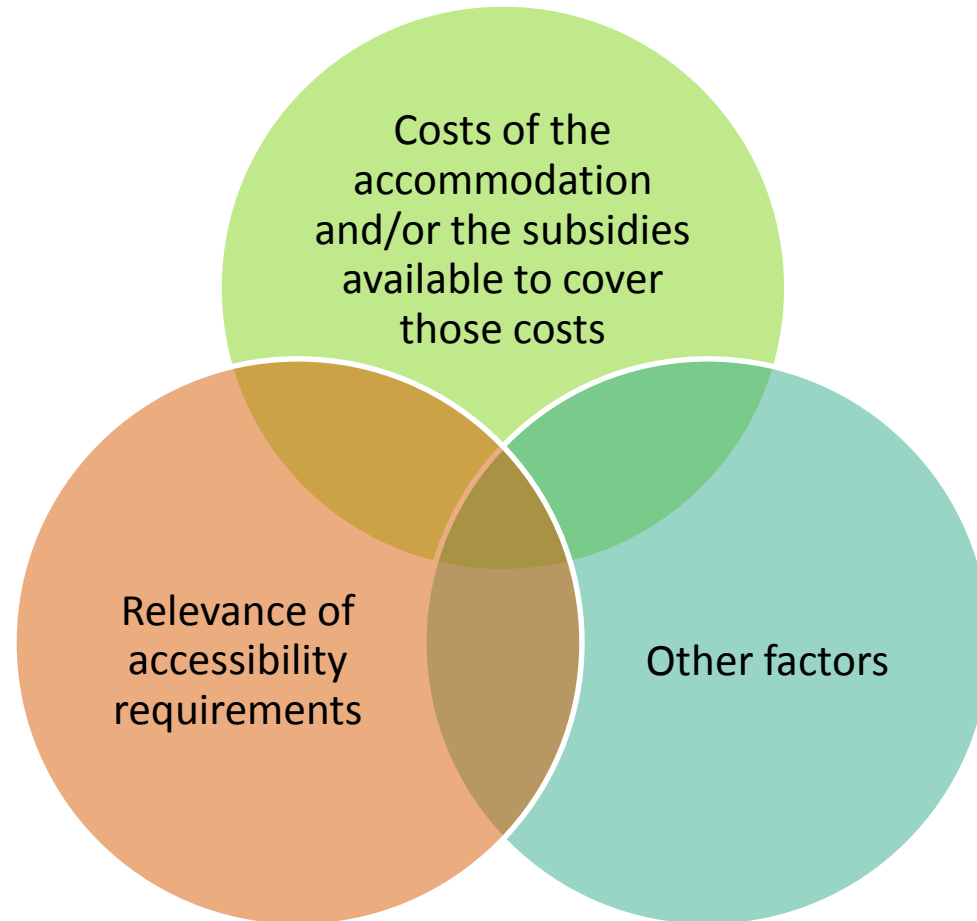


H.M. v Sweden

Communication No. 3/2011

*“...the State party is under an obligation to take steps to prevent similar violations in the future, including by ensuring that its legislation and the **manner in which it is applied by domestic courts is consistent with the State party’s obligations** to ensure that legislation does not have the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of any right for persons with disabilities on an equal basis with others”*

Disproportionate Burden



Jungelin v Sweden

Communication No. 5/2011

- ❖ Marie-Louise Jungelin, is a woman born with severe visual impairment
- ❖ In May 2006, she applied to the Social Insurance Agency (Försäkringskassan) to work as an assessor/investigator of sickness benefit and sickness compensation applications.
- ❖ On 25 August 2006, the author was informed that, although she fulfilled the competence, experience and reference requirements, she had not been considered for that vacant post because the Social Insurance Agency's internal computer systems could not be adapted for her sight impairment.

Jungelin v Sweden

Communication No. 5/2011

- ❖ Ms Jungelin argues that the decision by the Social Insurance Agency to discard her application for the investigator/assessor post constitutes a violation of Articles 5 and 27 of the Convention



Jungelin v Sweden

Communication No. 5/2011

*“...The Committee considers that, when assessing the reasonableness and proportionality of accommodation measures, State parties enjoy a certain **margin of appreciation**. It further considers that **it is generally for the courts** of States parties to the Convention **to evaluate facts and evidence** in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice...”*

Accessibility

Accessibility is a gateway or 'precondition' for the enjoyment of other human rights.

Art. 3

Art. 4

Art. 9

Art. 13

Art. 21

Accessibility

“Accessibility” means that persons with disabilities can access, on an equal basis with others, to **physical environments**, to **transportation**, to **information and communication**, including information and communication technologies and systems, and to other **facilities** and **services** open or provided to the public, both in urban and in rural areas (Art. 9)

Accessibility

accessibility is 'group related'

'[...] the duty to provide accessibility is an *ex ante* duty'.

Participation



Bujdosó et al. v Hungary

Communication No. 4/2011

“...an exclusion of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability, within the meaning of article 2 of the Convention...

[...]

*The State party is under an obligation to **remedy** the deletion of the authors’ names from the electoral registers, including by providing them with adequate compensation for moral damages incurred as a result of being deprived of their right to vote in the 2010 elections”*

Practical Approaches...



- ❖ These principles are ***benchmarks*** against which national law frameworks must be assessed
- ❖ These principles must be used to interpret national provisions (**consistent interpretation**)

The Monitoring System and the Optional Protocol in a Nutshell

Monitoring and Implementation



Internal

International

International Monitoring

The **Committee on the Rights of Persons with Disabilities** is the body of 18 independent experts which monitors implementation of the Convention by the States Parties



Committee on the Rights of Persons with Disabilities

- ❖ All States parties are obliged to submit **regular reports** to the Committee on how the rights are being implemented.
- ❖ States must report initially within two years of accepting the Convention and thereafter every four years.
- ❖ The Committee examines each report and shall make such suggestions and general recommendations on the report

The Optional Protocol

- ❖ 18 articles
- ❖ It introduces two procedures to strengthen the implementation of the Convention:
 - ❖ The **individual communication** procedure permits individuals and groups of individuals in a State Party (to the OP) to complain to the Committee on the Rights of Persons with Disabilities that the State has breached one of its obligations under the Convention (Art. 1 OP).
 - ❖ If the Committee receives reliable information indicating grave or systematic violations of the Convention by a State Party to the OP, an **enquiry** can be opened (Art. 6 OP).

Individual Communication-Inadmissibility

- ❖ The communication is **anonymous**
- ❖ The communication constitutes **an abuse of the right** of submission or is incompatible with the UNCRPD
- ❖ Issues have been examined by **another procedure** of international investigation or settlement;

Individual Communication-Inadmissibility

- ❖ All available domestic remedies have not been exhausted
- ❖ It is manifestly ill-founded or not sufficiently substantiated
- ❖ The facts that are the subject of the communication occurred prior to the entry into force of the Protocol for the State Party concerned

A.M. v Australia

Communication No. 12/2013

*“...the Committee considers that, for a person to claim to be the victim of a violation of a right protected by the Convention, he or she must show either that an act or an omission of the State party concerned **has already adversely affected** his or her enjoyment of that right, or that such an **effect is imminent**, for example on the basis of existing law and/or judicial or administrative decision or practice...”*

THANK YOU FOR YOUR ATTENTION!

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“EU DISABILITY LAW AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES “

SEMINAR FOR MEMBERS OF THE JUDICIARY

Trier, 13-15 June 2016

WORKSHOP

The legal status of the UNCRPD and its role as interpretation tool

The status of international agreements in domestic legal systems depends on how domestic constitutions spell out the relationship between national law and international law.

In some countries, constitutions explicitly establish that human rights treaties have constitutional status. By contrast, in most cases, constitutions make it clear that treaties have a legal status above domestic law or that in case of a conflict with domestic law, international treaties should prevail, but not over the domestic constitution (sub-constitutional status).

Regardless notable constitutional differences, in general, domestic law must be interpreted as far as possible, in light of and in compliance with international agreements.

Considering the principle of consistent interpretation, this workshop is designed for to help judges/legal practitioners integrating the UNCRPD principles into their reasoning. Participants are confronted with practical cases in different fields and must attempt solve the case in a manner consistent to the UNCRPD.

Methodology

Participants are divided into small groups and examine/discuss the following case-studies on the basis of the UNCRPD principles and provisions.

- **Case Study 1: 16.45 – 17.10**
- **Case Study 2: 17.10 - 17.35**
- **Case Study 3: 17.35 – 18**

CASE STUDY 1

In January 2015, Mrs. Francis started to work for Maynooth Ltd, a computer manufacturing company. She had been recruited by an employment agency and was initially employed on a six-month contract.

Mrs. Francis has **epilepsy**, but her condition is well controlled by medication. At the time of her employment, she informed the employment agency of her medical condition.

Mrs. Francis worked for Maynooth Ltd for four months **without any difficulty**. In April 2015, her supervisor informed her that her work performance was exceptionally satisfactory and that Maynooth Ltd would like her to apply for a permanent position.

Mrs. Francis completed an application form, where she declared her epilepsy. After submitting her application form, she was told that she would not be required to attend for interview, but would be required to undergo a medical examination by a doctor nominated by Maynooth Ltd.

Immediately, following the medical examination, the Maynooth HR decided not to offer Mrs. Francis a permanent post and to terminate her temporary contract with immediate effect, on the basis that she was not fit to operate the heavy machinery in use at Maynooth Ltd.

Mrs. Francis decided to sue Maynooth Ltd complaining that she had been discriminated against on the grounds of disability.

- 1. Is Mrs Francis a person with a disability?**
- 2. What rights guaranteed by the UNCRPD are affected in the circumstances described above?**
- 3. Is Mrs Francis' complaint well founded?**
- 4. What obligations (if any) Maynooth Ltd undergo?**

CASE STUDY 2

In June 2015, Mr Red was diagnosed a form of bipolar disorder, associated to occasional symptoms such as sudden dizziness, anger, reckless behaviour, claustrophobia, and insomnia.

He is able to live independently, and works as a janitor in a local office building. In general, he is well able to take care of himself and since the diagnosis is undertaking adequate therapies. However, Mr Red has a tendency to be irresponsible with money and to buy expensive goods and luxury accessories.

In December 2015, Mr Red decided to purchase a Ferrari car and used all his savings to pay the deposit. When his parents came to know about the purchase, without telling anything to Mr Red, they decided that he should be placed under guardianship. They applied to court.

- 1. Is Mr Red a person with a disability?**
- 2. What rights guaranteed by the UNCRPD are affected in the circumstances described above?**
- 3. Could Mr Red be placed under guardianship under your domestic legislation?**
- 4. What would be your decision in this case if you interpret your relevant national law in compliance with the UNCRPD?**

CASE STUDY 3

Mrs Francesca Rossi suffers from rare form of Glycogen storage disease type II (also called Pompe disease), which damages muscle and nerve cells throughout the body. Her disease causes *inter alia* progressive muscle weakness. As a consequence, Mrs Rossi is unable to walk for long distances, has strong difficulties in using stairs and she needs help when walking up and down a flight of stairs. However, she is not a wheelchair user.

Mrs. Francesca Rossi and his husband decided to spend a week on the Red Sea in a relaxing resort to celebrate their wedding anniversary. They went to the travel agency World Tour and asked for a resort on the Red Sea. After having consulted several catalogues of the tour operator ST and upon the advice of the travel agent, they booked a suite, located at the ground floor of the Fantastic Resort, which was situated directly on the beach.

Ms Rossi did not expressly asked for a resort accessible for people with disabilities, but asked for an accommodation with no stairs, and mentioned her disease. She also asked that all the facilities were easy to reach. Mrs Francesca Rossi, to support the request for a suite at the ground floor, near to the pool and a few metres from the beach, paid an additional reservation charge.

When Ms Rossi and his husband arrived to the Fantastic Resort, they discovered that their suite was located at the first floor of a chalet, and that the chalet was situated far away from the pool and the meeting facilities. They also discovered that, in order to reach all the facilities, there were several flight of stairs (which in a few cases were rickety). They raised an immediate complaint and asked the hotel director to be assigned another suite at the ground floor, but the resort was fully booked and no other suites were available. As a consequence Ms. Rossi could not walk around the resort alone, she experienced several problems in reaching the beach and the facilities, she had a very stressful holiday and her health conditions worsened.

Once back, Ms Rossi and his husband sued both World Tour and the tour operator ST and asked for compensation and damages.

World Tour rejected its responsibility on the basis that the package holiday was managed by ST and that the misleading information were provided by the catalogues printed by ST.

ST rejected its responsibility with different arguments.

First, ST claimed that Ms Rossi is not disabled and, in any case, did not state her disability. ST stated that Ms Rossi did not use a wheelchair, and she is perfectly able to use stairs though helped. Secondly, ST claimed that, in any case, Ms Rossi did not ask for an accessible resort and the Fantastic Resort was not defined in the catalogue as accessible. In this respect, ST claimed that the additional charge was due only to express a preference, but did entitle to a specific suite (and the possibility to have a suite at the ground floor was subject

to availability). ST also states that the stairs are not rickety according to Egyptian standards and there are numerous benches in the resort, and that Ms Rossi could have asked for help to the waiters.

- 1. Is Ms Rossi a person with disabilities?**
- 2. What rights guaranteed by the UNCRPD are affected in the circumstances described above?**
- 3. Ms Rossi did not expressly asked for accessible structure: is this relevant? Is it enough that there are numerous benches within the resort? Would the help of the waiters amount to reasonable accommodation?**



"Behinderung" im Unionsrecht

„Seminar für Angehörige der Justiz“

Trier, 13. Juni 2016

Ioanna Dervisopoulos

Überblick



- Gleichbehandlung im Unionsrecht
- Charta der Grundrechte
- EMRK
- Völkerrechtliche Verträge
- Richtlinie 2000/78 und Verbot der Diskriminierung aufgrund einer Behinderung

Historische Entwicklung



- Anfang: Verbot der Diskriminierung aufgrund der Staatsangehörigkeit
- Verbot der Diskriminierung aufgrund des Geschlechts
- EuGH-Grundrechtsurteile
- Vertrag von Amsterdam schafft breitere Zuständigkeiten: neue Richtlinien
- Charta der Grundrechte

Diskriminierung aufgrund des Geschlechts



- Art. 157 AEUV „gleiches Entgelt ... bei gleicher oder gleichwertiger Arbeit“ (seit den Römischen Verträgen)
- Richtlinie 1975/117: gleiches Entgelt
- Richtlinie 76/207: Gleichbehandlung der Geschlechter im Bereich Beschäftigung (neu gefasst durch Richtlinie 2006/54)
 - C-104/09, Roca Álvarez (Freistellung von der Arbeit zur Säuglingsversorgung)
 - C-167/12, CD (Mutterschaftsurlaub für Leihmütter)
- Richtlinie 79/7: Gleichbehandlung von Männern und Frauen in Sozialversicherungsangelegenheiten
 - 236/09, Test-Achats

Erweiterung des Geltungsbereichs der EU-Gesetzgebung



- Art. 13 EG-Vertrag (eingeführt 1999 durch den Vertrag von Amsterdam, jetzt Art. 19 AEUV)
- Einführung einer Zuständigkeit für angemessene Maßnahmen zur Bekämpfung von Diskriminierung aufgrund des Geschlechts, der Rasse oder ethnischen Herkunft, der Religion oder Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung

Erweiterung des Geltungsbereichs der EU-Gesetzgebung



Richtlinie 2000/43: Gleichbehandlung von Personen ungeachtet ihrer Rasse oder ethnischen Herkunft

Richtlinie 2000/78 zur Schaffung eines allgemeinen Rahmens für die Gleichbehandlung in den Bereichen Arbeit und Beschäftigung

EuGH-Grundrechtsurteile



- Anfänglich keine schriftlich fixierte Grundrechtsgewährleistung
- Gerichtshof erwähnt erstmals 1969 die in den allgemeinen Rechtsgrundsätzen enthaltenen „Grundrechte der Person“ (Rs. Stauder C-29/69)
- Beim Schutz der Grundrechte ließ sich der Gerichtshof von den den gemeinsamen Verfassungsüberlieferungen der Mitgliedsstaaten und der EMRK leiten (Rs. Nold 4/73)

Charta der Grundrechte



Entwicklung

- Ergebnis eines speziellen Verfahrens, ein Konvent unter dem Vorsitz von Roman Herzog wurde mit der Ausarbeitung eines Entwurfs beauftragt
(Konvent setzte sich zusammen aus Regierungsvertretern, Vertretern der nationalen Parlamente, des europäischen Parlaments und der Kommission)
- Vertrag von Nizza: Verkündung der Charta
- Seit dem Vertrag von Lissabon (1. Dezember 2009): rechtsverbindlich

Charta der Grundrechte



- Diskriminierungsverbot in der Charta:
Bestimmungen zur Gleichheit in Kapitel III

Artikel 21 Nichtdiskriminierung

Abs. 1: „Diskriminierungen, insbesondere wegen des Geschlechts, der Rasse, der Hautfarbe, der ethnischen oder sozialen Herkunft, der genetischen Merkmale, der Sprache, der Religion oder der Weltanschauung, der politischen oder sonstigen Anschauung, der Zugehörigkeit zu einer nationalen Minderheit, des Vermögens, der Geburt, einer Behinderung, des Alters oder der sexuellen Ausrichtung, sind verboten.“

Charta der Grundrechte



- Geltungsbereich: Artikel 51 Abs. 1 GR-Charta
- „Diese Charta gilt für die Organe und Einrichtungen der Union unter Einhaltung des Subsidiaritätsprinzips und für die Mitgliedstaaten ausschließlich bei der Durchführung des Rechts der Union. Dementsprechend achten sie die Rechte, halten sie sich an die Grundsätze und fördern sie deren Anwendung gemäß ihren jeweiligen Zuständigkeiten.“
- Durchführung des Unionsrechts = einzelstaatliche Gesetzgebung im Geltungsbereich des Rechts der Europäischen Union, Bestätigung der bisherigen Rspr. Des EuGH; vgl. Urteil vom 26. Februar 2013, Åkerberg Fransson, C-617/10, Rn. 19

Beitritt der EU zur EKMR



- Art. 6. Abs. 2 EU-Vertrag (Lissabon)
 - „Die Union tritt der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten bei.“
 - EuGH Gutachten 2/13, geplanter Beitritt ist nicht mit Art. 6 II EU-Vertrag und dem Protokoll Nr. 8 zu Art. 6 II vereinbar

Völkerrechtliche Verträge



- Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen
 - von EU genehmigt, Bestimmungen des Abkommens daher "integrierender Bestandteil der Unionsrechtsordnung"
 - daher ist die Richtlinie 2000/78 „nach Möglichkeit in Übereinstimmung mit diesem Übereinkommen auszulegen“.

Völkerrechtliche Verträge



- Art 267 Abs. 1 b) AEUV Gültigkeitskontrolle von Rechtsakten der Union am Maßstab völkerrechtlicher Verträge?
 - Nur, wenn die betreffenden Bestimmungen inhaltlich unbedingt und hinreichend genau ist; EuGH im Hinblick auf UNCPRD: nein (Urteil Z, C-363/12, Rn. 87ff.
 - Prüfung, ob Art und Struktur des völkerrechtlichen Vertrages eine Kontrolle der Gültigkeit von Unionsrechtsakten anhand des Völkerrechts zulassen, daher nicht erforderlich

Rechtsprechung des EuGH zur Diskriminierung aufgrund von Behinderung – RL 2000/78



- Urteil vom 11. Juli 2006, Chacon Navaz, C-13/05:
 - Behinderung in Richtlinie nicht definiert, aber autonom und einheitlich auszulegen
 - Definition "Behinderung" = "eine Einschränkung, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist und die ein Hindernis für die Teilhabe des Betroffenen am Berufsleben bildet" und, in Abgrenzung zu "Krankheit", "muss es wahrscheinlich sein, dass die Einschränkung von langer Dauer ist".
 - "Krankheit" kein weiteres, ungeschriebenes Diskriminierungsverbot

Rechtsprechung des EuGH zur Diskriminierung aufgrund von Behinderung – RL 2000/78



- Urteil vom 11. April 2013, Ring, C-335/11:
 - UNCPD 2009 von EU genehmigt, RL ist im Lichte des Abkommens auszulegen
 - Daher: Modifikation der Definition von Behinderung
 - „Einschränkung, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist, die in Wechselwirkung mit verschiedenen Barrieren den Betreffenden an der vollen und wirksamen Teilhabe am Berufsleben, gleichberechtigt mit den anderen Arbeitnehmern, hindern können, und wenn diese Einschränkung von langer Dauer ist.“
 - Daher nicht nur angeborene Behinderungen oder solche, die von Unfällen herrühren, sondern auch von Krankheit verursachte Behinderungen

Rechtsprechung des EuGH zur Diskriminierung aufgrund von Behinderung – RL 2000/78



- Urteile vom 18. März 2014, Z und CD, C-363/12 und C-167/12:
- Klarstellung der Definition in Rs. Ring: „nicht nur Unmöglichkeit, eine berufliche Tätigkeit auszuüben, sondern auch eine Beeinträchtigung der Ausübung einer solchen Tätigkeit“
- Fehlende Gebärmutter = Behinderung?
- Ring: "volle und wirksamen Teilhabe am Berufsleben, gleichberechtigt mit den anderen Arbeitnehmern"
- UNCPD: „volle, wirksame und gleichberechtigte Teilhabe an der Gesellschaft“
- Keine Gültigkeitskontrolle am Maßstab der UNCPD

Rechtsprechung des EuGH zur Diskriminierung aufgrund von Behinderung – RL 2000/78



- Urteil vom 18. Dezember 2014, FOA, C-354/13:
- Diskriminierung wegen Adipositas?
- RL nicht auf ungeschriebene Diskriminierungsverbote auszudehnen, im Unionsrecht kein allgemeines Verbot der Diskriminierung wegen Adipositas, daher auch Unionsgrundrechte nicht anwendbar
- Aber: Diskriminierung wegen Adipositas kann Diskriminierung wegen Behinderung sein, anders als GA kein konkreter BMI; nicht nur Unmöglichkeit der Berufstätigkeit, sondern auch Beeinträchtigung der Berufstätigkeit

Rechtsprechung des EuGH zur Diskriminierung aufgrund von Behinderung – RL 2000/78



- Adipositas dann Behinderung, wenn der AN aufgrund seiner Adipositas an der vollen und wirksamen Teilhabe am Berufsleben gehindert wäre, und zwar aufgrund eingeschränkter Mobilität oder dem Auftreten von Krankheitsbildern, die ihn an der Verrichtung seiner Arbeit hindern oder zu einer Beeinträchtigung seiner Berufstätigkeit führen

Rechtsprechung des EuGH zur Diskriminierung aufgrund von Behinderung – RL 2000/78



- Urteil vom 17. Juli 2008, Coleman, C-303/06: Diskriminierung durch Assoziierung, siehe auch Urteil vom 16. Juli 2015, CEZ Razpredelenie, C-83/17



Vielen Dank für Ihre Aufmerksamkeit!

ART.13 UNCRPD “ACCESS TO JUSTICE”

**Taking stock of its
everyday implementation
in the Italian justice
system**

**Dott. Stefan Tappeiner
Judge, Bolzano Regional Court**



The Italian justice system (ordinary jurisdiction)



26 Higher Regional Courts ("Corti d'Appello")

136 Regional Courts ("Tribunali")

187 Justices of the Peace ("Giudici di Pace")

Bolzano Regional Court



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Convention on the Rights of Persons with Disabilities – CRPD New York, 13 December 2006, ratified in Italy by Law No. 18 of 3 March 2009



Article 13 – Access to justice

(1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, **including through the provision of procedural and age-appropriate accommodation, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.**

(2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

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Art. 24 Constitution of the Republic of Italy



Art. 24

- (1) **Anyone** may bring cases before a court of law in order to protect their rights under civil and administrative law.
- (2) **Defence is an inviolable right at every stage and instance of legal proceedings.**
- (3) **The poor** are entitled by law to proper means of action or defence in all courts.
- (4) The law shall define the conditions and forms of reparation in case of judicial errors.

Art. 111 Constitution of the Republic of Italy (amended by Constitutional Act No. 2 of 23/11/1999)



SECTION II Rules on Jurisdiction Art. 111

- (1) The law is administered by means of a fair trial governed by the law.
- (2) Parties to all trials may speak in their own defence in the presence of the other parties, **under conditions of parity**, before an independent and impartial court. The law ensures a reasonable duration.
- (3) In the criminal process, the law shall ensure that persons charged with a criminal offence have the right to be notified promptly and confidentially of the nature and cause of the charges made against them; they shall be given adequate time and conditions to prepare their defence; they shall have the right to examine, or to have examined, the witnesses testifying against them in court and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them, and to obtain all other evidence on their behalf; **they shall be assisted by an interpreter if they cannot understand or speak the language used during the trial.**
(redacted)



DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

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Special provisions of a substantial and procedural nature for the protection of the rights of persons with disabilities in criminal and civil proceedings



- Custodianship Law (Law No. 6/2004), Art. 404 et seqq. Civil Code
- Art. 119 Code of Criminal Procedure
- Art. 190*bis* Code of Criminal Procedure
- Art. 398 Code of Criminal Procedure
- Art. 498 Code of Criminal Procedure
- Art. 124 Code of Civil Procedure
- Legislative Decree No. 216 of 9 July 2003
- Law No. 67 of 1 March 2006

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Guardianship (Art. 404 et seqq. Civil Code, amended by Law No. 6/2004)



Article 404 Guardian

A person who **can no longer take care of their own affairs due to a learning disability or a physical or psychological illness, including those which are partial or temporary, may be supported by a guardian** commissioned by the Guardianship Court in whose jurisdiction the person is resident or domiciled.

Guardianship (Art. 404 et seqq. Civil Code)



405. (Decree for the commission of a guardian. Duration of duty and corresponding publication)

On the appeal of one of the persons specified in Art. 406, the Guardianship Court shall enact a reasoned and immediately-enforceable decree within sixty days of the submission of an application for a guardian.
(redacted)

The following items must be included in the application for the commission of a guardian:

- 1) personal details of the beneficiary and the guardian;
- 2) duration of service - this may be conferred for an indefinite period;
- 3) the object of the authority and those legal acts which the guardian is authorised to undertake in the name and at the expense of the beneficiary;
- 4) the legal acts which the beneficiary is only able to perform with the assistance of the guardian;
- 5) the maximum amount of tasks which the guardian may perform using money which is owned or may be owned by the beneficiary; this maximum amount may also be set for repeated periods;
- 6) the regular intervals within which the guardian shall report to the Guardianship Court regarding the duties performed and the beneficiary's personal and social situation.

Guardianship (Art. 404 et seqq. Civil Code)



407. (Procedure)

In application for the establishment of the guardianship, the personal details of the beneficiary, their normal place of residence, the reasons for which an application for guardianship is being submitted and, should they be known to the applicant, the name and residence of the spouse, descendants, forbears, siblings, and any persons living in the same household as the beneficiary should be given.

The Guardianship Court shall listen personally to the person to which the procedure pertains and, if necessary, shall go to their place of residence, taking into account their needs and requirements, insofar as these are consistent with the person's needs for protection.

After performing the necessary enquiries and after hearing the person named in Article 406, the Guardianship Court shall take their decision; their failure to appear shall not hinder the taking of the decision.

(redacted)

Guardianship



The tasks of the guardian (or caretaker) often include representing the beneficiary in civil proceedings



BOLZANO REGIONAL COURT

Office of the Guardianship Judge

Guardianship No. 641/2008 R.G.V.G.

The Guardianship Judge, Dr Stefan Tappeiner, authorises the following

DECREE

on the provision of a guardian as per Art. 404 et seqq. Civil Code:

1. Mr XXXXXXXX Markus, born on 19/06/1971 in Meran, resident in, is hereby authorised to become the **Guardian** (Art. 404 Civil Code) of his brother YYYYY Felix (Beneficiary), born 23/06/1982 in Bolzano and resident in, de facto accommodated in the neurological department of the hospital of Bad Aibling (D).

2. This shall remain in effect for an indefinite period.

3. The guardianship is granted for the purpose of ensuring the care of the Beneficiary and the organisation of their life and affairs.

4. The Guardian shall support and represent the Beneficiary in the administration of their assets and all matters in connection with the settlement of their inheritance as per the wishes of the deceased mother and the **representation of the Beneficiary in any court proceedings arising in connection with this.**

5. **The Guardian shall also be obliged to take all necessary steps to claim compensation for the damages arising from the ski accident suffered by the Beneficiary, to represent the Beneficiary in all Court proceedings and to organise the best possible advocacy support.**

The Guardian shall administrate the Beneficiary's assets and may transfer excess amounts to the account without further authorisation to the same bank in a secured form in the name of the Beneficiary, whereby all credits and debits should pass through that account.

a) The Guardian shall be entitled to withdraw independently and autonomously a monthly sum of 2,500.00 EUR for the Beneficiary's expenses.



b) The Guardian shall be authorised to withdraw and use an annual sum of up to €3,000.00 for unforeseen and extraordinary expenses for the Beneficiary. The reason for withdrawal must be explicitly recorded.

c) Withdrawals and orders which exceed these specified limits, and transactions pertaining to property require the prior approval of the Guardianship Court, except in extraordinary circumstances.

6. The Guardian shall be authorised to submit any kind of application in the name of the Beneficiary to public or private entities who could be of benefit to the Beneficiary or may serve to organise or administrate their assets and to carry out all signatures to this end, and all related potential official declarations of commitment.

7. The Guardian shall be entitled to take all necessary measures for the Beneficiary's medical care and support and, if necessary, to take decisions regarding their medical treatment in his name, on discussion with the responsible medical personnel.

8. The Guardian shall provide the Court with an annual report on the Beneficiary's condition, the actions taken and the administration of his assets, particularly a detailed bank statement.

With immediate enforceability.

Delivery to the Beneficiary.

Notification of applicant, public prosecutor's office, municipal registry.

Record in the Guardianship Register.

Should the Beneficiary be the proprietor of properties or hold real property rights, an extract of a copy of this Decree (without justification) must be submitted to the Land Registry for recording therein.

A copy of the Decree for the provision of a guardian should also be submitted to the bank and the post office with which Mr holds an account so that the link to the Beneficiary's account and securities arising from this authorisation (which must be transferred in name) can be recorded.



The bank shall themselves also mark which person (the Guardian or supported person) has performed each individual operation (withdrawal of money).

A further copy of the Decree for the provision of a Guardian should be sent to the responsible pension organisation, in order that these may record the link to the pension arising from this authorisation. The pension shall be transferred directly into the supported person's bank account by the pension organisation.

The Guardian shall submit a written report to the Court Registry within 30 days of taking the oath, confirming that the above processes have been completed, with the corresponding documentation.

Procedural basis

Application of for the purpose of providing a Guardian as per Art. 404 ff. Civil Code for the abovenamed Beneficiary, including all attached medical documents.

Basis of the decision

As can be ascertained from the medical documentation, Mr received serious head injuries due to a skiing accident on 10 May 2008. Two days after the accident, Mr suffered a severe cerebral oedema, since which time Mr has been in a coma. He was transferred from the intensive care department at Bolzano Hospital to Bad Aibling (D) for neurological rehabilitation, and a his civil invalidity of 100% has already been recognised.

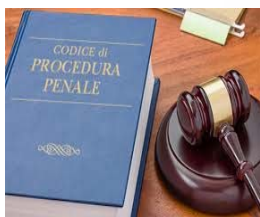
The legal requirements for the requested provision of a guardian for this person as per Art. 404 ff. Civil Code have therefore been fulfilled.

The affected person's brother..... is to be named as Guardian. This Office considers him to be appropriate and he also enjoys the Beneficiary's trust.

Bolzano,

Guardianship Judge
Dr Stefan Tappeiner

Provisions in the Italian Code of Criminal Procedure



Art. 119 Code of Criminal Procedure

Participation of deaf, mute, or deaf-mute persons in proceedings

1. Should a deaf, mute, or deaf-mute person wish to or have to issue a statement, the questions, instructions and warnings shall be provided to the deaf person in writing, and the person shall answer aloud; to the mute person, the questions, instructions and warnings shall be issued aloud and the person shall answer in writing; and to the deaf-mute person, the questions, instructions and warnings shall be issued in writing and answered in writing.

2. Should the deaf, mute, or deaf-mute person not have the ability to read or write, the authority shall order one or more interpreters for the person to which the proceedings are pending; these interpreters shall be selected preferentially by people who are used to interacting with them.

Judgement No. 391/1999 of the Constitutional Court



“Per violazione dell’art. 24, comma secondo, Cost. - assorbito ogni altro profilo della questione - l’art. 119 cod. proc. pen., nella parte in cui non prevede che l’imputato sordo, muto o sordomuto, indipendentemente dal fatto che sappia o meno leggere e scrivere, ha diritto di farsi assistere da un interprete, deve essere dichiarato illegittimo”

Each part of Art. 119 Code of Criminal Procedure shall be declared unlawful due to a violation of Art. 24, Para. 2 of the Constitution, in which the deaf, mute, and deaf-mute - irrespective of whether they have the ability to read or write, do not have the right to support by an interpreter.

Provisions in the Italian Code of Criminal Procedure



There is no similar provision for blind people in the Code of Criminal Procedure!

Resolution of May 2014, *LG Torre Annunziata*: a blind defendant shall not have the right to a translation of the files into Braille; this shall not violate the provisions of Articles 3, 24 and 111 of the Constitution.

Provisions in the Italian Code of Criminal Procedure



Art. 190-bis Code of Criminal Procedure

The characteristics of evidence in special cases

1. In proceedings pertaining to the crimes specified in Art. 51, Para. 3bis, should the hearing of a witness or a person described in Art. 210 be requested and should this person already have given evidence in proceedings for the preservation of evidence or in the main court proceedings under the right of defence with the person against which the evidence is to be used, or evidence which has been recorded in the files as per Art. 238, further hearing is only permissible should these have circumstances which differ from those found in the previous evidence given, or should the Court or one of the parties deem this to be necessary due to extraordinary circumstances.

1-bis. The same provisions shall be applied, should the proceedings pertain to one of the Articles 600-bis, Para. 1, 600-ter, 600-quater, or to pornographic materials as per Art. 600-quater.1, 600-quinquies, 609-bis, 609-ter, 609-quater, 609 quinquies e 609-octies Code of Criminal Procedure and pertains to the hearing of a witness who is under 16 years of age, and in every case, **should the requested witness hearing pertain to a particularly vulnerable victim** (in Italian: "persona offesa in condizione di particolare vulnerabilità").

(Paragraph added by the Decree of 15 December 2015, No. 212)

Provisions in the Italian Code of Criminal Procedure



Art. 498 Code of Criminal Procedure (current applicable version, after amendment by Decree 38/09, Law 93/2013, Decree 212/15)

Direct questioning and counter-questioning of witnesses

1. The questions shall be asked directly by the prosecutor or the counsel for the defence who requested that the witness be questioned.

2. Further questions may then be asked by the parties which did not request that the witness be questioned. This shall occur in the order set out in Art. 496.

3. The person who requested that the witness be questioned may ask new questions.

4. The questioning of a minor as a witness is carried out by the chairperson on the basis of the questions and counter-questions suggested by the parties. The chairperson may enlist the help of a member of the minor's family or a specialist in child psychology during the questioning. Should, after questioning has taken place, the chairperson hold the view that the direct questioning does not prevent the minor from issuing an impartial witness statement, they may order by way of a resolution that the statement be continued in the manner specified in the previous paragraphs. The resolution may be withdrawn during the course of questioning.

Provisions in the Italian Code of Criminal Procedure



Art. 498 Code of Criminal Procedure (current applicable version, after amendment by Decree 38/09, Law 93/2013, Decree 212/15)

4-bis Should one of the parties request it, the provisions of Art. 398, Para. 5-bis shall apply

4-ter Should the proceedings pertain to criminal acts as per Art. 572, 600, 600-bis, 600-ter, 600-quater, 600-quinquies, 601, 602, 609-bis, 609-ter, 609-quater, 609-octies und 612bis Code of Criminal Procedure, the hearing of the underage victim **or the of-age victim who suffers from a mental illness (in Italian: "infermo di mente") shall take place on their request or on the request of their counsel for defence through the use of mirrored glass and an intercommunication system.**

4-quater Apart from the provisions specified in the previous paragraphs, **should the hearing of a person in particular need of protection (in Italian: "persona particolarmente vulnerabile") be required, the Judge may, on the request of the defendant and of council for the defence, order particularly protected forms of hearing.**

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Judgement No. 283, of 30 July 1997, of the Constitutional Court

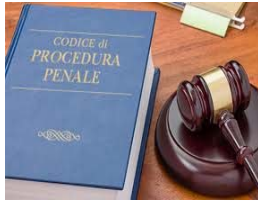


"È costituzionalmente illegittimo, per violazione dell'art. 2 Cost., l'art. 498 cod. proc. pen., nella parte in cui non consente, nel caso di testimone maggiorenne infermo di mente, che il presidente, sentite le parti, ove ritenga che l'esame del teste ad opera delle parti possa nuocere alla personalità del teste medesimo, ne conduca direttamente l'esame su domande e contestazioni proposte dalle parti, in quanto - posto che la disciplina della testimonianza e delle modalità per raccoglierla risponde anzitutto all'esigenza di assicurare la genuinità della prova, ma non può essere insensibile all'esigenza di tutelare la persona del teste nel delicato momento in cui è chiamato a deporre sui fatti e le circostanze dedotti in contraddittorio fra le parti; e che il vigente ordinamento processuale non consente in nessun caso, nell'assunzione della testimonianza di un maggiorenne, di derogare alla regola dell'art. 498 del codice, secondo cui "le domande sono rivolte direttamente dal pubblico ministero o dal difensore che ha chiesto l'esame del testimone" (comma 1), e altre domande possono essere rivolte sempre dalle parti (commi 2 e 3) - la garanzia del diritto fondamentale al rispetto della personalità esige che la stessa regola sia derogabile, non già in via generale, bensì in relazione alla concretezza delle circostanze, nel caso della testimonianza di persona inferma di mente"

Each of the provisions of Art. 498 Code of Criminal Procedure are to be considered unconstitutional due to violation of Art. 2 of the Constitution, in which it is not intended that, during questioning of a witness who is of age but who suffers from a mental illness, the chairperson may directly question the witness after hearing the parties. This contradicts the general rule of Art. 498 Code of Criminal Procedure, according to which the questions are asked directly by the prosecutor or the counsel for the defence who requested that the witness be questioned.

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Provisions in the Italian Code of Criminal Procedure



Art. 398 Code of Criminal Procedure Instructions for requesting proceedings for the preservation of evidence

(redacted)

5-bis Should the inquiries pertain to criminal acts as per Art.572, 600, 600-bis, 600-ter, including pornographic material as per Art.600-quater, 600-quinquies, 601, 602, 609-bis, 609-ter, 609-quater, 609-octies, 609- undecies and 612bis Code of Criminal Procedure, the Judge shall, should the persons involved in the taking of evidence be **underage**, order a special place, a special time or a special manner in which the preservation of the evidence should take place, should this be necessary or appropriate.

For this purpose, the hearing may also **take place outside of the court building; the Judge may, if available, make use of special facilities or may conduct the hearing in the person's place of residence.**

The statements given by the witness must be **phonographically and audiovisually recorded** in their entirety (redacted).

5-ter On the parties' request, the Judge shall apply the provisions specified in Para. 5-bis should the of-age persons under the person affected by the taking of evidence be in need of particular protection.

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Provisions in the Italian Code of Criminal Procedure



Art. 398 Code of Criminal Procedure Instructions for requesting proceedings for the preservation of evidence

5 quater Apart from the provisions of Para. 5 ter **for the hearing of victims in particular need of protection, the provisions of Art. 498, Para. 4 quater shall be observed.**

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Hearing witnesses/victims in the "mirrored room" ("sala specchio" in Italian)



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- the interview room should have a pleasant, friendly atmosphere (in contrast to a courtroom)
- along with the victim to be questioned, only one judge and one psychologist shall be present in the room
- all other persons involved in the trial shall stand in an adjoining room, following the questioning through the mirror glass

Hearing victims/witnesses in the mirrored room



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- the hearing shall be recorded on video
- the questions shall be asked directly by the Judge
- the prosecutor and counsel for the defence may not ask direct questions
- no cross-examination shall take place

Italian Code of Civil Procedure



Art.124 Code of Civil Procedure Questioning of deaf and mute persons

Should a deaf, mute or deaf-mute person be required to speak during the proceedings, the questions and answers may be made in writing.

If necessary, the Court may request an interpreter who shall take an oath as per Art.122, final paragraph.

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Special provisions of a substantial and procedural nature for the protection of the rights of persons with disabilities in criminal and civil proceedings



Legislative Decree No. 216 of 9 July 2003

- Art. 4 specifies special procedural standards for the protection of persons with disabilities against discrimination at work.

Law No. 67 of 1 March 2006

- Art. 3 and 4 specify special procedural standards for the legal protection of persons with disabilities against discrimination of any kind.

Decree No. 212/15

- Special provisions for the protection of victims

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Accessibility of Court buildings



Judgement No. 3376/2001 of the Court of Appeal

"Deve considerarsi legittimo l'impedimento a comparire, con conseguente nullità dell'ordinanza dichiarativa della contumacia, da parte dell'imputato disabile che non possa accedere ai locali di udienza per la presenza di barriere architettoniche, che dovrebbero essere rimosse ai sensi della legge 5 febbraio 1992, n. 104 e del DPR 24 luglio 1996, n. 503, e per il quale l'ufficio giudiziario non abbia altrimenti provveduto a consentire il dignitoso esercizio del diritto di difendersi presenziando al dibattimento"



A defendant shall be considered absent with valid excuse should their disability and any architectural obstacles, which should be removed under Law No. 104/92 and D.P.R. No. 503/96, make it impossible for the defendant to enter the hearing room.

The proceedings undertaken in the defendant's absence shall therefore be considered invalid.

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Accessibility of Court buildings



D.P.R. No. 503/1996



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Workshop - Case study



Criminal proceedings against P.H. and A.G.

Case No. 463/09 Gen. Reg.

Bolzano Regional Court

For the following criminal acts



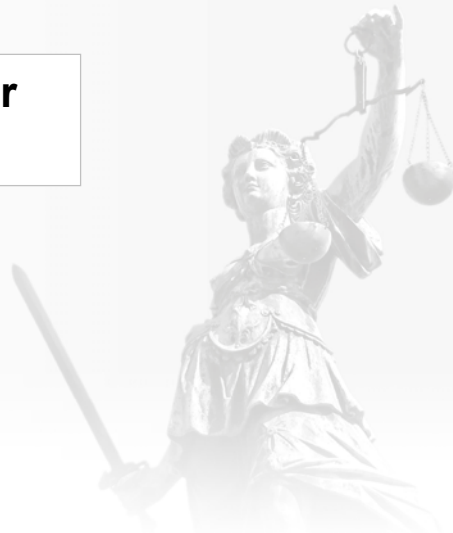
1) Art. 81, Para. 2, 110 and 572 Code of Criminal Procedure

2) Art. 40, Para. 2, 110, 609bis, 609ter Para. 1, No. 1 and 5 Para. 2, 609quater, 609octies Code of Criminal Procedure

3) Art. 40, Para. 2, 81, 110, 609bis, 609ter, Para. 1, No. 1 and 5, 609quater, 609octies Code of Criminal Procedure

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**Thank you for your
attention**



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ART.13 UNCRPD “ZUGANG ZUR JUSTIZ”

Eine Bestandsaufnahme über den Stand der Umsetzung im Justizalltag in Italien

Dott.Stefan Tappeiner
Richter am Landesgericht Bozen



Das italienische Justizsystem (ordentliche Gerichtsbarkeit)



26 Oberlandesgerichte
(„Corti d’Appello”)

136 Landesgerichte
(“Tribunali”)

187 Friedensgerichte
(“Giudici di Pace”)

Das Landesgericht Bozen



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Übereinkommen über die Rechte von Menschen mit Behinderungen (Convention on the Rights of Persons with Disabilities – CRPD New York 13 Dezember 2006, in Italien ratifiziert durch das Gesetz Nr.18 vom 3.März 2009



Artikel 13 – Zugang zur Justiz

(1) Die Vertragsstaaten gewährleisten Menschen mit Behinderungen gleichberechtigt mit anderen wirksamen Zugang zur Justiz, **unter anderem durch verfahrensbezogene und altersgemäße Vorkehrungen, um ihre wirksame unmittelbare und mittelbare Teilnahme, einschließlich als Zeugen und Zeuginnen, an allen Gerichtsverfahren, auch in der Ermittlungsphase und in anderen Vorverfahrensphasen, zu erleichtern.**

(2) Um zur Gewährleistung des wirksamen Zugangs von Menschen mit Behinderungen zur Justiz beizutragen, fördern die Vertragsstaaten geeignete Schulungen für die im Justizwesen tätigen Personen, einschließlich des Personals von Polizei und Strafvollzug

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Art.24 Verfassung der Republik Italien



Art.24.

- (1) Jedermann darf zum Schutz der eigenen Rechte und der rechtmäßigen Interessen vor einem Gericht Klage erheben.
- (2) Die Verteidigung ist in jedem Stand und in jeder Stufe des Verfahrens ein unverletzliches Recht.
- (3) Den Mittellosen werden durch eigene Einrichtungen die Mittel zur Klage und Verteidigung bei jedem Gerichtsverfahren zugesichert.
- (4) Das Gesetz bestimmt die Bedingungen und Formen für die Wiedergutmachung von Justizirrtümern

Art.111 Verfassung der Republik Italien (novelliert durch VerfG Nr.2 vom 23.11.1999)



II. ABSCHNITT Bestimmungen über die Rechtsprechung Art.111.

- (1) Die Rechtsprechung wird im Rahmen eines gesetzlich geregelten fairen Verfahrens ausgeübt.
- (2) Jedes Verfahren ist vor einem unbefangenen und unparteiischen Richter so abzuwickeln, **dass das rechtliche Gehör der Parteien gewahrt wird und diesen die gleiche Behandlung zuteil wird.** Das Gesetz hat die angemessene Dauer des Verfahrens zu gewährleisten.
- (3) Für das Strafverfahren muss das Gesetz gewährleisten, dass die einer strafbaren Handlung beschuldigte Person in der kürzest möglichen Zeit über den Inhalt und die Gründe der gegen sie erhobenen Anklage vertraulich verständigt wird; dass ihr die für die Vorbereitung ihrer Verteidigung nötige Zeit und die dazu erforderlichen Gelegenheiten eingeräumt werden; dass ihr die Möglichkeit geboten wird, jene Personen vor Gericht zu vernehmen oder vernehmen zu lassen, die für sie nachteilige Erklärungen abgeben, die Vorladung und die Vernehmung der zur eigenen Entlastung aufgebotenen Personen unter Bedingungen zu erwirken, wie sie für die Anklage gelten, sowie jedes sonstige für sie günstige Beweismittel beibringen zu dürfen; **dass ihr ein Dolmetscher beisteht, wenn sie die im Verfahren verwendete Sprache nicht versteht oder nicht spricht.**
(omissis)



**RICHTLINIE 2012/29/EU DES EUROPÄISCHEN
PARLAMENTS UND DES RATES
vom 25. Oktober 2012
über Mindeststandards für die Rechte, die
Unterstützung und den Schutz von Opfern von
Straftaten sowie zur Ersetzung des
Rahmenbeschlusses 2001/220/JI**

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**Spezielle Bestimmungen substanzieller und verfahrensrechtlicher
Natur zur Wahrung der Rechte von Personen mit Behinderung in Straf-
und Zivilverfahren**



- Sachwalterschaftsgesetz (Gesetz Nr.6/2004), Art.404 ff.ZGB
- Art.119 StPO
- Art.190bis StPO
- Art.398 StPO
- Art.498 StPO
- Art.124 ZPO
- Gesetzesvertretendes Dekret Nr.216 vom 9 Juli 2003
- Gesetz Nr.67 vom 1.März 2006

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Die Sachwalterschaft (Art.404 ff. ZGB, novelliert durch das Gesetz Nr.6/2004)



Artikel 404 Sachwalter

Die Person, die ihre Angelegenheiten **wegen einer geistigen Behinderung oder einer physischen oder psychischen Krankheit nicht mehr selbst wahrnehmen kann, sei es auch nur teilweise oder vorübergehend, kann durch einen Sachwalter unterstützt werden**, der vom Vormundschaftsgericht bestellt wird, in dessen Sprengel die Person ihren Wohnsitz oder ihr Domizil hat.

Die Sachwalterschaft (Art.404 ff. ZGB)



405. (Dekret zur Bestellung des Sachwalters. Dauer des Amtes und entsprechende öffentliche Bekanntmachung)

Das Vormundschaftsgericht verfügt aufgrund eines Rekurses einer der in Artikel 406 angegebenen Personen innerhalb von sechzig Tagen ab der Einbringung des Antrags auf Sachwalterbestellung mit einem begründeten und sofort vollstreckbaren Dekret.

(omissis)

Im Dekret über die Bestellung des Sachwalters sind anzugeben:

- 1) die Personalien der begünstigten Person und des Sachwalters;
- 2) die Dauer des Amtes, wobei dieses auch auf unbestimmte Zeit übertragen werden kann;
- 3) der Gegenstand des Amtes und diejenigen Rechtshandlungen, die der Sachwalter im Namen und auf Rechnung des Begünstigten vorzunehmen befugt ist;
- 4) die Rechtshandlungen, die der Begünstigte nur mit dem Beistand des Sachwalters vornehmen kann;
- 5) das Höchstausmaß der Ausgaben, die der Sachwalter unter Verwendung von Geldmitteln, über die der Begünstigte verfügt oder verfügen kann, vornehmen darf, wobei dieses Höchstausmaß auch für wiederkehrende Zeiträume bestimmt werden kann;
- 6) die regelmäßigen zeitlichen Abstände, innerhalb derer der Sachwalter dem Vormundschaftsgericht über die ausgeübte Tätigkeit und die persönliche und soziale Lebenssituation des Begünstigten zu berichten hat.

Die Sachwalterschaft (Art.404 ff. ZGB)



407. (Verfahren)

Im Rekurs auf Einrichtung der Sachwalterschaft sind die Personalien des Begünstigten, sein gewöhnlicher Aufenthaltsort, die Gründe, deretwegen die Bestellung eines Sachwalters beantragt wird, sowie, wenn sie dem Antragsteller bekannt sind, die Namen und das Domizil des Ehegatten, der Nachkommen, der Vorfahren, der Geschwister und der mit den Begünstigten im selben Haushalt lebenden Personen anzugeben.

Das Vormundschaftsgericht hat die Person, auf die sich das Verfahren bezieht, persönlich anzuhören und sich erforderlichenfalls dorthin zu begeben, wo sie sich befindet, sowie auf ihre Bedürfnisse und Forderungen Bedacht zu nehmen, soweit sie mit den Interessen und den Schutzefordernissen der Person vereinbar sind.

Das Vormundschaftsgericht entscheidet nach Einholung der notwendigen Erkundigungen und nach Anhörung der in Artikel 406 genannten Personen; es entscheidet auch bei deren Nichterscheinen über den Rekurs.

(omissis)

Die Sachwalterschaft



Zu den Aufgaben des Sachwalters (oder Vormundes) gehört oft die Vertretung des Begünstigten in Zivilverfahren



LANDESGERICHT BOZEN
Amt des Vormundschaftsrichters
Sachwalterschaft Nr.641/2008 R.G.V.G.

Der Vormundschaftsrichter Dr. Stefan Tappeiner erlässt folgendes

DEKRET

auf Bestellung eines Sachwalters gemäß Art. 404 und ff. ZGB:

1. Herr XXXXXXXX Markus, geboren am 19.06.1971 in Meran, wohnhaft in wird zum **Sachwalter** (Art. 404 ZGB) für seinen Bruder YYYYYY Felix (Begünstigter), geboren am 23.06.1982 in Bozen und wohnhaft in, de facto untergebracht in der neurologischen Abteilung des Krankenhauses von Bad Aibling (D) bestellt.
 2. Der Auftrag erfolgt auf unbestimmte Zeit.
 3. Die Sachwalterschaft hat den Zweck, die Pflege und Lebensorganisation für den Begünstigten zu gewährleisten.
 4. Der Sachwalter hat den Begünstigten bei der Verwaltung des Vermögens zu unterstützen und zu vertreten und alle Handlungen im Zusammenhang mit der Abwicklung der Erbschaft nach der verstorbenen Mutter und der **Vertretung des Begünstigten in eventuell diesbezüglich anstehenden Gerichtsverfahren.**
 5. Dem Sachwalter obliegt es auch, alle zur Geltendmachung der Schadensersatzansprüche hinsichtlich des vom Begünstigten erlittenen Skandalfalles notwendigen Schritte zu unternehmen, den Begünstigten in allenfalls anstehenden gerichtlichen Verfahren zu vertreten und die bestmögliche anwaltschaftliche Betreuung zu organisieren.
- Der Sachwalter verwaltet das Vermögen des Begünstigten und kann überschüssiges Geld auf dem Konto ohne weitere Ermächtigung beim selben Bankinstitut in kapitalgesicherter Form auf den Namen des Begünstigten anlegen, wobei alle Ein- und Ausgänge über das Konto abzuwickeln sind.
- a. Der Sachwalter kann eigenständig und autonom monatlich bis 2.500,00 € für die laufenden Ausgaben des Begünstigten begeben.

1



- b. Der Sachwalter ist befugt, jährlich einen Betrag bis zu 3.000,00 € für unvorhergesehene und außerordentliche Spesen für den Begünstigten zu begeben und zu verwenden. Der Entnahmegrund ist spezifisch zu vermerken.
 - c. Behebungen und Verfügungen, die über die genannten Grenzen hinausgehen, sowie Verfügungsgeschäfte von Immobilien, bedürfen, ausgenommen in dringenden Fällen, der vorherigen Genehmigung des Vormundschaftsgerichts.
6. Der Sachwalter ist ermächtigt, in Namen des Begünstigten jegliche Art von Anträgen an öffentliche oder private Stellen zu richten, die einen Vorteil für die Begünstigte bringen können oder der Verwaltung oder Organisation des Vermögens dienen und die diesbezüglichen Unterschriften, sowie evtl. notwendig verknüpfte Verpflichtungserklärungen, zu leisten.
 7. Der Sachwalter ist befugt, die für die medizinische Betreuung und Pflege des Begünstigten notwendigen Maßnahmen zu ergreifen und gegebenenfalls in seinem Namen, nach Absprache mit den behandelnden Ärzten, Entscheidungen über die medizinische Behandlung zu treffen.
 8. Der Sachwalter hat dem Gericht einmal jährlich Bericht zu erstatten, über den Zustand der Begünstigten, die durchgeführte Tätigkeit und die Vermögensverwaltung und insbesondere einen detaillierten Kontauszug zu hinterlegen.

Mit sofortiger Vollstreckbarkeit.

Zustellung an die Begünstigte.

Mitteilung an Antragsteller, Staatsanwaltschaft, Standesamt.

Vermerk im Sachwalterschaftsregister.

Falls der Begünstigte Eigentümer von Immobilien oder Inhaberin von dinglichen Rechten an Immobilien sein sollte, ist eine auszugsweise Abschrift des vorliegenden Dekretes (ohne Begründung) dem Grundbuchsamt zu übermitteln, damit es dort angemerkt werden kann.

Eine Abschrift des Dekretes auf Bestellung zum Sachwalter ist weiters an die Bank bzw. an das Postamt zu übermitteln, bei welcher das Konto zugunsten von Herrn eröffnet wird, damit die aus dieser Verfügung entstandene Bindung auf das Konto und auf die Wertpapiere der unterstützten Person (welche in nennentliche umgewandelt werden müssen) angemerkt werden kann.

2



Die Bank hat zudem in den Kontoauszügen mit eigener Anmerkung anzugeben, welche Person (Sachwalter oder unterstützte Person) die einzelne Operation (z.B. Geldbehebung) durchgeführt hat.

Eine weitere Abschrift des Dekretes auf Bestellung zum Sachwalter ist an das zuständige Renteninstitut zu übermitteln, damit die aus dieser Verfügung entstandene Bindung auf die Rente angemerkert werden kann. Die Rente ist vom Renteninstitut direkt auf das Konto der unterstützten Person zu überweisen.

Der Sachwalter hat innerhalb von 30 Tagen ab Vereidigung, in der Gerichtskanzlei des Vormundschaftsgerichtes einen schriftlichen Bericht zu hinterlegen, in dem er die Vornahme obiger Handlungen, mit Vorlage der entsprechenden Dokumentation, nachweist.

Verfahrensgrundlagen

- Antrag vom, zwecks Bestellung eines Sachwalters im Sinne der Artt. 404 ff. ZGB für den oben genannten Begünstigten, samt beiliegender medizinischer Unterlagen.

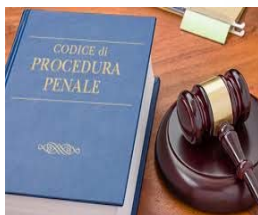
Entscheidungsgrundlagen

- Wie aus der gelegten medizinischen Dokumentation hervorgeht hat sich Herr bei einem Skiunfall am 10.Mai 2008 schwere Kopfverletzungen zugezogen. Zwei Tage nach dem Unfall entwickelte sich ein schweres Hirnödem und seitdem liegt Herrm Koma. Er wurde von der Intensivstation des Krankenhauses Bozen zur Neurologischen Rehabilitation nach Bad Aibling (D) überstellt und es wurde ihm bereits eine Zivilinvalidität von 100% zuerkannt.
- Die gesetzlichen Voraussetzungen für die beantragte Bestellung eines Sachwalters für die betroffene Person gemäß Art. 404 ff. ZGB liegen somit vor.
- Als Sachwalter für den Betroffenen ist dessen Brudernamhaft zu machen, welcher für dieses Amt geeignet erscheint und auch das Vertrauen der Unterstützten genießt.

Bozen, am

Der Vormundschaftsrichter
Dr. Stefan Tappeiner

Bestimmungen in der italienischen StPO



Art.119 StPO

Teilnahme eines Tauben, Stummen oder Taubstummen an Verfahrenshandlungen

1. Wenn ein Tauber, Stummer oder Taubstummer Erklärungen abgeben will oder muss, werden dem Tauben die Fragen, Belehrungen und Ermahnungen schriftlich vorgelegt und dieser antwortet mündlich; an den Stummen werden die Fragen, Belehrungen und Ermahnungen mündlich gerichtet und dieser antwortet schriftlich; dem Taubstummen werden die Fragen, Belehrungen und Ermahnungen schriftlich vorgelegt und dieser antwortet schriftlich.
2. Wenn der Taube, Stumme oder Taubstumme nicht lesen oder nicht schreiben kann, bestellt die Behörde, der der das Verfahren anhängig ist, einen oder mehrere Dolmetscher, die vorzugsweise unter den Personen ausgewählt werden, die es gewohnt sind, mit ihm zu verkehren.

Urteil Nr.391/1999 des Verfassungsgerichtshofes



“Per violazione dell’art. 24, comma secondo, Cost. - assorbito ogni altro profilo della questione - l’art. 119 cod. proc. pen., nella parte in cui non prevede che l’imputato sordo, muto o sordomuto, indipendentemente dal fatto che sappia o meno leggere e scrivere, ha diritto di farsi assistere da un interprete, deve essere dichiarato illegittimo”

Art.119 StPO wird, wegen Verstoß gegen Art.24, Abs.2 der Verfassung, in jenem Teil für rechtswidrig erklärt, in welchem dem Tauben, Stummen und Taubstummen- unabhängig davon, ob er des Lesens und des Schreibens mächtig ist, nicht das Recht auf einen Beistand durch einen Dolmetscher zugestanden wird.

Bestimmungen in der italienischen StPO



Es fehlt in der StPO eine entsprechende Bestimmung für Blinde!

Beschluss vom Mai 2014, LG Torre Annunziata: ein blinder Angeklagter hat kein Recht auf Übersetzung der Akten in die Blindenschrift und es liegt auch keine Verletzung der Bestimmungen der Art.3, 24 und 111 der Verfassung vor.

Bestimmungen in der italienischen StPO



Art. 190-bis StPO.

Die Eigenschaften der Beweise in besonderen Fällen

1. In Verfahren wegen der Verbrechen welche in Art.51, Abs.3bis vorgesehen sind, falls die Einvernahme eines Zeugen oder einer der in Art.210 angeführten Personen beantragt wird und diese bereits eine Aussage in einem Beweissicherungsverfahren gemacht haben oder im Hauptverfahren unter Wahrung des rechtlichen Gehörs mit der Person gegen die die Aussagen verwendet werden sollen, oder einen Aussage deren Niederschrift im Sinne des Art.238 zu den Akten genommen worden ist, ist eine weitere Einvernahme nur zulässig, wenn diese Umstände zum Gegenstand hatm welche Verschieden von jenen sind, die Gegenstand der vorhergehenden Aussagen bildeten oder wenn das Gericht oder eine der Parteien diese aufgrund besonderer Bedürfnisse für notwendig erachtet wird.

1-bis. Dieselben Bestimmungen finden Anwendung, falls wegen einer von den Artikeln 600-bis, Abs.1, 600-ter, 600-quater, auch hinsichtlich des pornografischen Materials gemäß Art. 600-quater.1, 600-quinquies, 609-bis,609-ter, 609-quater, 609 quinquies e 609-octies StGB vorgegangen wird und die Einvernahme einen Zeugen betrifft, welcher unter 16 Jahre als ist und auf jeden Fall, **falls die beantragte Zeugeneinvernahme ein besonders verletzliches Tatopfer** (ital. "persona offesa in condizione di particolare vulnerabilità") **betrifft**.

(Absatz hinzugefügt durch das GvD vom 15.Dezember 2015, Nr.212)

Bestimmungen in der italienischen StPO



Art. 498 StPO (in der geltenden Fassung, nach der Novellierung durch GvD 38/09, Gesetz 93/2013, GvD 212/15)

Direkte Vernehmung und Gegenvernehmung von Zeugen

1. Die Fragen werden direkt vom Staatsanwalt oder vom Verteidiger gestellt, der die Vernehmung des Zeugen beantragt.

2. In der Folge dürfen weitere Fragen von den Parteien gestellt werden, welche die Vernehmung nicht beantragt haben, und zwar in der von Art.496 bezeichneten Reihenfolge.

3. Wer die Vernehmung beantragt hat, darf neue Fragen stellen.

4. Die Vernehmung eines Minderjährigen als Zeugen wird vom Vorsitzenden auf Grund der von den Parteien vorgeschlagenen Fragen und Gegenfragen geführt. Der Vorsitzende kann sich zur Vernehmung der Hilfe eines Familienangehörigen des Mindejährigen oder eines Fachkundigen auf dem Gebiet der Kinderpsychologie bedienen. Ist der Vorsitzende nach Anhörung der Parteien der Ansicht, dass die direkte Vernehmung den Minderjährigen nicht an einer unbefangenen Zeugenaussage hindert, so ordnet er mit Beschluss die Fortsetzung der Aussage nach den in den vorhergehenden Absätzen vorgesehenen Formen an. Der Beschluss kann im Laufe der Vernehmung widerrufen werden.

Bestimmungen in der italienischen StPO



Art. 498 StPO (in der geltenden Fassung, nach der Novellierung durch GvD 38/09, Gesetz 93/2013, GvD 212/15)

4-bis Falls eine der Parteien es beantragt, finden die Bestimmungen des Art.398, Abs.5-bis Anwendung.

4-ter Falls das Verfahren die Straftaten gemäß Art.572, 600, 600-bis, 600-ter, 600-quater, 600-quinquies, 601, 602, 609-bis, 609-ter, 609-quater, 609-octies und 612bis StGB betrifft, erfolgt die Einvernahme des minderjährigen Opfers **oder des volljährigen Opfers, welches an einer Geisteskrankheit ("ital.infermo di mente") leidet, auf Antrag desselben oder von dessen Verteidiger durch die Benützung eines Spiegelglases und einer Gegensprechanlage.**

4-quater Abgesehen von den Bestimmungen der vorangehenden Absätze, verfügt der Richter, **falls er eine besonders schutzbedürftige Person (ital. "persona particolarmente vulnerabile") anzuhören hat, auf Antrag des Tatopfers und von von dessen Anwalt, besonders geschützte Formen der Anhörung.**

Urteil Nr.283 vom 30 Juli 1997 des Verfassungsgerichtshofes



"È costituzionalmente illegittimo, per violazione dell'art. 2 Cost., l'art. 498 cod. proc. pen., nella parte in cui non consente, nel caso di testimone maggiorenne infermo di mente, che il presidente, sentite le parti, ove ritenga che l'esame del teste ad opera delle parti possa nuocere alla personalità del teste medesimo, ne conduca direttamente l'esame su domande e contestazioni proposte dalle parti, in quanto - posto che la disciplina della testimonianza e delle modalità per raccoglierla risponde anzitutto all'esigenza di assicurare la genuinità della prova, ma non può essere insensibile all'esigenza di tutelare la persona del teste nel delicato momento in cui è chiamato a deporre sui fatti e le circostanze dedotti in contraddittorio fra le parti; e che il vigente ordinamento processuale non consente in nessun caso, nell'assunzione della testimonianza di un maggiorenne, di derogare alla regola dell'art. 498 del codice, secondo cui "le domande sono rivolte direttamente dal pubblico ministero o dal difensore che ha chiesto l'esame del testimone" (comma 1), e altre domande possono essere rivolte sempre dalle parti (commi 2 e 3) - la garanzia del diritto fondamentale al rispetto della personalità esige che la stessa regola sia derogabile, non già in via generale, bensì in relazione alla concretezza delle circostanze, nel caso della testimonianza di persona inferma di mente"

Die Bestimmungen des Art.498 StPO sind in jenem Teil wegen Verletzung des Art.2 der Verfassung als verfassungswidrig anzusehen, in dem nicht vorgesehen ist, dass der Vorsitzende bei der Einvernahme eines volljährigen, unter einer Geisteskrankheit leidenden Zeugen, nach Anhörung der Parteien, direkt die Einvernahme des Zeugen vornehmen kann, unter Abweichung der allgemeinen Regel des Art.498 StPO, laut welchen die Fragen direkt vom Staatsanwalt oder vom Verteidiger gestellt werden, der die Vernehmung des Zeugen beantragt hat

Bestimmungen in der italienischen StPO



Art. 398 StPO

Verfügungen über den Antrag auf ein Beweissicherungsverfahren

(omissis)

5-bis Falls die Ermittlungen die Straftaten gemäß Art.572, 600, 600-bis, 600-ter, auch betreffend pornografisches Material gemäß Art.600-quater, 600-quinquies, 601, 602, 609-bis, 609-ter, 609-quater, 609-octies, 609-undecies und 612bis StGB betreffen verfügt der Richter, falls die Personen die von der Beweisaufnahme betroffen sind **minderjährig** sind, einen besonderen Ort, eine besondere Zeit oder eine besonderen Formen in welcher die Beweissicherung stattfinden soll, wenn dies notwendig oder angebracht ist. Zu diesem Zwecke kann die Verhandlung auch an einen **Ort außerhalb des Gerichtsgebäudes stattfinden und der Richter kann sich, falls vorhanden besonderer Einrichtungen bedienen oder die Einvernahme in der Wohnung der betroffenen Person vornehmen.**

Die Zeugenaussagen müssen vollinhaltlich **fonografisch und audiovisuell aufgezeichnet werden** (omissis).

5-ter Auf Antrag der Parteien, wendet der Richter die von Abs.5-bis vorgesehenen Bestimmungen an, wenn sich unter den von der Beweisaufnahme betroffenen Personen volljährige Personen in einer Situation von besonderer Schutzbedürftigkeit befinden.

Bestimmungen in der italienischen StPO



Art. 398 StPO

Verfügungen über den Antrag auf ein Beweissicherungsverfahren

5- quater Abgesehen von den Bestimmungen des Abs.5-ter **finden bei der Anhörung von besonders Schutzbedürftigen Tatopfern die Bestimmungen des Art.498, Abs.4- quater Anwendung.**

Einvernahme von Zeugen/Tatopfern im sog. „Spiegelsaal“ (ital.sala specchio“)



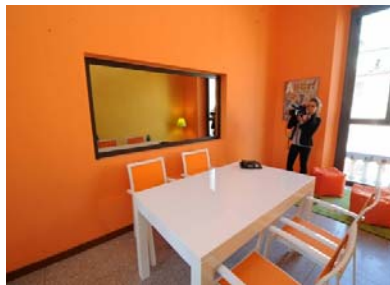
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- der Befragungsraum soll eine angenehme, freundliche Atmosphäre ausstrahlen (im Unterschied zu einem Gerichtssaal)

-im Raum befinden sich, neben dem zu befragenden Opfer bzw. nur ein Richter/eine Richterin, sowie ein Psychologe/eine Psychologin

-alle anderen Prozessbeteiligten befinden sich im Nebenraum und verfolgen die Einvernahme durch die Spiegelglasscheibe

Einvernahme von Tatopfern/Zeugen im Spiegelsaal



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- die Einvernahme wird mittels Videoaufzeichnung dokumentiert

- die Befragung erfolgt direkt durch den Richter

- Staatsanwalt und Verteidiger dürfen keine direkten Fragen stellen

- es erfolgt kein Kreuzverhör

Ital. ZPO



Art.124 ZPO

Vernehmung eines Stummen und eines Tauben

Ist im Verfahren ein Stummer, Tauber oder Taubstummer zu hören, können die Befragung und die Beantwortung schriftlich erfolgen.

Das Gericht kann erforderlichenfalls einen Dolmetscher bestellen, der einen Eid gemäß Art.122, letzter Absatz leistet.

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Spezielle Bestimmungen substanzieller und verfahrensrechtlicher Natur zur Wahrung der Rechte von Personen mit Behinderung in Straf- und Zivilverfahren



Gesetzesvertretendes Dekret Nr.216 vom 9 Juli 2003

- Art.4 sieht besondere verfahrensrechtliche Normen zum Schutz von Personen mit Behinderung gegen Diskriminierung am Arbeitsplatz vor.

Gesetz Nr.67 vom 1.März 2006

- Art.3 und 4 sehen besondere verfahrensrechtliche Normen zum Rechtsschutz gegen Diskriminierungen jeglicher Art von Personen mit Behinderung vor.

GvD Nr. 212/15

- Spezielle Bestimmungen zum Schutz von Tatopfern

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Der barrierefreier Zugang zum Gerichtsgebäude



Urteil Nr. 3376/2001 des Kassationsgerichtshofes

“Deve considerarsi legittimo l'impedimento a comparire, con conseguente nullità dell'ordinanza dichiarativa della contumacia, da parte dell'imputato disabile che non possa accedere ai locali di udienza per la presenza di barriere architettoniche, che dovrebbero essere rimosse ai sensi della legge 5 febbraio 1992, n. 104 e del DPR 24 luglio 1996, n. 503, e per il quale l'ufficio giudiziario non abbia altrimenti provveduto a consentire il dignitoso esercizio del diritto di difendersi presenziando al dibattimento”

Ein Angeklagter ist als entschuldigt abwesend anzusehen, falls es ihm aufgrund seiner Behinderung und aufgrund des Vorhandenseins von architektonischen Barrieren, welche laut Gesetz Nr.104/92 und D.P.R. Nr.503/96 eigentlich entfernt werden müssten, nicht in der Lage ist in den Verhandlungssaal zu gelangen.

Das in seiner Abwesenheit abgewickelte Verfahren ist somit als nichtig anzusehen.

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Der barrierefreie Zugang zum Gerichtsgebäude



D.P.R. Nr. 503/1996



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Workshop- Fallbeispiel



Strafverfahren gegen P.H. und A.G.

Aktenzahl Nr.463/09 Allg.Reg.

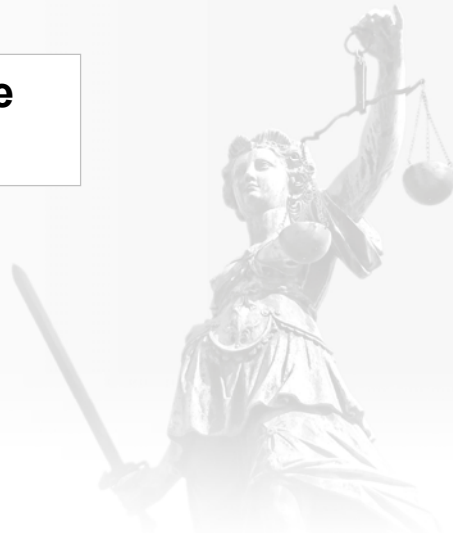
Landesgericht Bozen

wegen der Straftaten

- 1) Art.81, Abs.2, 110 und 572 StGB
- 2) Art.40, Abs.2, 110, 609bis, 609ter Abs.1, Nr.1 und 5 Abs.2, 609quater, 609octies StGB
- 3) Art.40, Abs.2, 81, 110, 609bis, 609ter, Abs.1, Nr.1 und 5, 609quater, 609octies StGB

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**Vielen Dank für die
Aufmerksamkeit**



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Article 9: Eliminating barriers to accessibility

Damjan Tatic, Ph. D, expert at CRPD Committee

- Accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society.
- Without access to the physical environment, to transportation, to information and communication, including information and communications technologies and systems, and to other facilities and services open or provided to the public, persons with disabilities would not have equal opportunities for participation in their respective societies.
- Historically, the persons with disabilities movement has argued that access to the physical environment and public transport for persons with disabilities is a precondition for freedom of movement

Article 9: Eliminating barriers to accessibility

Damjan Tatic, Ph. D, expert at CRPD Committee

- Similarly, access to information and communication is seen as a precondition for freedom of opinion and expression
- Article 12 of the International Telecommunication Regulations (Dubai, 2012) enshrines the right for persons with disabilities to access international telecommunication services, taking into account the relevant International Telecommunication Union (ITU) Recommendations. The provision of this article could serve as a basis to reinforce State parties' national legislative frameworks.
- The *World Report on Disability* (2011) stresses that the built environment, transport systems and information and communication are often inaccessible to persons with disabilities
- Persons with disabilities are prevented from enjoying some of their basic rights, such as the right to seek employment or the right to health care, due to a lack of accessible transport.

Article 9: Eliminating barriers to accessibility
Damjan Tatic, Ph. D, expert at CRPD Committee

- The Committee on the Rights of Persons with Disabilities has considered accessibility as one of the key issues in each of the ten dialogues it has held until the drafting process of this General Comment with States parties to consider their initial reports.
- After a Day of General Discussion held in Geneva, and extensive consultations that involved review of dozens of written submissions, the Committee on the Rights of Persons with Disabilities adopted General Comment Number 2 on Article 9 of the Convention on the Rights of Persons with Disabilities-accessibility
- The Committee on the Rights of Persons with Disabilities has also addressed the issue of accessibility in its jurisprudence.
- In the case of Szilvia Nyusti, Péter Takács and Tamás Fazekas v. Hungary the Committee addressed the issue of removing the barriers to accessibility of facilities and services open to the public- ATM in this concrete case.

Article 9: Eliminating barriers to accessibility
Damjan Tatic, Ph. D, expert at CRPD Committee

- In the case of Szilvia Nyusti, Péter Takács and Tamás Fazekas v. Hungary (communication No. 1/2010, Views adopted on 16 April 2013), the Committee was of the view that all services open or provided to the public must be accessible in accordance with the provisions of article 9 of the Convention on the Rights of Persons with Disabilities. The State party was called upon to ensure that blind persons had access to automatic teller machines (ATMs). The Committee recommended, inter alia, that the State party should establish “minimum standards for the accessibility of banking services provided by private financial institutions for persons with visual and other types of impairments”, “create a legislative framework with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment by private financial institutions of previously inaccessible banking services provided by them into accessible ones” and “ensure that all newly procured ATMs and other banking services are fully accessible for persons with disabilities” (para. 10.2 (a)).

Article 9: Eliminating barriers to accessibility
Damjan Tatic, Ph. D, expert at CRPD Committee

- In the case of Gerhard Fechter v. Austria (communication No. 21/2014), the Committee reviewed the issue of Accessibility to live information in public transport on an equal basis with others
- The Committee on the Rights of Persons with Disabilities, acting under article 5 of the Optional Protocol to the Convention, is of the view that the State party has failed to fulfil its obligations under article 5, paragraph 2, and article 9, paragraph 1 and paragraph 2, (f) and (h) of the Convention.
- The Committee therefore makes the following recommendations to the State party:

Article 9: Eliminating barriers to accessibility
Damjan Tatic, Ph. D, expert at CRPD Committee

- 1. Concerning the authors: the State party is under an obligation to remedy the lack of accessibility for the author to the information visually available in all lines of the tram network. The State party should also provide adequate compensation to the author for the legal costs incurred during domestic proceedings and the costs incurred in filing this communication;
- 2. General: the State party is under an obligation to take measures to prevent similar violations in the future, including by:
 - (a) Ensuring that the existing minimum standards for the accessibility of public transport guarantee the access of all persons with visual and other types of impairments to the live information visually available to other users of the tram and of all other forms of public transport. In this context, the Committee recommends that the State party create a legislative framework with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment necessary to enable the access by persons with visual impairment to the information that is visually available. The State party should also ensure that all newly procured tram lines and other public transport networks are fully accessible for persons with disabilities;

Article 9: Eliminating barriers to accessibility
Damjan Tatic, Ph. D, expert at CRPD Committee

- (b) Ensuring that appropriate and regular training on the scope of the Convention and its Optional Protocol, including on accessibility for persons with disabilities, is provided to all service providers involved in the design, construction and equipment of public transport networks, to guarantee that future networks are built and equipped in compliance with the principle of universal design;
- (c) Ensuring that disability rights laws concerned with non-discriminatory access in areas such as transport and procurement include access to ICT and the many goods and services central to modern society that are offered through ICT. The Committee recommends that the review and adoption of these laws and regulations are carried out in close consultation with persons with disabilities and their representative organizations (article 4, paragraph 3), as well as all other relevant stakeholders, including members of the academic community and expert associations of architects, urban planners, engineers and designers. Legislation should incorporate and be based on the principle of universal design, and it should provide for the mandatory application of accessibility standards and for sanctions for those who fail to apply them.

Article 9: Eliminating barriers to accessibility
Damjan Tatic, Ph. D, expert at CRPD Committee

- The rights of two deaf people in Australia were violated when they were called up for jury service but then told they could not have the support they needed, in the form of sign language interpretation and real-time captioning, to participate in the proceedings, UN experts have found.
- G.B. was called up for jury duty in New South Wales (NSW) in November 2012 and informed the body that oversees functioning of the courts, the Office of the Sheriff of New South Wales, that she would need Australian Sign Language (Auslan) interpreting. M.L. was called up three times in 2012 and told officials that he would need real-time steno-captioning.
- The Sheriff's Office said such support could not be provided, as it would undermine confidentiality by introducing a non-jury person into the jury deliberation room.

Article 9: Eliminating barriers to accessibility
Damjan Tatic, Ph. D, expert at CRPD Committee

- in both cases, the Committee found that the rights of the complainants had been violated under various articles of the Convention”, including with regard to equality and non-discrimination; accessibility; and access to justice.
- Among its recommendations, the Committee called upon Australia to enable the complainants to participate in jury duty by providing reasonable accommodation in the form of Auslan interpreting and steno-captioning, “in a manner that is respecting the confidentiality of proceedings, at all stages of the jury selection and court proceedings.”
- The Committee recommended that Australia should ensure that every time a person with disabilities is called up for jury duty, “a thorough, objective and comprehensive assessment of his/her request for adjustment is carried out, and all reasonable accommodations are duly provided to enable his/her full participation.”

Article 9: Eliminating barriers to accessibility
Damjan Tatic, Ph. D, expert at CRPD Committee

- Article 9 of the Convention clearly enshrines accessibility as the precondition for persons with disabilities to live independently, participate fully and equally in society, and have unrestricted enjoyment of all their human rights and fundamental freedoms on an equal basis with others.
- The right to access for persons with disabilities is ensured through strict implementation of accessibility standards. Barriers in the existing objects, facilities, goods, services aimed at or open to the public shall be removed gradually in a systematic and more importantly, a continuously monitored manner, with the aim of achieving full accessibility.

Article 9: Eliminating barriers to accessibility
Damjan Tatic, Ph. D, expert at CRPD Committee

- The strict application of universal design to all new goods, products, facilities, technologies and services should ensure full, equal and unrestricted access for all potential consumers, including persons with disabilities, in a way that takes full account of their inherent dignity and diversity.
- . Persons with disabilities and other users should be able to move in barrier-free streets, enter accessible low-floor vehicles, access information and communication, and enter and move inside universally designed buildings, using technical aids and live assistance where necessary.

Article 9: Eliminating barriers to accessibility
Damjan Tatic, Ph. D, expert at CRPD Committee

- Accessibility of information and communication, including information and communications technology (ICT), should also be achieved from the outset because subsequent adaptations to the Internet and ICT may increase costs. It is therefore more economical to incorporate mandatory ICT accessibility features from the earliest stages of design and production from the earliest stages of design and construction.
- Article 9, paragraph 1, requires States parties to identify and eliminate obstacles and barriers to accessibility, inter alia, to
- Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities, and workplaces;
- Information, communications and other services, including electronic services and emergency services.

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Damjan Tatic, Ph. D, expert at CRPD Committee

- The above- mentioned “other indoor and outdoor facilities” should *inter alia* include facilities of law enforcement agencies, tribunals and prisons, social institutions, areas of social interactions, recreation, cultural, religious, political and sport activities and shopping establishments.
- “Other services” should *inter alia* include facilities of post, banking, telecommunication and information services.
- Without access to information and communication, enjoyment of freedom of thought and expression and many other basic rights and freedoms for persons with disabilities may be seriously undermined and restricted.

Article 9: Eliminating barriers to accessibility
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- Article 9, paragraphs 2 (f) and (g), of the Convention therefore provide that States parties should promote appropriate forms of assistance and support to persons with disabilities to ensure their access to information, and promote access for persons with disabilities to new information and communications technologies and systems, including the Internet, through the application of mandatory accessibility standards.
- Information and communication should be available in easy- to- read formats, alternative and augmentative modes and methods to persons with disabilities who use such formats modes and methods.

Article 9: Eliminating barriers to accessibility
Damjan Tatic, Ph. D, expert at CRPD Committee

- Article 9, paragraph 2 (h), therefore calls on States parties to promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.
- The use of hearing enhancement systems including ambient assistive systems to assist hearing aid and induction loop users, and passenger lifts pre-equipped to allow use by persons with disabilities during the emergency building evacuations constitute just some of the examples of technological advancements in the service of accessibility.

Article 9: Eliminating barriers to accessibility
Damjan Tatic, Ph. D, expert at CRPD Committee

- States parties are obliged to adopt, promulgate and monitor national accessibility standards. If no relevant legislation is in place, adopting a suitable legal framework is the first step.
- Often, disability laws fail to include ICTs in their definition of accessibility, while disability rights laws concerned with non-discriminatory access in areas such as procurement, employment and education fail to include access to ICT and the many goods and services that are central to modern society that are offered through ICT.
- It is important that the review and adoption of these laws and regulations are carried out in close consultation with persons with disabilities and their representative organizations (art. 4, para. 3), as well as all other relevant stakeholders, including members of the academic community, expert associations of architects, urban planners, engineers and designers.
- Legislation should incorporate and be based on the principle of universal design

Article 9: Eliminating barriers to accessibility
Damjan Tatic, Ph. D, expert at CRPD Committee

- It is helpful to mainstream accessibility standards that prescribe various areas that have to be accessible — the physical environment in laws on construction and planning, transportation in laws on public aerial, railway, road and water transport, information and communication, and services open to the public.
- However, accessibility should be encompassed in general and specific laws on equal opportunities, equality and participation in the context of the prohibition of disability-based discrimination.
- Denial of access should be clearly defined as a prohibited act of discrimination. Persons with disabilities who have been denied access to the physical environment, transportation, information and communication, or services open to the public should have effective legal remedies at their disposal.
- It is necessary to establish minimum standards for the accessibility of different services provided by public and private enterprises for persons with different types of impairments.

Article 9: Eliminating barriers to accessibility
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- As part of their review of accessibility legislation, States parties must also consider their laws on public procurement. They should ensure that their public procurement procedures incorporate accessibility requirements.
- It is unacceptable to use public funds to create or perpetuate the inequality that inevitably results from inaccessible services and facilities. Public procurements should be used to implement affirmative action

Article 9: Eliminating barriers to accessibility
Damjan Tatic, Ph. D, expert at CRPD Committee

- States parties should adopt action plans and strategies to identify existing barriers to accessibility, set time frames with specific deadlines and provide both the human and material resources necessary to remove the barriers. Once adopted, such action plans and strategies should be strictly implemented.
- States parties should also strengthen their monitoring mechanisms in order to ensure accessibility and they should continue providing sufficient funds to remove barriers to accessibility and train monitoring staff.
- As accessibility standards are often implemented locally, continuous capacity-building of the local authorities responsible for monitoring implementation of the standards is of paramount importance. States parties are under an obligation to develop an effective monitoring framework and set up efficient monitoring bodies with adequate capacity and appropriate mandates to make sure that plans, strategies and standardization are implemented and enforced.

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Damjan Tatic, Ph. D, expert at CRPD Committee

- **Thank you for your attention**

Disability in Employment

Philip Rostant
Employment Judge
Employment Tribunals England and Wales



UNCRPD and Employment-Article 27

Appropriate steps, including through legislation to...

- **Prohibit discrimination** on the basis of disability;
- **Protect the rights** of persons with disabilities;
- Ensure that **reasonable accommodation** is provided to persons with disabilities in the workplace;
- Promote access to training, vocational guidance, work experience and other **measures designed to improve access by people with disabilities to the job market.**

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

Employ persons with disabilities in the public sector;

Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

Promote the acquisition by persons with disabilities of work experience in the open labour market;

Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

The constitutional position (1)

- The UNCRP is '**programmatic**'.
- The provisions of the UN Convention are subject, to the **adoption of subsequent measures** which are the responsibility of the Contracting Parties.
- The provisions of the Convention **do not have direct effect** in European Union law.
- *Z v A Government Department* .

Individual member states will have their own constitutional arrangements and I am not able to talk about what the status of Article 27 is across all of the countries of the European Union. I can however discuss the position in European law.

This extract comes from the judgement of the Court in *Z*

“88 Therefore, as the Advocate General noted in point 114 of his Opinion, in so far as the obligations imposed by that Convention are addressed to Contracting Parties, that international agreement is ‘programmatic’.

89 Consequently, the provisions of the UN Convention are subject, in their implementation or effects, to the adoption of subsequent measures which are the responsibility of the Contracting Parties. In that context, Annex II to Decision 2010/48 contains a declaration concerning the competence of the European Union with regard to matters governed by the UN Convention and the European Union acts which refer to matters governed by that Convention.

90 In those circumstances, without there being any need to examine the nature and broad logic of the UN Convention, it must be held that the provisions of that Convention are not, as regards their content, provisions that are unconditional and sufficiently precise within the meaning of the case-law cited in paragraphs 85 and 86 of the present judgment, and that they therefore do not have direct effect in European Union law. It follows from this that the validity of Directive 2000/78 cannot be assessed in the light of the UN Convention.”

Z v A Government Department . Case C -363/12 ECLI:EU:C:2014:159

Ending Discrimination-Promoting Participation

UNCRPD-Art 27



Council Directive 2000/78/EC of 27
November 2000

Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation

United Nations Convention on the Rights of People with Disabilities

The constitutional position (2)

- International agreements concluded by the European Union are **binding** on its institutions, and **prevail over acts of the European Union**
- Instruments of the European Union must as far as possible be **interpreted in a manner that is consistent** with those agreements
- The EU has approved the UN Convention. The provisions of that convention are an **integral part of the European Union legal order**.
- **Directive 2000/78** (the Framework Directive) must, as far as possible, **be interpreted in a manner consistent with that convention**.
- *Ring*

Below is the relevant part of the Court's Judgment in *Ring*

“28 It should be noted, as a preliminary point, that, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding on its institutions, and consequently they prevail over acts of the European Union (Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755, paragraph 50 and the case-law cited).

29 It should also be recalled that the primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements (Joined Cases C-320/11, C-330/11, C-382/11 and C-383/11 *Digitalnet and Others* [2012] ECR, paragraph 39 and the case-law cited).

30 It follows from Decision 2010/48 that the European Union has approved the UN Convention. The provisions of that convention are thus, from the time of its entry into force, an integral part of the European Union legal order (see, to that effect, Case 181/73 *Haegeman* [1974] ECR 449, paragraph 5).

31 Moreover, according to the appendix to the Annex II to that decision, in the field of independent living and social inclusion, work and employment, Directive 2000/78 is one of the European Union acts which refer to matters governed by the UN Convention.

32 It follows that Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with that convention.”

HK Danmark, acting on behalf of Ring v Dansk Almennyttigt Boligselskab; HK Danmark, acting on behalf of Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S Cases C-335/11 and 337/11 ECLI:EU:C:2013:222 (hereafter *Ring*)

**Council Directive 2000/78/EC of 27 November 2000
(the Framework Directive)**

- Article 1
- The purpose of this Directive is to lay down a general framework for **combating discrimination** on the grounds of, ...**disability**,as regards employment and occupation, with a view to putting into effect in the Member States the **principle of equal treatment**.

We now know that the **principle of equal treatment** is a **fundamental principle** of European law (see for example Case C-144/04 *Mangold v Helm* [2005] ECR I-09981) and that this means that **national law which cannot be interpreted consistently with European instruments guaranteeing the principle of equal treatment must be disapplied** (see *Dansk Industri (DI) acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* Case C-441/14.) In this way, the UNCRPD as interpreted by the CJEU when interpreting the Framework Directive, has direct application in the law on disability discrimination of each member state.

The Framework Directive

Article 2

Concept of discrimination

For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no **direct** or **indirect discrimination** whatsoever on any of the grounds referred to in Article 1.

+

harassment (Article 2(3))

victimisation (Article 11).

reasonable accommodation (Article 5)

Article 1 of the Directive sets out the prohibited grounds for discrimination and includes **disability** without defining what disability is. Of course, the Court has since filled that gap.

A claim of disability discrimination

Preliminary considerations

- Disability
- Nature of claim
- Nature of the disability
- Knowledge of disability

Is the claimant disabled? The CJEU in *Coleman* confirmed that the duty to make adjustments only applies in cases where the claimant actually has a disability.

Or is she/he associated with someone who is disabled? In *Coleman*, the CJEU confirmed that a complaint of direct discrimination could be brought by someone *associated* with a person with a disability and it seems that that principle has been extended to claims of indirect discrimination in C-83/14 *CHEZ Razpredelenie Bulgaria AD*.

Also, potentially, **has the claimant been perceived as disabled?** As yet there is no case law on the question of “perceived disability” but the reasoning particularly in paragraphs 22 and 23 of AG Maduro’s opinion in *Coleman* (of which more later) would seem to apply just as persuasively to the idea of perceived disability as it does to association with it.

AG Jaaskinen in his opinion in *Kaltoft* referred to the possibility of discrimination on the basis of perception but concluded that it was not a necessary in that case “to take a stand on this difficult legal question”. He did however refer to paragraph 4.5 of the Report from the Commission to the European Parliament and the Council Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘Racial Equality Directive’) and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (‘Employment Equality Directive’) COM (2014) 2 final. Rather tentatively that report concludes that the directives to extend protection to people received to possess a protected characteristic.

What claim is being brought? Unless we establish the nature of the claim we will not know what we need to consider, what needs to be proved by whom.

What is the nature of the disability? In many cases, particularly cases for reasonable adjustments the claim cannot be decided without an understanding of the nature of the disability. What is the physical or mental impairment, what are the barriers to full participation in the workplace, what are the functional deficits caused by the impairment.? In some cases, there may be more than one impairment and for each impairment the court must decide that whether the definition of disability is met.

Did the employer know of the disability? As we will see, some cases will fail if the employer can show that it did not know of the disability.

The Concept of Disability

A medical model



So far, the most obvious effect of the coming in to force of the Convention has been on the **definition of disability** adopted by the Court in interpreting the Framework Directive. The Directive has no definition of disability and the matter was first addressed in *Chacón Navas v Eurest Colectividades SA* Case C-13/05 ECLI:EU:C:2006:456 [2006] ECR I-6467.

‘In that context, the concept of “disability” must be understood as referring to a limitation which results in particular from physical mental or psychological impairments which hinders the participation of a person in professional life.’ para 43.

This is a “medical model” of disability. It holds that the effect of an ‘impairment’ upon function is what creates the disability. So a person who has impaired mobility is disabled because their ability to walk is limited.

It is the model adopted by the UK in its Equality Act and a number of other member states (See European Public Law, Vol. 22 (3), forthcoming 2016, 1-Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints-Silvia Favalli and Delia Ferri)

The Concept of Disability

A social model



Article 1 - Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

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

Responding to its obligations to interpret the Directive in accordance with the Convention the Court in *Ring* said:

'47 It follows from the above considerations that the answer to Questions 1 and 2 is that the concept of 'disability' in Directive 2000/78 must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which *in interaction with various barriers* (my emphasis) may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one.'

It follows that the worker may not have any physical difficulty at all but may still be disabled by for example the attitudes of colleagues to his impairment. In my view this would now extend to people with facial disfigurements or with other stigmatising conditions.

The Concept of Disability



This is potentially a very significant change of approach. It has been affirmed by later decisions including the most recent, *Fag Og Arbejde acting on behalf of Karsten Kaltoft v Kommunernes Landsforening acting on behalf of the Municipality of Billund*, Case C-354/2013 ECLI:EU:C:2014:2463. (*Kaltoft*). The Court was asked to rule whether obesity could be a disability under the Directive and, following *Ring*, concluded:

“59 However, in the event that, under given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of ‘disability’ within the meaning of Directive 2000/78 ... “

It may be significant that the Court is saying that the barriers must be such as to inhibit participation in *professional life*. This is not surprising, given the scope of the Directive, and it is not entirely clear whether that qualification to the broader formulation makes any real difference in practice.

In *Z v A Government Department* Case C-363/12 ECLI:EU:C:2014:159 The CJEU found, following *Ring*, that the UNCRD was capable of being relied upon in interpreting the Framework Directive and in particular as to the concept of disability (see paras 70-76). However it went on to state that the Framework Directive presupposed that disability had to be understood as arising from the interaction between an impairment and the relevant barriers such as to hinder that person’s **full and effective participation in professional life** on an equal basis with other workers’ (para 80). The CJEU asserted that the UNCRD is essentially programmatic in nature and is not capable of being relied on directly so as to challenge the validity of the Framework Directive.

Since the Framework Directive is limited in its scope to discrimination in relation to work, a wider definition of disability, establishing the existence of disability even where the impairment in question has no impact on the ability to participate in work, was not required. This may be seen as something of a check to the idea that there has been a wholesale embracing of the social model in its broadest sense.

Proving disability

- Impairment
- Long-term
- Functional deficit and/or
- Barriers hindering full and effective participation {in society}
- In the workplace

It will be for the worker to bring evidence to show that she or he is a person with a disability. That evidence must address all of the above elements. The Article does not define long term, although it is open to national legislators to define long term and in the UK it is 12 months.

Proving discrimination

Framework Directive-Art 10.

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, **when persons who consider themselves wronged** because the principle of equal treatment has not been applied to them **establish**, before a court or other competent authority, **facts from which it may be presumed that there has been direct or indirect discrimination**, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

The so called reverse burden of proof applies wherever there is a claim that the principle of equal treatment has not been applied. The Article makes it clear that the reverse burden must be applied in cases of indirect and indirect discrimination and harassment since the latter is specifically included as a form of discrimination.

It is not so obvious that it should be applied in complaints of failure to make a reasonable accommodation or victimisation. In the UK transposition of the Directive, both of these prohibited conducts are classified as types of discrimination and the reverse burden is applied to them also, but the Framework Directive is not so clear. However in my view the better approach is to treat Article 5 and Article 11 as part of the “**general framework for combating discrimination**”. That framework is intended to give effect to the **principle of equal treatment** and Article 10 is intended to apply wherever a person believes they have been wronged because the that principle has not been applied to them. The scope for a reverse burden in a complaint of failure to make a reasonable accommodation is more limited but there is certainly a place for it in victimisation which is very similar, in its effect, to direct discrimination.

In the case of a claim of disability discrimination the facts must include the facts necessary to establish the *existence of disability*, or possibly perception of disability. They will include also the facts necessary to establish that a person has been *wronged*. If a person with a disability can establish those matters then it will be for the national court to decide whether those facts alone, or in combination with other facts, are sufficient to allow the court to presume that discrimination could have taken place. If so, then it will be for the employer to prove that the protected characteristic of disability in no sense whatsoever influenced the treatment of the claimant.

Knowledge of disability?

- Direct discrimination
- Indirect discrimination
- Harassment
- Reasonable accommodation

This passage from the judgment in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia, Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane*. Case C-83/14 [2016] ECLI:EU:C:2015:480 (CHEZ) makes it clear that for a finding of **direct discrimination** the treatment complained of must be motivated by the existence of the protected characteristic. If the employer is ignorant of the characteristic (possible in cases of disability) it follows that any treatment cannot be for a reason relating to the characteristic.

“91. In the light of all the foregoing, the answer to the second, third and fourth questions is that Article 2(2)(a) of Directive 2000/43 must be interpreted as meaning that a measure such as the practice at issue **constitutes direct discrimination** within the meaning of that provision **if that measure proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned**, a matter which is for the referring court to determine by taking account of all the relevant circumstances of the case and of the rules relating to the reversal of the burden of proof that are envisaged in Article 8(1) of the directive.”

I think that the matter is less clear cut in European Law for the other types of claims. The definition of Indirect Discrimination (see slide 21) does not appear to require that the employer knows of the existence of a disability, merely that there is a policy criterion or practice which has the effect of putting people with a particular disability at a disadvantage.

The definition of harassment requires that there be unwanted treatment meeting the definition of harassment **related** to the protected characteristic. Conceivably that could be treatment which was done in ignorance of the existence of disability but was related to the disability, for example making jokes about a colleague’s poor spelling or slow reading without being aware that that colleague was disabled because they had dyslexia.

As to the requirement for reasonable accommodation it is hard to see in practical terms how that could come about unless the employer knew what it was it was expected to accommodate

but again the wording of Article 5 leaves room for doubt.

Reasonable accommodation(1)

Recital 16

The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

I want to turn first to the concept of reasonable accommodation.

The Framework Directive complies with the EU's obligation to put in place a measure which will ensure reasonable accommodation through the medium of Article 5. This idea is unique to disability. So far it has been resisted in other areas where it might also be a useful concept, for example religion and belief and pregnancy and maternity. It is however absolutely central to the promotion and preservation of the ability of people with disability to participate in the workplace. Note that the Directive situates the requirement to provide reasonable accommodation firmly within the context of anti-discrimination.

Reasonable accommodation(2)

- **Article 5**
- Measure to ensure **compliance with the principle of equal treatment**
- Requires employers to take **appropriate measures**, where **necessary**, 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.

Article 5

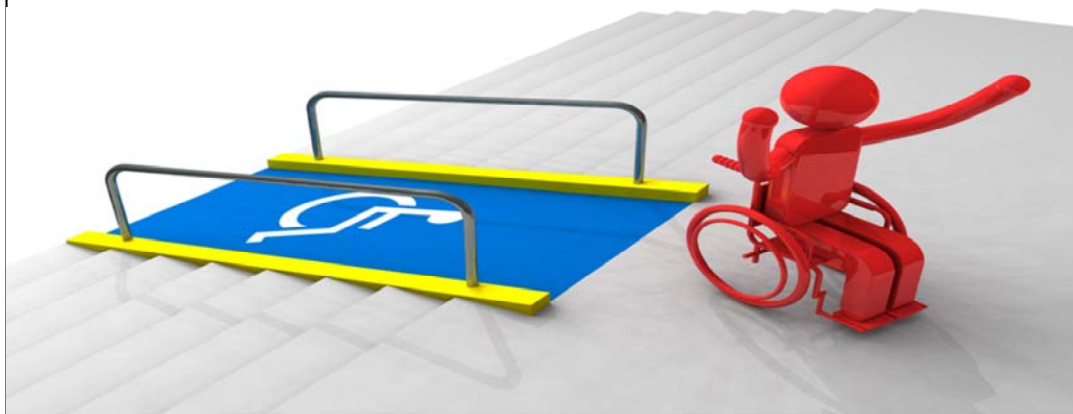
Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation 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 measures existing within the framework of the disability policy of the Member State concerned.

It is clear (in my view at any rate) that the Directive intends to treat a breach of a failure to make reasonable accommodation as a form of discrimination. Although this is not explicit, as it is in Article 2 of the Convention it is implicit from the reference in Article 5 of the Directive to the principle of equal treatment.

Appropriate and necessary

- Measure must address the barrier or difficulty.
- Without the measure, the person with the disability is prevented or hindered from participation.



Recital (20) of the Framework Directive gives the following non-exhaustive list

“ Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources. “

The Court in *Ring* said:

”50 Neither Article 5 of Directive 2000/78 nor recital 20 in its preamble mentions reduced working hours. However, the concept of ‘patterns of working time’ mentioned in that recital must be interpreted in order to determine whether an adaptation of working hours may be covered by that concept.

51 DAB and Pro Display submit that that concept refers to such matters as the organisation of the patterns and rhythms of work, for example in connection with a production process, and of breaks, so as to relieve as much as possible the burden on workers with disabilities.

52 However, it does not appear from recital 20 in the preamble or from any other provision of Directive 2000/78 that the European Union legislature intended to limit the concept of ‘patterns of working time’ to such elements and to exclude the adaptation of working hours, in particular the possibility for persons with a disability who are not capable, or no longer capable, of working full-time to work part-time.

53 **In accordance with the second paragraph of Article 2 of the UN Convention, ‘reasonable accommodation’ is ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’. It follows that that provision prescribes a broad definition of the concept of ‘reasonable accommodation’.**

54 Thus, with respect to Directive 2000/78, that concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers.

55 As recital 20 in the preamble to Directive 2000/78 and the second paragraph of Article 2 of the UN Convention envisage not only material but also organisational measures, and the term ‘pattern’ of working time must be understood as the rhythm or speed at which the work is done, it cannot be ruled out that a reduction in working hours may constitute one of the accommodation measures referred to in Article 5 of that directive.

56 It should be observed, moreover, that the list of appropriate measures to adapt the workplace to the disability in recital 20 in the preamble to Directive 2000/78 is not exhaustive and, consequently, even if it were not covered by the concept of ‘pattern of working time’, a reduction in working hours could be regarded as an accommodation measure referred to in Article 5 of the directive, in a case in which reduced working hours make it possible for the worker to continue employment, in accordance with the objective of that article.”

Note the reference to the Convention when the Court explains why the idea of reasonable accommodation should be interpreted broadly

Disproportionate burden

- The duty is only to provide *reasonable* accommodation



Recital 17 of the Framework Directive says

“(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.”

Recital 21 says

“(21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.”

Structured approach



Identify the nature of the disability

Identify the aspect of the work that is said to hinder the disabled person's ability to participate in work

Identify what adjustments are necessary and appropriate to overcome the barrier to participation

Identify whether any of those adjustments place a disproportionate burden on the employer

Direct Discrimination

Article 2(2)

*“2. For the purposes of paragraph 1: **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**, on **any of the grounds** referred to in Article 1;”*

Let us look now at direct discrimination

In the context of disability discrimination we now know that this Article extends protection not just to people who are themselves disabled but to those who are closely associated with people who have a disability. see Case C-303/06 *Coleman v Attridge Law and others* ECLI:EU:C:2008:415 [2008] ECR I-5603. In that case, Mrs Coleman considered that she was suffering discrimination because of her association with her son. Mrs Coleman was not a person with a disability but her son was.

In fact, proving direct discrimination on the ground of disability is very difficult. At least in UK law, the worker has to show that it is the disability *itself* that is the cause of the less favourable treatment and not, for example, something that arises because of the disability such as absence from work. A complaint of direct discrimination can often be met by an employer saying “I am not treating him differently because of his disability. Other non-disabled workers with a poor attendance record at work are also treated this way.”

Direct Discrimination

Comparable situation



10 years relevant experience
University degree
Further professional qualifications



10 years relevant experience
University degree
Further professional qualifications
History of depression

Here are two applicants for a managerial position in an office. They are equally qualified and experienced and what marks them apart, at least until they have been interviewed, is that the man on the right has a history of poor mental health and has identified himself as such on his application form.

Direct Discrimination

Treated less favourably



The man on the left has got a letter inviting him to interview. The one on the right has not.

Direct Discrimination

On any of the grounds



Depression?

Can we conclude that our unsuccessful candidate has been treated less favourably than the other comparable candidate because of his history of depression? If so, this is an example of direct discrimination unless there is some aspect of the job that means that depression makes him unsuitable for the job and for which no reasonable adjustment can be made.

Recital 17 of the Directive reads

“This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.”

Indirect Discrimination

Article 2(2)

(b) **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 unless:**

- (i) that provision, criterion or practice is **objectively justified** by a **legitimate aim** and the means of achieving that aim are **appropriate and necessary,**

The conceptual difficulty when considering a claim of indirect discrimination in the disability context is the interaction of such a claim with a complaint that the employer has failed to make a reasonable accommodation. The close connection between the concept of a neutral provision and the idea of a barrier to participation in employment which requires an accommodation, and a similarly close connection between the defences of objective justification and disproportionate burden means that it is difficult in many cases to see when one would apply and not the other. The CJEU in *Ring*, which was a case about reasonable accommodation (see above) commented that the case could also be pursued as a claim of indirect discrimination.

I can see two possible areas where the difference may matter.

The case of *Odar v Baxter Deutschland GmbH* Case C-152/11 [2012] ECLI:EU:C:2012:772. an occupational redundancy scheme which had the effect of disadvantaging workers who met the German national definition of severely disabled. Although the case was brought (and won) on the basis that the apparently neutral provision in fact impacted more heavily on disabled people and could not be objectively justified, such a claim cast as one of reasonable adjustment might have failed because the relevant rule did not hinder *participation in, or access to, the workplace* and therefore there would be no obligation to make a reasonable accommodation.

Another area of potential differentiation may be derived from the decisions in *Coleman* and *CHEZ*. *Coleman* confirms that complaint of failure to make a reasonable adjustment can only be pursued by a person *with* a disability. *CHEZ* seems to be saying that a complaint of direct discrimination can be pursued by a person *associated* with a person with the relevant protected characteristic. (In the case of *CHEZ* the characteristic was race-Roma- but in principle the same reasoning could apply in the area of disability.)

Harassment

Article 2(3)

- Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when **unwanted conduct related to any of the grounds** referred to in Article 1 takes place with the **purpose** or **effect** of **violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment...**

Note how, as in the cases of Direct and Indirect Discrimination, the definition can be broken down in to mutually dependent parts.

Harassment

Unwanted conduct



Let us imagine that our worker with depression often refuses invitations to join in social activities amongst his colleagues and on some days will be silent and withdrawn, not joining in the conversation in the office and preferring to take breaks on his own. Occasionally he is even irritable. This is because of his illness although his colleagues do not know that he has a diagnosis of depression. Soon, his colleagues stop including him in invitations and some do not even bother to say hello to him in the morning, finding him unfriendly and moody. He overhears colleagues commenting on how unfriendly he is. He feels very isolated and he complains about this to his manager.

This is a clear case of unwanted conduct.

Harassment

Related to any of the grounds



Is this unwanted treatment related to the claimant's disability.? It is not because he has a diagnosis of depression. His colleagues do not know that. But it is because of behaviour which is because of his depression and therefore it is **related** to the ground of disability.

Harassment

Purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment



Victimisation

Article 11

“Victimisation

*Member States shall introduce into their national legal systems such measures as are necessary to protect employees against **dismissal or other adverse treatment** by the employer as a **reaction to a complaint** within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.”*

Victimisation

Dismissal or other adverse treatment



In our example above, the depressed worker has complained about his treatment. The manager speaks to the rest of the staff and, with the worker's permission, explains about his illness. His colleagues resent being told by their manager who they should include in their social invitations and resent the depressed worker for complaining about them. The next time there is an office social event they arrange it in secret and do not invite the claimant. The claimant finds out about it and is very distressed.

This intensification or continuation of the original conduct is adverse treatment and provided that it can be linked to the original complaint it amounts to victimisation. In most member states (Spain and Denmark being the exceptions

(ec.europa.eu/justice/discrimination/.../final_beyond_employment_en.pdf) where the law includes a provision that makes the employer liable for the conduct of the employees it would not matter that the adverse treatment was not actually done by the manager.

Positive action

- Article 7
- 1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.
- 2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

There is a large body of case law from the Court about positive action measures although none that relates directly to disability. The jurisprudence is complicated and deals almost entirely with quota schemes for the appointment and promotion of women.

Despite the generality of the provisions in the Article all forms of positive action must be seen as an exception to the requirement not to discriminate. Any positive treatment of a disabled person, for example by automatically promoting any suitably qualified disabled candidate for a post, runs the risk of discriminating against non-disabled potential candidates.

The provision in the Framework Directive aims to permit measures that prevent or compensate for the disadvantage suffered by the protected groups in employment. The aim of positive action provisions is therefore to promote greater equality through policies, programmes or other measures. A summary of the jurisprudence establishes the following principles. In order to be lawful positive action measures must: a) address a particular disadvantage of a group which is supported by evidence; b) be proportionate; and c) only continue as long as the disadvantage continues. It does not, however, permit positive discrimination in favour of a protected group where one group is automatically given preferential treatment. This would be unlawful discrimination.

The End

Thank You

Case Study

Introduction

You have just finished hearing a case of discrimination brought by Klaus. The case was against his former employer Sadistisch Fitness-Studios GmbH (SFS) which owned the gymnasium in Trier where he worked until he was dismissed.

Klaus gave evidence at the hearing as did Philipp the regional manager, and Klaus's immediate line manager Magda, the head of administration at the gymnasium. Ursula, the manager of the gymnasium at the relevant time did not attend the hearing. By the time the case came to court, she had left the employment of SFS to work as the private fitness coach for a billionaire based in Bermuda.

The following facts have been established.

- 1 Ursula is a former professional athlete and remains very fit. Klaus was employed in administration.
2. The gymnasium has a modern open plan reception area. Klaus's office was on the first floor and to reach it from the main administration office on the ground floor he had to cross reception and go up an open flight of stairs. Klaus regularly had to go between the two offices several times a day and when he did so it was in full view of the customers of the gymnasium who were arriving and leaving. The alternative to the open plan stairs was to take the lift.
3. Klaus is HIV positive and is significantly overweight although not clinically obese. He told the Court that he found using the stairs, particularly if he had to do so several times in a short space of time, very tiring and he sometimes got out of breath. This was made even worse if he had to carry anything of any weight, such as paper files or packets of bottled water. For this reason, he almost always used the lift, even though it was often slower than taking the stairs due to the fact that was the only lift and it served several floors.
4. SFS was concerned about the financial performance of this particular gymnasium, which is in competition with two others in

Trier. When she was appointed, Ursula set about improving the image of the gymnasium. She directed that all staff, even those working in reception and in administration must wear SFS tracksuits at work. Klaus hated this. He thought he looked ridiculous in a track suit because of his weight. His colleagues, who had never mentioned it before, now started making comments about his clothing. The comments were, prima facie, sympathetic. For instance, he was encouraged to take off the tracksuit top when he was in the main administration office, out of sight to gymnasium users, because he must “find it very hot”. He was also asked by the person in charge of ordering tracksuits for the staff whether she should look for a larger size because the one she had ordered for him “looks a bit uncomfortable”. On another occasion, in his hearing, two of his younger colleagues discussed the requirement to wear tracksuits and one of them said that she did not mind but that she thought that other people might mind because “tracksuits do not look good on everybody”. Klaus found these comments insensitive and upsetting.

5. At a staff meeting, Ursula announced that the use of the lift by staff only going as far as the first floor was inefficient and presented a bad image for the gymnasium users. She directed that all staff only going to the first floor must use the stairs, unless they were carrying anything heavy. One afternoon, she saw Klaus walk across reception and stand waiting for the lift. She called across to him to remind him that she expected him to take the stairs if he was only going up one floor. Reluctantly Klaus took the stairs. Later that day he complained to Ursula that it was unreasonable to require him to use the stairs every time and that an exception should be made for him. Ursula did not agree and said that if she saw Klaus using the lift again he would be disciplined.

6. A few weeks later, at the end of a long hot afternoon, Ursula spotted Klaus, carrying a packet of six 33cl bottles of mineral water, coming out of the lift on the first floor. She immediately called him in to her office. Klaus explained that he thought that he was not breaking the rule about using the lift because he was carrying a heavy object. He also pointed out that his colleague, Karin, was permitted to use the lift when she was carrying water bottles. Ursula was not impressed. She did not agree that the water bottles were heavy for a man. She warned Klaus that if she saw him using the lift again, against the rule, he would be dismissed.

7. Klaus appealed this warning to the Regional Manager Philipp. In his appeal he said that he believed that Ursula had discriminated against him because of his weight and that he believed that that was discrimination because of disability. His appeal was dismissed.
8. A few months later, there was a redundancy exercise. Ursula announced that the gymnasium was not performing well enough and that to save money some staff would have to be dismissed. The gymnasium employs fitness instructors, who tend to be in their 20s and 30s, as well as administration staff. She decided that the fitness instructors must remain but that she could make savings in administration.
9. Klaus was one of three administration staff selected for redundancy by Magda the head of administration. At the time of his selection, the gymnasium had a vacancy for a trainee fitness instructor, which was first offered to the three redundant administration staff. All three applied as an alternative to being dismissed. Ursula was on the selection panel. Klaus was not selected. When he asked why, he was told that his image was wrong for the job and also that it was not clear that he had the necessary levels of personal fitness. The person selected was 27 and, although slim, is a heavy smoker.
10. There was also a vacancy for a manager for the restaurant in the gymnasium. Klaus has previous experience in catering and applied for the vacancy. He was the only person to do so. Ursula was also responsible for appointing to this post. She refused to appoint Klaus. She failed to give a reason and Klaus suspects that it is because she is concerned about his HIV positive status.

Questions

1. Do you think that Klaus is a person with a disability?

For the remaining questions assume that Klaus meets the definition of disability.

3. Assess the chances of any Klaus's following claims succeeding.

3.1 Direct Discrimination

3.2 Harassment

3.3 Breach of the duty to make a reasonable accommodation

3.4 Indirect Discrimination

3.5 Victimisation

Does your approach change to any of your findings, including your decision on disability, if the following facts are also established?

1. Klaus is a very keen swimmer and swims a kilometer every day before work although he did not mention that when he was interviewed for the trainee fitness coach job.
2. You conclude that Magda was not being truthful when she said in court that the selection decision for the redundant administration staff was made by her alone and that Ursula was not involved at all.
3. SFS produces evidence that if administrative staff used the lift every time they needed to go upstairs they would, on average spend 30 minutes a day waiting for it to come.

Philip Rostant

Detention of persons with disabilities

Europäische Rechtsakademie, ERA

Trier

14.06.15

Sie befinden sich in Teil A

14:00 PARALLEL SESSIONS

A. Detention of persons with disabilities
Marc Lehmann

B. Disability in employment
Philip Rostant

Kurzvita

- LMD Dr. Marc Lehmann *1963
- 1982 Nach dem Abitur Sanitätsoffizieranwärter Bundeswehr und Studium Humanmedizin Universität zu Köln, Promotion
- 1989 Sanitätsoffizier Marine und Heeresflieger
- 2000 Anstaltsarzt Jugendanstalt Hameln
- 2007 Medizinische Fachaufsicht Justizvollzug, Land Mecklenburg Vorpommern
- 2007 nationaler Repräsentant in der PH EG der NDPHS
- 2009 Ärztlicher Direktor Justizvollzugskrankenhaus und Leiter Anstaltsärztlicher Dienst Justiz, Land Berlin
- 2016 Vorsitzender der NDPHS Expert Group Prison Health

Fragen an das Auditorium?

- Welche Teilnehmer/-innen beschäftigen sich mit Strafrecht?
- Wer ist im Bereich des Strafvollzugsrecht tätig?
- Hat jemand schon einmal eine Behinderungsproblematik in Bezug auf staatliche Freiheitsentziehung bearbeitet.

In medias res.

(Horaz, >>Ars Poetica<< 148)

Mitten in die Sache hinein.

Zur Sache / zum Wesentlichen (kommen).

- Der römische Dichter Quintus Horatius Flaccus (Horaz, 65 - 8 v. Chr.) genoss die Unterstützung und Förderung von Maecenas und Augustus. In seinen Episteln >>Ars poetica<< (Dichtkunst) lobt er Homer (griechischer Dichter, 8. Jh. v. Chr.) über alle Maßen. Dieser habe es verstanden, sofort zur Sache zu kommen und den Zuhörer von vorneherein << in medias res<< zu führen.

Wo gibt es „Detention“

Detention may refer to:

[School detention, a form of punishment used in schools](#)

[Detention \(imprisonment\), imprisonment of someone guilty or suspected of a crime](#)

[Detention basin, an artificial flow control structure that is used to contain flood water for a limited period of a time](#)

[Remand \(detention\), the keeping in custody of an arrested person awaiting adjudication](#)

[Immigration detention, imprisonment of an unauthorised person entering a country](#)

Detention of an individual with symptoms of severe mental illness (for the legal procedure involving a court order, see [Involuntary commitment](#))

[Preventive detention](#)

- Haft
- Strafvollzug
- U-Haft
- Psychiatrie
- Polizei
- Abschiebegewahrsam
- Flüchtlingscamps
- Lager
- Geschlossene Pflegeheime
- Geschlossene Jugendheime

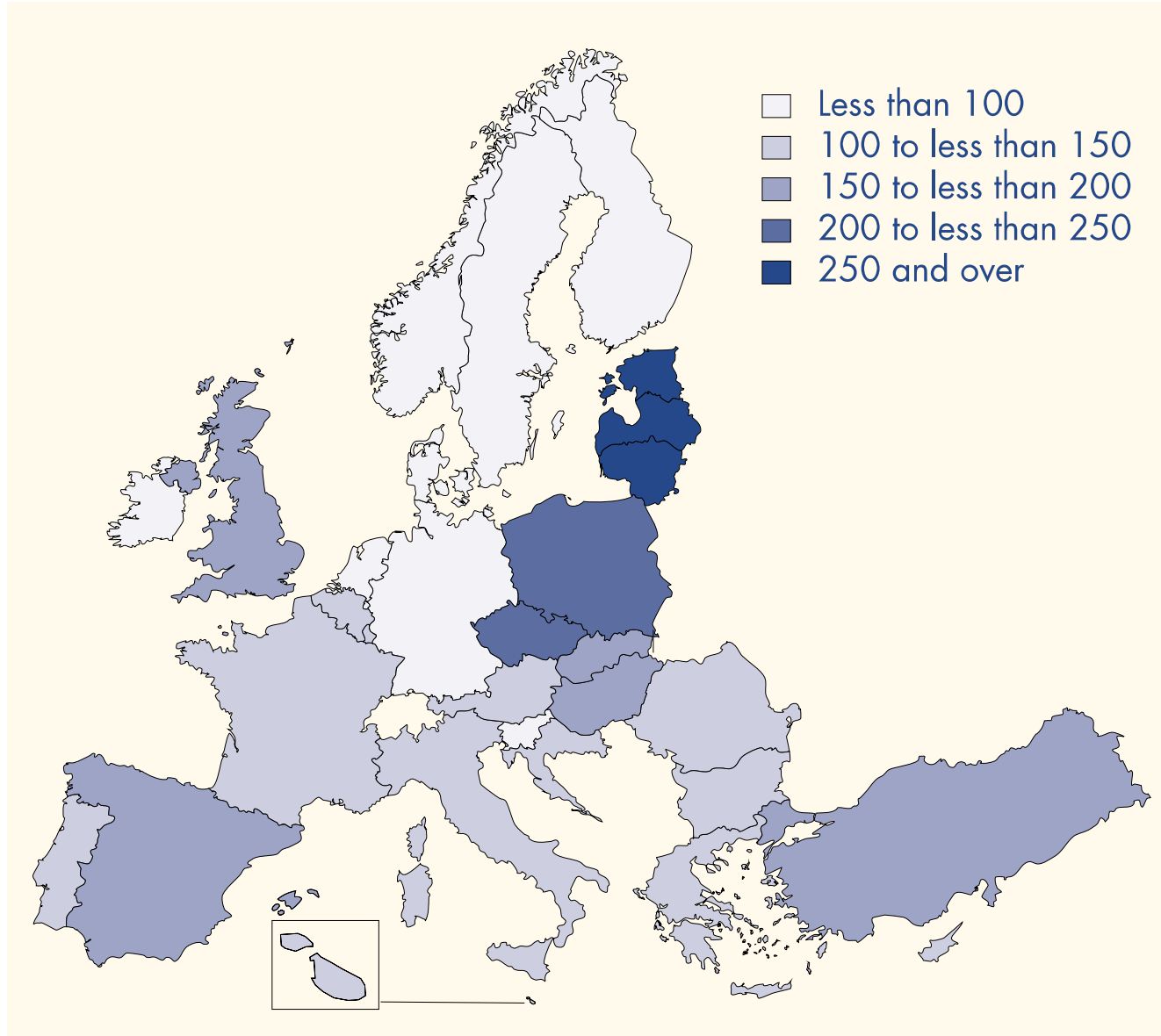
ICRC: SPECIAL APPEAL 2016: DISABILITY AND MINE ACTION GENEVA, DECEMBER 2015

- The Third Geneva Convention 18 also requires that special facilities be established in prisoner of war camps for the care and rehabilitation of persons with disabilities. Lastly, under customary IHL – rules that come from general practice accepted as law, which exist independently of treaty law – the “disabled” and “infirm” are entitled to special respect and protection during conflicts.

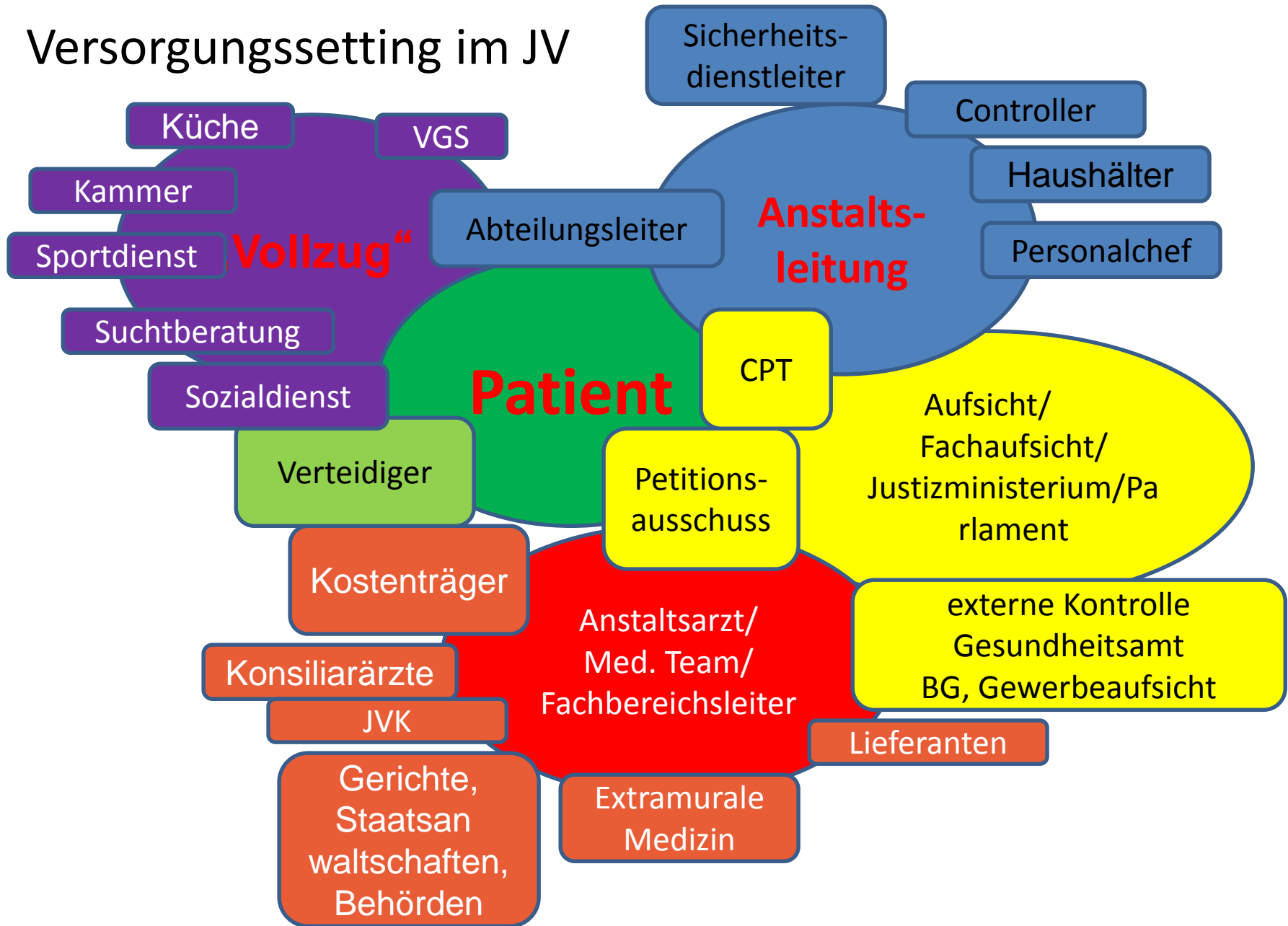
Behinderung Atr. 1 der UN Charta

- Menschen die ...langfristige körperliche, seelische, geistige oder Sinnesbeeinträchtigungen haben, welche sie in Wechselwirkungen mit verschiedenen Barrieren an der vollen und gleichberechtigten Teilhabe an der Gesellschaft hindern können.

Figure 1: Prisoners per 100 000 population in EU Member States, candidate countries Croatia and Turkey and Norway in 2010



Das medizinische Versorgungssetting im JV

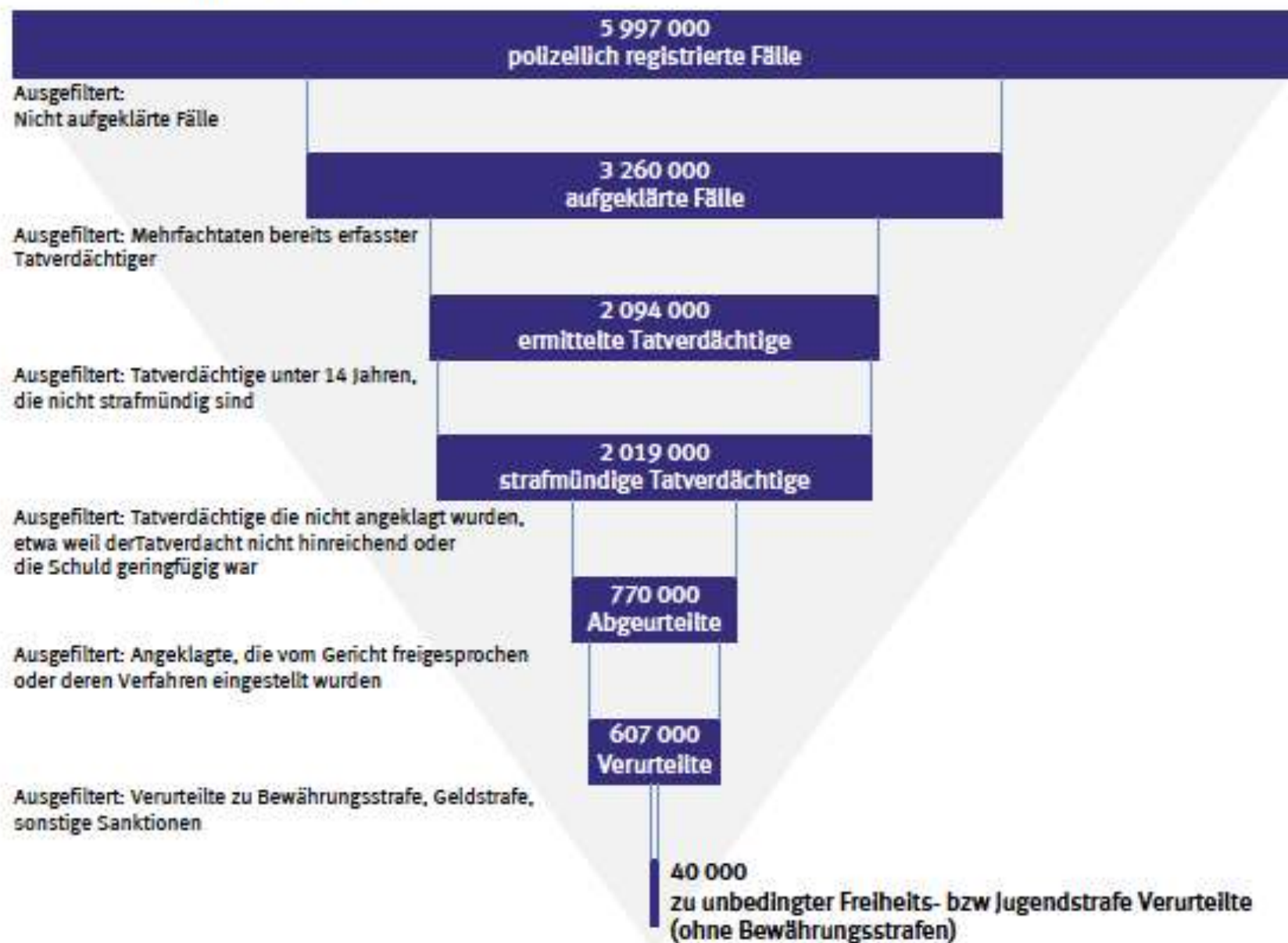


Resolution 217 A (III) der Generalversammlung vom 10. Dezember 1948



- *Artikel 5* Niemand darf der Folter oder grausamer, unmenschlicher oder erniedrigender Behandlung oder Strafe unterworfen werden.

Ausfilterung im Strafverfahren 2012



Ohne Straftaten im Straßenverkehr.

Datenquellen: Bundeskriminalamt (Polizeiliche Kriminalstatistik), Statistisches Bundesamt (Strafverfolgungsstatistik).

Resolution adopted by the General Assembly on 17 December
2015

[on the report of the Third Committee (A/70/490)] 70/175.

United Nations Standard Minimum Rules for the
Treatment of Prisoners (the **Nelson Mandela Rules**)

- Rule 5
- 2. Prison administrations shall make all reasonable accommodation and adjustments to ensure that prisoners with physical, mental or other disabilities have full and effective access to prison life on an equitable basis.
- General Assembly Seventieth session
- Agenda item 106
- Distr.: General 8 January 2016

European Prison Rules, Rule 18

- 18.1 The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.

-

Comment:

Moreover, the authorities have to consider the special needs of prisoners: to accommodate a severely disabled person in prison without providing additional facilities may amount to inhuman or degrading treatment (Price v. the United Kingdom, No. 33394/96, judgment of 10/07/2001).

Rule 28

- 28.3 Particular attention shall be paid to the education of young prisoners and those with special needs.
- Comment.
Prison authorities should pay special attention to the education of young prisoners and those with special educational needs such as prisoners of foreign origin, disabled prisoners and others.

CPT Standards

- The particular needs of disabled persons in relation to catering arrangements should also be taken into account.

CPT Visit report Germany 2014

- 14. As regards conditions of detention, the delegation was particularly impressed by the newly- constructed unit for preventive detention at Diez Prison. All accommodation rooms were spacious (measuring some 18 m² including the sanitary annexe) and well-equipped (including with a toilet, shower and kitchenette). On each floor there was a specially equipped room for impaired or disabled inmates. In addition, there were various association and activity rooms (including a fitness room).

CPT Visit report 2014

- 5. At Freiburg Prison, material conditions were generally good in the new unit for preventive detention. All the rooms were in a very good state of repair, spacious (some 14 m² without counting the sanitary annexe) and well-equipped (one room was designed and specially equipped for an impaired/disabled inmate). On every floor, there was a large living/dining room (measuring some 50 m² and equipped with tables, chairs, a sofa, a television set, a refrigerator and plants), a kitchen and a laundry room. In addition, the detention unit comprised a large workshop, a computer room and an art therapy room.

WHO Prison and Health 2014

- **17. Prisoners with special needs**
- Admission of severely ill or disabled people to prison should be avoided and only used as a last resort.
- **20. Primary health care in prisons**
- Prison health care services must be able following priority areas:
 - ...
 - the health needs of special populations, including women and elderly and disabled people.

Problem

- In die internationalen Regelungen sind, wenn sie sich auf staatliche Freiheitsentziehungen beschränken, dann sehr speziell auf die Situation Gefängnis ausgerichtet.

WHO Prison and Health 2014

- **Prisoners with physical disabilities**
- ***A proper manner of detention***
- Those with disabilities are highly vulnerable to humiliation and violence. Plans to tackle such stigma, discrimination
- Prisoners with special needs
- 153
- Prisons and health
- and bullying must be part of the prison coping mechanism for such prisoners, reflected in prison staff training.

Key points

- People who are in prison have the **same right to health** care as everyone else.
- Prison administrations have a responsibility to ensure that prisoners receive proper health care and that prison conditions promote the well-being of both prisoners and prison staff.
- Health care staff must deal with prisoners primarily **as patients and not prisoners.**
- Health care staff must have the **same professional independence as their professional colleagues who work in the community.**
- Health policy in prisons should be integrated into national health policy, and the administration of public health should be closely linked to the health services administered in prisons.
- This applies to all health matters but is particularly important for communicable diseases.
- The European Prison Rules of the Council of Europe provide important standards for prison health care.

2. Standards in prison health: the prisoner as a patient -Andrew Coyle

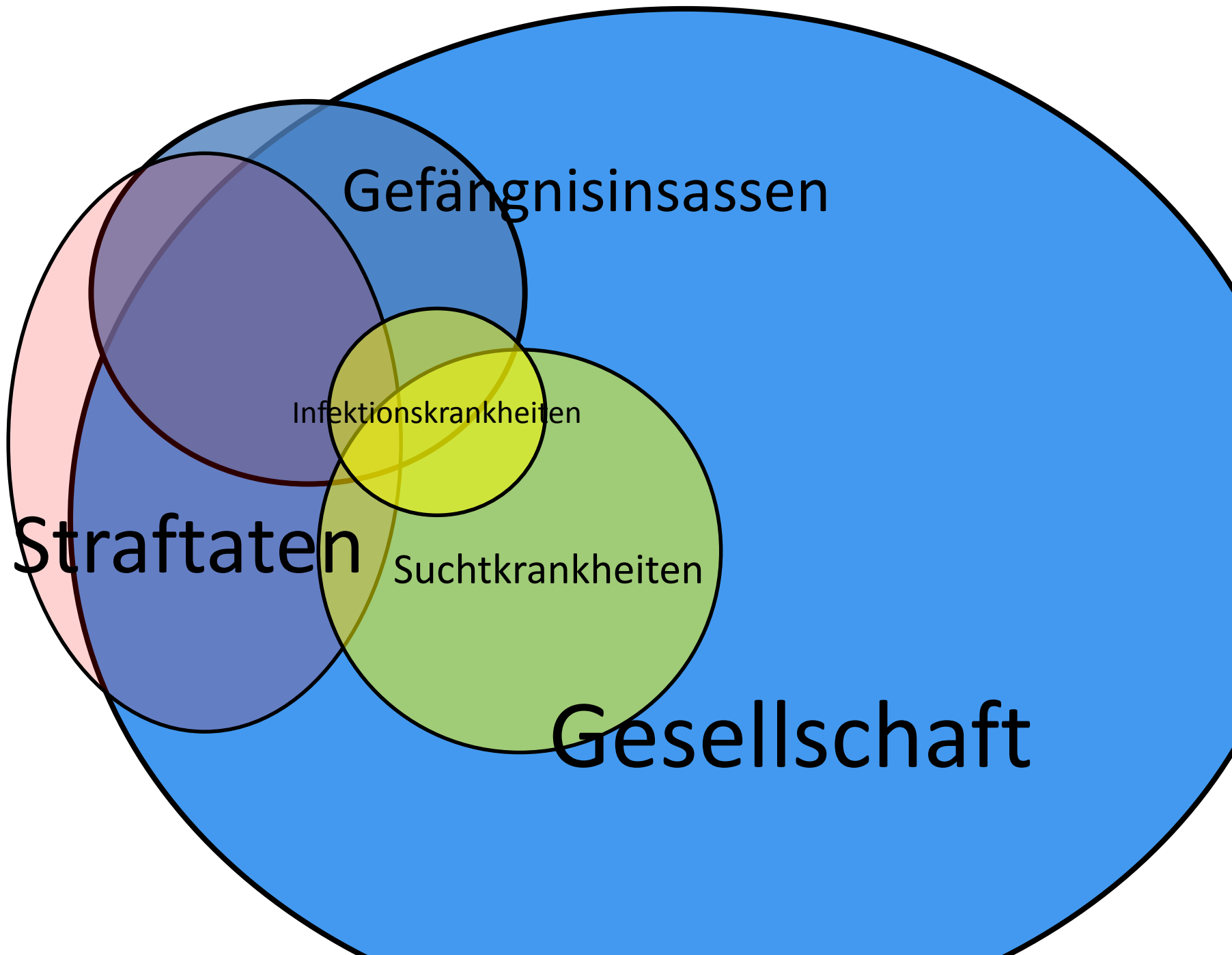
Health in prisons. A WHO guide to the essentials in prison health

Edited by Lars Møller, Heino Stöver, Ralf Jürgens, Alex Gatherer and Haik Nikogosian

2007, xvi + 179 pages ISBN 978 92 890 7280 9

Was sind die Primärprobleme Behinderter in staatlicher Freiheitsentziehung

- Strenge hierarchische Strukturen in den Einrichtungen
 - Beim Personal
 - Unter den Insassen
 - Wer hält das Gewaltmonopol
 - Wer sollte es haben?
- Konstellation aus Tätern die oft gleichzeitig Opfer sind
- Verminderte Gegenwehr
- Reduzierter Zugang für Unterstützer NGO
- Schlechtes Sozialprestige



Gefängnisinsassen

Infektionskrankheiten

Straftaten

Suchtkrankheiten

Gesellschaft

Gesetz zur Gleichstellung behinderter Menschen (Behindertengleichstellungsgesetz - BGG) Beispiel für nationales Recht

- **§ 7 Benachteiligungsverbot für Träger öffentlicher Gewalt**
- (1) Die Dienststellen und sonstigen Einrichtungen der Bundesverwaltung, einschließlich der bundesunmittelbaren Körperschaften, Anstalten und Stiftungen des öffentlichen Rechts sollen im Rahmen ihres jeweiligen Aufgabenbereichs die in § 1 genannten Ziele aktiv fördern und bei der Planung von Maßnahmen beachten. Das Gleiche gilt für Landesverwaltungen, einschließlich der landesunmittelbaren Körperschaften, Anstalten
- und Stiftungen des öffentlichen Rechts, soweit sie Bundesrecht ausführen. In Bereichen bestehender Benachteiligungen behinderter Menschen gegenüber nicht behinderten Menschen sind besondere Maßnahmen zum Abbau und zur Beseitigung dieser Benachteiligung zulässig. Bei der Anwendung von Gesetzen zur tatsächlichen Durchsetzung der Gleichberechtigung von Frauen und Männern ist den besonderen Belangen behinderter Frauen Rechnung zu tragen.
- (2) Ein Träger öffentlicher Gewalt im Sinne des Absatzes 1 darf behinderte Menschen nicht benachteiligen. Eine Benachteiligung liegt vor, wenn behinderte und nicht behinderte Menschen ohne zwingenden Grund unterschiedlich behandelt werden und dadurch behinderte Menschen in der gleichberechtigten Teilhabe am Leben in der Gesellschaft unmittelbar oder mittelbar beeinträchtigt werden.
- (3) Besondere Benachteiligungsverbote zu Gunsten von behinderten Menschen in anderen Rechtsvorschriften, insbesondere im Neunten Buch Sozialgesetzbuch, bleiben unberührt.

Konsequenz

- Behinderte werden gern der Gruppe der besonders schutzbedürftigen zugeordnet (vulnerable Groups)
- Sie werden damit in allgemeinen Verständnis in Bezug auf den Vollzug in Beziehung gesetzt zu Frauen, Jugendlichen, Alten, aber eben auch besonderen Ethnien wie „Zigeunern“, Sinthi, Roma und auch anderen Gruppen.

Gesetz zur Gleichstellung behinderter Menschen (Behindertengleichstellungsgesetz - BGG)

- **§ 10 Gestaltung von Bescheiden und Vordrucken**
- (1) Träger öffentlicher Gewalt im Sinne des § 7 Abs. 1 Satz 1 haben bei der Gestaltung von schriftlichen Bescheiden, Allgemeinverfügungen, öffentlich-rechtlichen Verträgen und Vordrucken eine Behinderung von Menschen zu berücksichtigen. Blinde und sehbehinderte Menschen können nach Maßgabe der Rechtsverordnung nach Absatz 2 insbesondere **verlangen, dass ihnen Bescheide, öffentlich-rechtliche Verträge und Vordrucke ohne zusätzliche Kosten auch in einer für sie wahrnehmbaren Form zugänglich gemacht werden, soweit dies zur Wahrnehmung eigener Rechte im Verwaltungsverfahren erforderlich ist.**
- (2) Das Bundesministerium für Arbeit und Soziales bestimmt durch Rechtsverordnung, die nicht der Zustimmung des Bundesrates bedarf, bei welchen Anlässen und in welcher Art und Weise die in Absatz 1 genannten Dokumente blinden und sehbehinderten Menschen zugänglich gemacht werden.

Grundprinzipien des Strafvollzuges

- Angleichungsgrundsatz
 - Das Leben im Vollzug den allgemeinen Lebensverhältnissen soweit wie möglich anpassen
- Gegensteuerungsgrundsatz
 - Schädliche Einflüssen entgegenwirken
- Integrationsgrundsatz
 - Vollzug so ausrichten, dass er dem Gefangenen hilft, sich in das Leben in Freiheit einzugliedern

Äquivalenzprinzip

- Die medizinische Versorgung ist so zu gestalten, dass sie den Bedingungen der Versorgung der Bevölkerung entspricht
 - In Deutschland: Beispielsweise der Verweis auf die entsprechende Sozialgesetzgebung in den Strafvollzugsgesetzen

- **b. Equivalence of care**

- *i) general medicine*

- 38. A prison health care service should be able to provide medical treatment and nursing care, as well as appropriate diets, physiotherapy, rehabilitation or any other necessary special facility, **in conditions comparable to those enjoyed by patients in the outside community.**

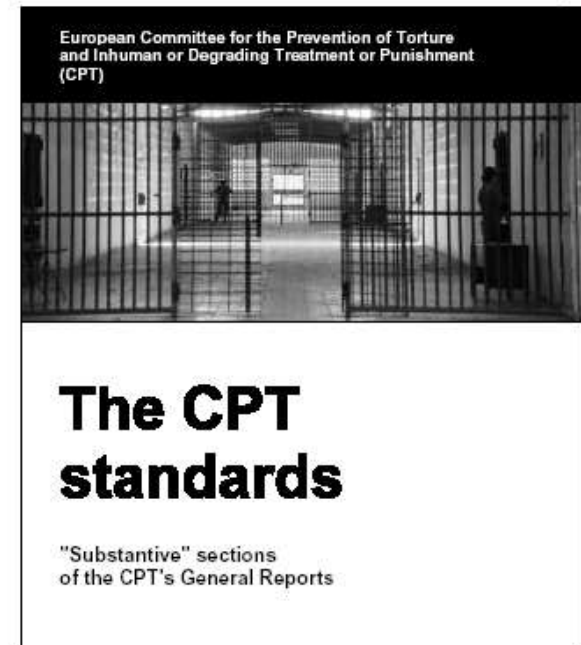
- Provision in terms of medical, nursing and technical staff, as well as premises, installations and equipment, should be geared accordingly.

- **d. Preventive health care**

- 52. The task of prison health care services should not be limited to treating sick patients.
- They should also be entrusted with responsibility for social and preventive medicine.



CPT/InfE (2002) 1 - Rev. 2003
English



Was passiert bei der Inhaftierung (auch ohne bestehende Behinderung)?

- Reduktion oder Verlust der Sozialkontakte
- Verlust des gewohnten Umfelds
(Inhaftierungsschock)
 - Haustiere
 - Wohnung
 - Freunde, Familie
 - Hilfsmittel, uU Medikamente und
Behandlungsinformationen
 - Zugang zum Hilfesystem
- Freie Bewegung

Zugang zu

- **Resozialisierenden Maßnahmen**
- Medizinischer Versorgung
- Sozialleben/Teilhabe
- Sozialkontakten
- Rechtsakten, Eingaben und Beschwerden
- Betreuer
- Lesen der Akte
- Rechtsschutz

Zugang zu 2

- Gnadenverfahren
- Maßnahmen von NGO
- Transport
- Kultur
- Information
- Unterstützung

Vollzugsuntauglichkeit STPO

- **§ 455 Strafausstand wegen Vollzugsuntauglichkeit**
- (1) Die Vollstreckung einer Freiheitsstrafe ist aufzuschieben, wenn der Verurteilte in Geisteskrankheit verfällt.
- (2) Dasselbe gilt bei anderen Krankheiten, wenn von der Vollstreckung eine nahe Lebensgefahr für den Verurteilten zu besorgen ist.
- (3) Die Strafvollstreckung kann auch dann aufgeschoben werden, wenn sich der Verurteilte in einem körperlichen Zustand befindet, bei dem eine sofortige Vollstreckung mit der Einrichtung der Strafanstalt unverträglich ist.
- (4) Die Vollstreckungsbehörde kann die Vollstreckung einer Freiheitsstrafe unterbrechen, wenn
 - der Verurteilte in Geisteskrankheit verfällt,
 - wegen einer Krankheit von der Vollstreckung eine nahe Lebensgefahr für den Verurteilten zu besorgen ist oder
 - der Verurteilte sonst schwer erkrankt und die Krankheit in einer Vollzugsanstalt oder einem Anstaltskrankenhaus nicht erkannt oder behandelt werden kann
 - und zu erwarten ist, daß die Krankheit voraussichtlich für eine erhebliche Zeit fortbestehen wird. Die Vollstreckung darf nicht unterbrochen werden, wenn überwiegende Gründe, namentlich der öffentlichen Sicherheit, entgegenstehen.

Strafausstand aus Gründen der Vollzugsorganisation STPO

- **§ 455a Strafausstand aus Gründen der Vollzugsorganisation**
- (1) Die Vollstreckungsbehörde kann die Vollstreckung einer Freiheitsstrafe oder einer freiheitsentziehenden Maßregel der Besserung und Sicherung aufschieben oder ohne Einwilligung des Gefangenen unterbrechen, wenn dies aus Gründen der Vollzugsorganisation erforderlich ist und überwiegende Gründe der öffentlichen Sicherheit nicht entgegenstehen.
- (2) Kann die Entscheidung der Vollstreckungsbehörde nicht rechtzeitig eingeholt werden, so kann der Anstaltsleiter die Vollstreckung unter den Voraussetzungen des Absatzes 1 ohne Einwilligung des Gefangenen vorläufig unterbrechen.

Leistungen StVollzG (Bund)

- **Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßnahmen der Besserung und Sicherung (Strafvollzugsgesetz - StVollzG)**
- **§ 58 Krankenbehandlung**
- Gefangene haben Anspruch auf Krankenbehandlung, wenn sie notwendig ist, um eine Krankheit zu erkennen, zu heilen, ihre Verschlimmerung zu verhüten oder Krankheitsbeschwerden zu lindern. Die Krankenbehandlung umfaßt insbesondere
 - 1.
 - ärztliche Behandlung,
 - 2.
 - zahnärztliche Behandlung einschließlich der Versorgung mit Zahnersatz,
 - 3.
 - Versorgung mit Arznei-, Verband-, Heil- und Hilfsmitteln,
 - 4.
- medizinische und ergänzende Leistungen zur Rehabilitation sowie Belastungserprobung und Arbeitstherapie, soweit die Belange des Vollzuges dem nicht entgegenstehen.

The National Judge as Guarantor of Article 12 UNCRPD



Denzil Lush
Senior Judge of the
Court of Protection
London

Guarantors of Human Rights

According to Albert Venn Dicey (1835-1922), the three main guarantors of civil liberties are:

- Parliament
- Public opinion
- The Ordinary Law of the Land

Tom Bingham, Lord Bingham of Cornhill (1933-2010), did not entirely agree with Dicey.

Judicial development of mental capacity law

Judicial precedent has only a limited role to play in any mental capacity jurisdiction because each case is unique and each solution is unique.

- Mr Justice Hedley in *Re GC* (2008)
- Judge Hazel Marshall QC in *SM v HM* (2012)
- Senior Judge Lush in *Re A; Ross v A* (2015)
- Baroness Hale in *Aintree University Hospitals NHS Trust v James* (2013)

Judicial development of mental capacity law

Judicial discretion, on the other hand, plays an enormous role, which means that outcomes are not always predictable

- John Selden (1584-1654) on the Lord Chancellor's 'foot'
- Sir Henry Theobald KC (1847-1934) on the similarities and differences between Chancery and Lunacy practice
- Lord Bingham on the 'rare inviolability' of a judge's discretionary decision
- Mr Justice Peter Jackson on "the search for the ideal solution leading to decent but imperfect outcomes being rejected": *A and B (Court of Protection: Delay and Costs)* (2014)

Decisions on aspects of Article 12 UNCRPD

- Re JW; GGW v East Sussex County Council (2015): conflicts of interest are ubiquitous in any mental capacity jurisdiction. It is the court's function to manage them.
- Re AMH (2015): support for the supporter. Although the court revoked the appointment of AMH's daughter as her attorney, it respected AMH's choice of decision-maker and immediately reappointed the daughter as her deputy, subject to supervision by the Office of the Public Guardian.
- Re FH (2016): the applicant had limited language and literacy skills. The Office of the Public Guardian will provide support to enable him to perform the deputyship functions for his wife.

The qualities required of a mental capacity judge

In *Compassion and the law: a judicial perspective*, published in *Elder Law Journal* 2015, Anselm Eldergill suggests that, in addition to knowing the relevant law and being a competent evaluator of evidence, a mental capacity judge needs to have

- Compassion
- Experience
- Understanding
- Courage

Conclusion

The national Parliament is potentially the most effective guarantor of Article 12 UNCRPD.

The national judge's role can be solid and effective in terms of raising awareness of Article 12

However, the overall protection provided by the national judge will inevitably be piecemeal and incomplete because:

- The mental capacity jurisdiction is unique and measures must be tailored to each individual's circumstances
- Judicial precedent is of limited importance; and
- Judicial discretion (which can be unpredictable in its outcome) plays a key role.

ART.13 UNCRPD “ZUGANG ZUR JUSTIZ”

Eine Bestandsaufnahme über den Stand der Umsetzung im Justizalltag in Italien

Dott.Stefan Tappeiner

Richter am Landesgericht Bozen



Das italienische Justizsystem (ordentliche Gerichtsbarkeit)



26 Oberlandesgerichte
(„Corti d’Appello”)

136 Landesgerichte
(“Tribunali”)

187 Friedensgerichte
(“Giudici di Pace”)

Das Landesgericht Bozen



Übereinkommen über die Rechte von Menschen mit Behinderungen (Convention on the Rights of Persons with Disabilities – CRPD New York 13 Dezember 2006, in Italien ratifiziert durch das Gesetz Nr.18 vom 3.März 2009



Artikel 13 – Zugang zur Justiz

(1) Die Vertragsstaaten gewährleisten Menschen mit Behinderungen gleichberechtigt mit anderen wirksamen Zugang zur Justiz, **unter anderem durch verfahrensbezogene und altersgemäße Vorkehrungen, um ihre wirksame unmittelbare und mittelbare Teilnahme, einschließlich als Zeugen und Zeuginnen, an allen Gerichtsverfahren, auch in der Ermittlungsphase und in anderen Vorverfahrensphasen, zu erleichtern.**

(2) Um zur Gewährleistung des wirksamen Zugangs von Menschen mit Behinderungen zur Justiz beizutragen, fördern die Vertragsstaaten geeignete Schulungen für die im Justizwesen tätigen Personen, einschließlich des Personals von Polizei und Strafvollzug

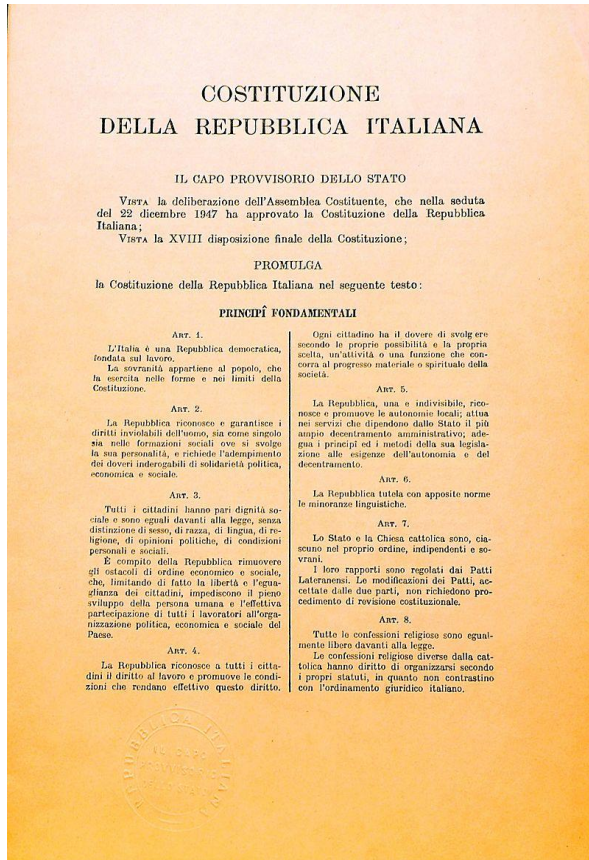
Art.24 Verfassung der Republik Italien



Art.24.

- (1) **Jedermann** darf zum Schutz der eigenen Rechte und der rechtmäßigen Interessen vor einem Gericht Klage erheben.
- (2) **Die Verteidigung ist in jedem Stand und in jeder Stufe des Verfahrens ein unverletzliches Recht.**
- (3) **Den Mittellosen** werden durch eigene Einrichtungen die Mittel zur Klage und Verteidigung bei jedem Gerichtsverfahren zugesichert.
- (4) Das Gesetz bestimmt die Bedingungen und Formen für die Wiedergutmachung von Justizirrtümern

Art.111 Verfassung der Republik Italien (novelliert durch VerfG Nr.2 vom 23.11.1999)



II. ABSCHNITT

Bestimmungen über die Rechtsprechung

Art.111.

- (1) Die Rechtsprechung wird im Rahmen eines gesetzlich geregelten fairen Verfahrens ausgeübt.
- (2) Jedes Verfahren ist vor einem unbefangenen und unparteiischen Richter so abzuwickeln, **dass das rechtliche Gehör der Parteien gewahrt wird und diesen die gleiche Behandlung zuteil wird.** Das Gesetz hat die angemessene Dauer des Verfahrens zu gewährleisten.
- (3) Für das Strafverfahren muss das Gesetz gewährleisten, dass die einer strafbaren Handlung beschuldigte Person in der kürzest möglichen Zeit über den Inhalt und die Gründe der gegen sie erhobenen Anklage vertraulich verständigt wird; dass ihr die für die Vorbereitung ihrer Verteidigung nötige Zeit und die dazu erforderlichen Gelegenheiten eingeräumt werden; dass ihr die Möglichkeit geboten wird, jene Personen vor Gericht zu vernehmen oder vernehmen zu lassen, die für sie nachteilige Erklärungen abgeben, die Vorladung und die Vernehmung der zur eigenen Entlastung aufgeborenen Personen unter Bedingungen zu erwirken, wie sie für die Anklage gelten, sowie jedes sonstige für sie günstige Beweismittel beibringen zu dürfen; **dass ihr ein Dolmetscher beisteht, wenn sie die im Verfahren verwendete Sprache nicht versteht oder nicht spricht.**
(omissis)



**RICHTLINIE 2012/29/EU DES EUROPÄISCHEN
PARLAMENTS UND DES RATES
vom 25. Oktober 2012
über Mindeststandards für die Rechte, die
Unterstützung und den Schutz von Opfern von
Straftaten sowie zur Ersetzung des
Rahmenbeschlusses 2001/220/JI**

Spezielle Bestimmungen substanzieller und verfahrensrechtlicher Natur zur Wahrung der Rechte von Personen mit Behinderung in Straf- und Zivilverfahren



- **Sachwalterschaftsgesetz (Gesetz Nr.6/2004), Art.404 ff.ZGB**
- **Art.119 StPO**
- **Art.190*bis* StPO**
- **Art.398 StPO**
- **Art.498 StPO**
- **Art.124 ZPO**
- **Gesetzesvertretendes Dekret Nr.216 vom 9 Juli 2003**
- **Gesetz Nr.67 vom 1.März 2006**

Die Sachwalterschaft (Art.404 ff. ZGB, novelliert durch das Gesetz Nr.6/2004)



Artikel 404 Sachwalter

Die Person, die ihre Angelegenheiten **wegen einer geistigen Behinderung oder einer physischen oder psychischen Krankheit nicht mehr selbst wahrnehmen kann, sei es auch nur teilweise oder vorübergehend, kann durch einen Sachwalter unterstützt werden**, der vom Vormundschaftsgericht bestellt wird, in dessen Sprengel die Person ihren Wohnsitz oder ihr Domizil hat.

Die Sachwalterschaft (Art.404 ff. ZGB)



405. (Dekret zur Bestellung des Sachwalters. Dauer des Amts und entsprechende öffentliche Bekanntmachung)

Das Vormundschaftsgericht verfügt aufgrund eines Rekurses einer der in Artikel 406 angegebenen Personen innerhalb von sechzig Tagen ab der Einbringung des Antrags auf Sachwalterbestellung mit einem begründeten und sofort vollstreckbaren Dekret.

(omissis)

Im Dekret über die Bestellung des Sachwalters sind anzugeben:

- 1) die Personalien der begünstigten Person und des Sachwalters;
- 2) die Dauer des Amts, wobei dieses auch auf unbestimmte Zeit übertragen werden kann;
- 3) der Gegenstand des Amts und diejenigen Rechtshandlungen, die der Sachwalter im Namen und auf Rechnung des Begünstigten vorzunehmen befugt ist;
- 4) die Rechtshandlungen, die der Begünstigte nur mit dem Beistand des Sachwalters vornehmen kann;
- 5) das Höchstausmaß der Ausgaben, die der Sachwalter unter Verwendung von Geldmitteln, über die der Begünstigte verfügt oder verfügen kann, vornehmen darf, wobei dieses Höchstausmaß auch für wiederkehrende Zeiträume bestimmt werden kann;
- 6) die regelmäßigen zeitlichen Abstände, innerhalb derer der Sachwalter dem Vormundschaftsgericht über die ausgeübte Tätigkeit und die persönliche und soziale Lebenssituation des Begünstigten zu berichten hat.

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Die Sachwalterschaft (Art.404 ff. ZGB)



407. (Verfahren)

Im Rekurs auf Einrichtung der Sachwalterschaft sind die Personalien des Begünstigten, sein gewöhnlicher Aufenthaltsort, die Gründe, deretwegen die Bestellung eines Sachwalters beantragt wird, sowie, wenn sie dem Antragsteller bekannt sind, die Namen und das Domizil des Ehegatten, der Nachkommen, der Vorfahren, der Geschwister und der mit den Begünstigten im selben Haushalt lebenden Personen anzugeben.

Das Vormundschaftsgericht hat die Person, auf die sich das Verfahren bezieht, persönlich anzuhören und sich erforderlichenfalls dorthin zu begeben, wo sie sich befindet, sowie auf ihre Bedürfnisse und Forderungen Bedacht zu nehmen, soweit sie mit den Interessen und den Schutzefordernissen der Person vereinbar sind.

Das Vormundschaftsgericht entscheidet nach Einholung der notwendigen Erkundigungen und nach Anhörung der in Artikel 406 genannten Personen; es entscheidet auch bei deren Nichterscheinen über den Rekurs.

(omissis)

Die Sachwalterschaft



**Zu den Aufgaben des Sachwalters (oder Vormundes)
gehört oft die Vertretung des Begünstigten
in Zivilverfahren**



LANDESGERICHT BOZEN

Amt des Vormundschaftsrichters

Sachwalterschaft Nr.641/2008 R.G.V.G.

Der Vormundschaftsrichter Dr. Stefan Tappeiner erlässt folgendes

DEKRET

auf Bestellung eines Sachwalters gemäß Artt. 404 und ff. ZGB:

1. Herr **XXXXXXXXX Markus**, geboren am 19.06.1971 in Meran, wohnhaft in wird zum **Sachwalter** (Art. 404 ZGB) für seinen Bruder **YYYYY Felix** (Begünstigter), geboren am 23.06.1982 in Bozen und wohnhaft in, de facto untergebracht in der neurologischen Abteilung des Krankenhauses von Bad Aibling (D) bestellt.
2. Der Auftrag erfolgt auf unbestimmte Zeit.
3. Die Sachwalterschaft hat den Zweck, die Pflege und Lebensorganisation für den Begünstigten zu gewährleisten.
4. Der Sachwalter hat den Begünstigten bei der Verwaltung des Vermögens zu unterstützen und zu vertreten und alle Handlungen im Zusammenhang mit der Abwicklung der Erbschaft nach der verstorbenen Mutterund **der Vertretung des Begünstigten in eventuell diesbezüglich anstehenden Gerichtsverfahren.**
5. **Dem Sachwalter obliegt es auch, alle zur Geltendmachung der Schadensersatzansprüche hinsichtlich des vom Begünstigten erlittenen Skiunfalles notwendigen Schritte zu unternehmen, den Begünstigten in allesfalls anstehenden gerichtlichen Verfahren zu vertreten und die bestmögliche anwaltschaftliche Betreuung zu organisieren.**
Der Sachwalter verwaltet das Vermögen des Begünstigten und kann überschüssiges Geld auf dem Konto ohne weitere Ermächtigung beim selben Bankinstitut in kapitalgesicherter Form auf den Namen des Begünstigten anlegen, wobei alle Ein- und Ausgänge über das Konto abzuwickeln sind.
 - a. Der Sachwalter kann eigenständig und autonom monatlich bis 2.500,00 € für die laufenden Ausgaben des Begünstigten beheben.



- b. Der Sachwalter ist befugt, jährlich einen Betrag bis zu 3.000,00 € für unvorhergesehene und außerordentliche Spesen für den Begünstigten zu beheben und zu verwenden. Der Entnahmegrund ist spezifisch zu vermerken.
 - c. Behebungen und Verfügungen, die über die genannten Grenzen hinausgehen, sowie Verfügungsgeschäfte von Immobilien, bedürfen, ausgenommen in dringenden Fällen, der vorherigen Genehmigung des Vormundschaftsgerichts.
6. Der Sachwalter ist ermächtigt, in Namen des Begünstigten jegliche Art von Anträgen an öffentliche oder private Stellen zu richten, die einen Vorteil für die Begünstigte bringen können oder der Verwaltung oder Organisation des Vermögens dienen und die diesbezüglichen Unterschriften, sowie evtl. notwendig verknüpfte Verpflichtungserklärungen, zu leisten.
 7. Der Sachwalter ist befugt, die für die medizinische Betreuung und Pflege des Begünstigten notwendigen Maßnahmen zu ergreifen und gegebenenfalls in seinem Namen, nach Absprache mit den behandelnden Ärzten, Entscheidungen über die medizinische Behandlung zu treffen.
 8. Der Sachwalter hat dem Gericht einmal jährlich Bericht zu erstatten, über den Zustand der Begünstigten, die durchgeführte Tätigkeit und die Vermögensverwaltung und insbesondere einen detaillierten Kontoauszug zu hinterlegen.

Mit sofortiger Vollstreckbarkeit.

Zustellung an die Begünstigte.

Mitteilung an Antragsteller, Staatsanwaltschaft, Standesamt.

Vermerk im Sachwalterschaftsregister.

Falls der Begünstigte Eigentümer von Immobilien oder Inhaberin von dinglichen Rechten an Immobilien sein sollte, ist eine auszugsweise Abschrift des vorliegenden Dekretes (ohne Begründung) dem Grundbuchsamt zu übermitteln, damit es dort angemerkt werden kann.

Eine Abschrift des Dekretes auf Bestellung zum Sachwalter ist weiters an die Bank bzw. an das Postamt zu übermitteln, bei welcher das Konto zugunsten von Herrneröffnet wird, damit die aus dieser Verfügung entstandene Bindung auf das Konto und auf die Wertpapiere der unterstützten Person (welche in namentliche umgewandelt werden müssen) angemerkt werden kann.



Die Bank hat zudem in den Kontoauszügen mit eigener Anmerkung anzugeben, welche Person (Sachwalter oder unterstützte Person) die einzelne Operation (z.B. Geldbehebung) durchgeführt hat.

Eine weitere Abschrift des Dekretes auf Bestellung zum Sachwalter ist an das zuständige Renteninstitut zu übermitteln, damit die aus dieser Verfügung entstandene Bindung auf die Rente angemerkt werden kann. Die Rente ist vom Renteninstitut direkt auf das Konto der unterstützten Person zu überweisen.

Der Sachwalter hat innerhalb von 30 Tagen ab Vereidigung, in der Gerichtskanzlei des Vormundschaftsgerichtes einen schriftlichen Bericht zu hinterlegen, in dem er die Vornahme obiger Handlungen, mit Vorlage der entsprechenden Dokumentation, nachweist.

Verfahrensgrundlagen

- Antrag vom, zwecks Bestellung eines Sachwalters im Sinne der Artt. 404 ff. ZGB für den oben genannten Begünstigten, samt beiliegender medizinischer Unterlagen.

Entscheidungsgrundlagen

- Wie aus der gelegten medizinischen Dokumentation hervorgeht hat sich Herr bei einem Skiunfall am 10.Mai 2008 schwere Kopfverletzungen zugezogen. Zwei Tage nach dem Unfall entwickelte sich ein schweres Hirnödem und seitdem liegt Herrm Koma. Er wurde von der Intensivstation des Krankenhauses Bozen zur Neurologischen Rehabilitation nach Bad Aibling (D) überstellt und es wurde ihm bereits eine Zivilinvalidität von 100% zuerkannt.
- Die gesetzlichen Voraussetzungen für die beantragte Bestellung eines Sachwalters für die betroffene Person gemäß Art. 404 ff. ZGB liegen somit vor.
- Als Sachwalter für den Betroffenen ist dessen Brudernamhaft zu machen, welcher für dieses Amt geeignet erscheint und auch das Vertrauen der Unterstützten genießt.

Bozen, am

Der Vormundschaftsrichter

Dr. Stefan Tappeiner

Bestimmungen in der italienischen StPO



Art.119 StPO

Teilnahme eines Tauben, Stummen oder Taubstummen an Verfahrenshandlungen

1. Wenn ein Tauber, Stummer oder Taubstummer Erklärungen abgeben will oder muss, werden dem Tauben die Fragen, Belehrungen und Ermahnungen schriftlich vorgelegt und dieser antwortet mündlich; an den Stummen werden die Fragen, Belehrungen und Ermahnungen mündlich gerichtet und dieser antwortet schriftlich; dem Taubstummen werden die Fragen, Belehrungen und Ermahnungen schriftlich vorgelegt und dieser antwortet schriftlich.
2. Wenn der Taube, Stumme oder Taubstumme nicht lesen oder nicht schreiben kann, bestellt die Behörde, der der das Verfahren anhängig ist, einen oder mehrere Dolmetscher, die vorzugsweise unter den Personen ausgewählt werden, die es gewohnt sind, mit ihm zu verkehren.

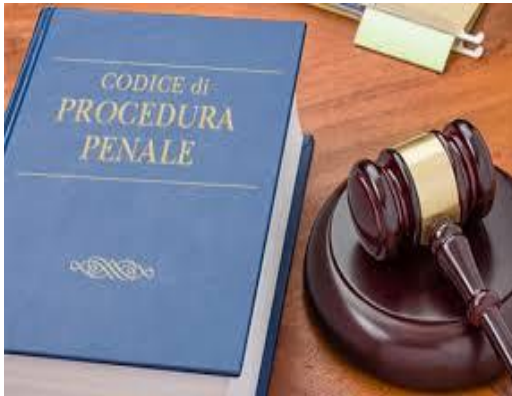
Urteil Nr.391/1999 des Verfassungsgerichtshofes



“Per violazione dell'art. 24, comma secondo, Cost. - assorbito ogni altro profilo della questione - l'art. 119 cod. proc. pen., nella parte in cui non prevede che l'imputato sordo, muto o sordomuto, indipendentemente dal fatto che sappia o meno leggere e scrivere, ha diritto di farsi assistere da un interprete, deve essere dichiarato illegittimo”

Art.119 StPO wird, wegen Verstoß gegen Art.24, Abs.2 der Verfassung, in jenem Teil für rechtswidrig erklärt, in welchem dem Tauben, Stummen und Taubstummen- unabhängig davon, ob er des Lesens und des Schreibens mächtig ist, nicht das Recht auf einen Beistand durch einen Dolmetscher zugestanden wird.

Bestimmungen in der italienischen StPO



Es fehlt in der StPO eine entsprechende Bestimmung für Blinde!

Beschluss vom Mai 2014, LG Torre Annunziata: ein blinder Angeklagter hat kein Recht auf Übersetzung der Akten in die Blindenschrift und es liegt auch keine Verletzung der Bestimmungen der Art.3, 24 und 111 der Verfassung vor.

Bestimmungen in der italienischen StPO



Art. 190-bis StPO.

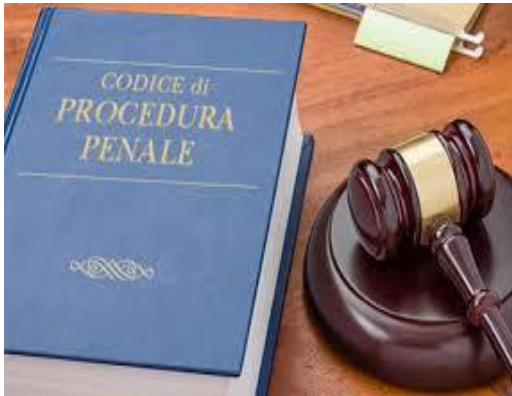
Die Eigenschaften der Beweise in besonderen Fällen

1. In Verfahren wegen der Verbrechen welche in Art.51, Abs.3bis vorgesehen sind, falls die Einvernahme eines Zeugen oder einer der in Art.210 angeführten Personen beantragt wird und diese bereits eine Aussage in einem Beweissicherungsverfahren gemacht haben oder im Hauptverfahren unter Wahrung des rechtlichen Gehörs mit der Person gegen die die Aussagen verwendet werden sollen, oder einen Aussage deren Niederschrift im Sinne des Art.238 zu den Akten genommen worden ist, ist eine weitere Einvernahme nur zulässig, wenn diese Umstände zum Gegenstand hatm welche Verschieden von jenen sind, die Gegenstand der vorhergehenden Aussagen bildeten oder wenn das Gericht oder eine der Parteien diese aufgrund besonderer Bedürfnisse für notwendig erachtet wird.

1-bis. Dieselben Bestimmungen finden Anwendung, falls wegen einer von den Artikeln 600-bis, Abs.1, 600-ter, 600-quater, auch hinsichtlich des pornografischen Materials gemäß Art. 600-quater.1, 600-quinquies, 609-bis,609-ter, 609-quater, 609 quinquies e 609-octies StGB vorgegangen wird und die Einvernahme einen Zeugen betrifft, welcher unter 16 Jahre als ist und auf jeden Fall, **falls die beantragte Zeugeneinvernahme ein besonders verletzliches Tatopfer** (ital. “persona offesa in condizione di particolare vulnerabilità”) **betrifft.**

(Absatz hinzugefügt durch das GvD vom 15.Dezember 2015, Nr.212)

Bestimmungen in der italienischen StPO



Art. 498 StPO (in der geltenden Fassung, nach der Novellierung durch GvD 38/09, Gesetz 93/2013, GvD 212/15)

Direkte Vernehmung und Gegenvernehmung von Zeugen

1. Die Fragen werden direkt vom Staatsanwalt oder vom Verteidiger gestellt, der die Vernehmung des Zeugen beantragt.
2. In der Folge dürfen weitere Fragen von den Parteien gestellt werden, welche die Vernehmung nicht beantragt haben, und zwar in der von Art.496 bezeichneten Reihenfolge.
3. Wer die Vernehmung beantragt hat, darf neue Fragen stellen.
4. Die Vernehmung eines Minderjährigen als Zeugen wird vom Vorsitzenden auf Grund der von den Parteien vorgeschlagenen Fragen und Gegenfragen geführt. Der Vorsitzende kann sich zur Vernehmung der Hilfe eines Familienangehörigen des Minderjährigen oder eines Fachkundigen auf dem Gebiet der Kinderpsychologie bedienen. Ist der Vorsitzende nach Anhörung der Parteien der Ansicht, dass die direkte Vernehmung den Minderjährigen nicht an einer unbefangenen Zeugenaussage hindert, so ordnet er mit Beschluss die Fortsetzung der Aussage nach den in den vorhergehenden Absätzen vorgesehenen Formen an. Der Beschluss kann im Laufe der Vernehmung widerrufen werden.

Bestimmungen in der italienischen StPO



Art. 498 StPO (in der geltenden Fassung, nach der Novellierung durch GvD 38/09, Gesetz 93/2013, GvD 212/15)

4-bis Falls eine der Parteien es beantragt, finden die Bestimmungen des Art.398, Abs.5-bis Anwendung.

4-ter Falls das Verfahren die Straftaten gemäß Art.572, 600, 600-bis, 600-ter, 600-quater, 600-quinquies, 601, 602, 609-bis, 609-ter, 609-quater, 609-octies und 612bis StGB betrifft, erfolgt die Einvernahme des minderjährigen Opfers **oder des volljährigen Opfers, welches an einer Geisteskrankheit (“ital.infermo di mente”) leidet, auf Antrag desselben oder von dessen Verteidiger durch die Benützung eines Spiegelglases und einer Gegensprechanlage.**

4-quater Abgesehen von den Bestimmungen der vorangehenden Absätze, verfügt der Richter, **falls er eine besonders schutzbedürftige Person (ital. “persona particolarmente vulnerabile”) anzuhören hat, auf Antrag des Tatopfers und von von dessen Anwalt, besonders geschützte Formen der Anhörung.**

Urteil Nr.283 vom 30 Juli 1997 des Verfassungsgerichtshofes



“È costituzionalmente illegittimo, per violazione dell'art. 2 Cost., l'art. 498 cod. proc. pen., nella parte in cui non consente, nel caso di testimone maggiorenne infermo di mente, che il presidente, sentite le parti, ove ritenga che l'esame del teste ad opera delle parti possa nuocere alla personalità del teste medesimo, ne conduca direttamente l'esame su domande e contestazioni proposte dalle parti, in quanto - posto che la disciplina della testimonianza e delle modalità per raccoglierla risponde anzitutto all'esigenza di assicurare la genuinità della prova, ma non può essere insensibile all'esigenza di tutelare la persona del teste nel delicato momento in cui è chiamato a deporre sui fatti e le circostanze dedotti in contraddittorio fra le parti; e che il vigente ordinamento processuale non consente in nessun caso, nell'assunzione della testimonianza di un maggiorenne, di derogare alla regola dell'art. 498 del codice, secondo cui "le domande sono rivolte direttamente dal pubblico ministero o dal difensore che ha chiesto l'esame del testimone" (comma 1), e altre domande possono essere rivolte sempre dalle parti (commi 2 e 3) - la garanzia del diritto fondamentale al rispetto della personalità esige che la stessa regola sia derogabile, non già in via generale, bensì in relazione alla concretezza delle circostanze, nel caso della testimonianza di persona inferma di mente”

Die Bestimmungen des Art.498 StPO sind in jenem Teil wegen Verletzung des Art.2 der Verfassung als verfassungswidrig anzusehen, in dem nicht vorgesehen ist, dass der Vorsitzende bei der Einvernahme eines volljährigen, unter einer Geisteskrankheit leidenden Zeugen, nach Anhörung der Parteien, direkt die Einvernahme des Zeugen vornehmen kann, unter Abweichung der allgemeinen Regel des Art.498 StPO, laut welchen die Fragen direkt vom Staatsanwalt oder vom Verteidiger gestellt werden, der die Vernehmung des Zeugen beantragt hat

Bestimmungen in der italienischen StPO



Art. 398 StPO

Verfügungen über den Antrag auf ein Beweissicherungsverfahren

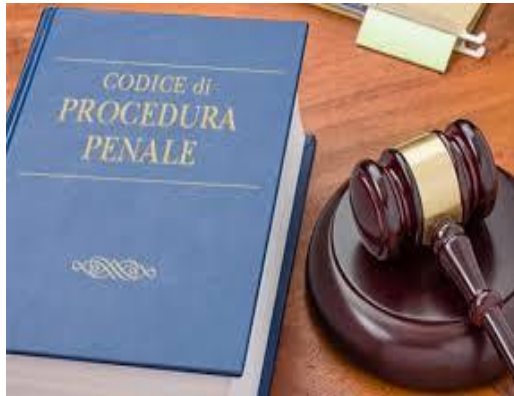
(omissis)

5-bis Falls die Ermittlungen die Straftaten gemäß Art.572, 600, 600-bis, 600-ter, auch betreffend pornografisches Material gemäß Art.600-quater, 600-quinquies, 601, 602, 609-bis, 609-ter, 609-quater, 609-octies, 609- undecies und 612bis StGB betreffen verfügt der Richter, falls die Personen die von der Beweisaufnahme betroffen sind **minderjährig** sind, einen besonderen Ort, eine besondere Zeit oder eine besonderen Formen in welcher die Beweissicherung stattfinden soll, wenn dies notwendig oder angebracht ist. Zu diesem Zwecke kann die Verhandlung auch an einen **Ort außerhalb des Gerichtsgebäudes stattfinden und der Richter kann sich, falls vorhanden besonderer Einrichtungen bedienen oder die Einvernahme in der Wohnung der betroffenen Person vornehmen.**

Die Zeugenaussagen müssen vollinhaltlich **fonografisch und audiovisuell aufgezeichnet werden** (omissis).

5-ter Auf Antrag der Parteien, wendet der Richter die von Abs.5-bis vorgesehenen Bestimmungen an, wenn sich unter den von der Beweisaufnahme betroffenen Personen volljährige Personen in einer Situation von besonderer Schutzbedürftigkeit befinden.

Bestimmungen in der italienischen StPO



Art. 398 StPO

Verfügungen über den Antrag auf ein Beweissicherungsverfahren

5- quater Abgesehen von den Bestimmungen des Abs.5-ter **finden bei der Anhörung von besonders Schutzbedürftigen Tatopfern die Bestimmungen des Art.498, Abs.4- quater Anwendung.**

Einvernahme von Zeugen/Tatopfern im sog. „Spiegelsaal“ (ital.sala specchio“)



- der Befragungsraum soll eine angenehme, freundliche Atmosphäre ausstrahlen (im Unterschied zu einem Gerichtssaal)
- im Raum befinden sich, neben dem zu befragenden Opfer bzw. nur ein Richter/eine Richterin, sowie ein Psychologe/eine Psychologin
- alle anderen Prozessbeteiligten befinden sich im Nebenraum und verfolgen die Einvernahme durch die Spiegelglasscheibe

Einvernahme von Tatopfern/Zeugen im Spiegelsaal



- die Einvernahme wird mittels Videoaufzeichnung dokumentiert
- die Befragung erfolgt direkt durch den Richter
- Staatsanwalt und Verteidiger dürfen keine direkten Fragen stellen
- es erfolgt kein Kreuzverhör

Art.124 ZPO

Vernehmung eines Stummen und eines Tauben

Ist im Verfahren ein Stummer, Tauber oder Taubstummer zu hören, können die Befragung und die Beantwortung schriftlich erfolgen.

Das Gericht kann erforderlichenfalls einen Dolmetscher bestellen, der einen Eid gemäß Art.122, letzter Absatz leistet.

Spezielle Bestimmungen substanzieller und verfahrensrechtlicher Natur zur Wahrung der Rechte von Personen mit Behinderung in Straf- und Zivilverfahren



Gesetzesvertretendes Dekret Nr.216 vom 9 Juli 2003

- **Art.4 sieht besondere verfahrensrechtliche Normen zum Schutz von Personen mit Behinderung gegen Diskriminierung am Arbeitsplatz vor.**

Gesetz Nr.67 vom 1.März 2006

- **Art.3 und 4 sehen besondere verfahrensrechtliche Normen zum Rechtsschutz gegen Diskriminierungen jeglicher Art von Personen mit Behinderung vor.**

GvD Nr. 212/15

- **Spezielle Bestimmungen zum Schutz von Tatopfern**

Der barrierefreier Zugang zum Gerichtsgebäude



Urteil Nr. 3376/2001 des Kassationsgerichtshofes

“Deve considerarsi legittimo l'impedimento a comparire, con conseguente nullità dell'ordinanza dichiarativa della contumacia, da parte dell'imputato disabile che non possa accedere ai locali di udienza per la presenza di barriere architettoniche, che dovrebbero essere rimosse ai sensi della legge 5 febbraio 1992, n.104 e del DPR 24 luglio 1996, n.503, e per il quale l'ufficio giudiziario non abbia altrimenti provveduto a consentire il dignitoso esercizio del diritto di difendersi presenziando al dibattimento”

Ein Angeklagter ist als entschuldigt abwesend anzusehen, falls es ihm aufgrund seiner Behinderung und aufgrund des Vorhandenseins von architektonischen Barrieren, welche laut Gesetz Nr.104/92 und D.P.R. Nr.503/96 eigentlich entfernt werden müssten, nicht in der Lage ist in den Verhandlungssaal zu gelangen.

Das in seiner Abwesenheit abgewickelte Verfahren ist somit als nichtig anzusehen.

Der barrierefreie Zugang zum Gerichtsgebäude



D.P.R. Nr. 503/1996



Workshop- Fallbeispiel



Strafverfahren gegen P.H. und A.G. Aktenzahl Nr.463/09 Allg.Reg. Landesgericht Bozen

wegen der Straftaten



- 1) Art.81, Abs.2, 110 und 572 StGB**
- 2) Art.40, Abs.2, 110, 609bis, 609ter Abs.1, Nr.1 und 5 Abs.2, 609quater, 609octies StGB**
- 3) Art.40, Abs.2, 81, 110, 609bis, 609ter, Abs.1, Nr.1 und 5, 609quater, 609octies StGB**

**Vielen Dank für die
Aufmerksamkeit**



L'ART. 13 DE LA CONVENTION SUR LES DROITS DES PERSONNES HANDICAPÉES « ACCÈS À LA JUSTICE »

État des lieux de la transposition dans la justice au quotidien en Italie

Dott. Stefan Tappeiner

Juge au Tribunal de Bolzano



Le système judiciaire italien (juridictions ordinaires)



26 tribunaux régionaux
supérieurs
(« Corti d'Appello »)

136 tribunaux
(« Tribunali »)

187 justices de paix
(« Giudici di Pace »)

Le tribunal de Bolzano



Convention relative aux droits des personnes handicapées (CRPD) New York, 13 décembre 2006, ratifiée en Italie par la loi n° 18 du 3 mars 2009



Article 13 – Accès à la justice

1. Les États Parties assurent l'accès effectif des personnes handicapées à la justice, sur la base de l'égalité avec les autres, **y compris par le biais d'aménagements procéduraux et d'aménagements en fonction de l'âge, afin de faciliter leur participation effective, directe ou indirecte, notamment en tant que témoins, à toutes les procédures judiciaires, y compris au stade de l'enquête et aux autres stades préliminaires.**

2. Afin d'aider à assurer l'accès effectif des personnes handicapées à la justice, les États Parties favorisent une formation appropriée des personnels concourant à l'administration de la justice, y compris les personnels de police et les personnels pénitentiaires.

Art. 24 de la constitution de la République italienne



Art. 24

1. Il est reconnu à **tout individu** le droit d'ester en justice pour la protection de ses droits et de ses intérêts légitimes.
2. **La défense est un droit inviolable dans tous les états et à tous les degrés de la procédure.**
3. Les moyens d'ester et de se défendre devant toutes les juridictions sont assurés aux **indigents** par des institutions juridiques spécifiques.
4. La loi détermine les conditions et les modalités de la réparation des erreurs judiciaires.

Art. 111 de la constitution de la République italienne (modifié par la loi constitutionnelle n° 2 du 23.11.1999)

COSTITUZIONE DELLA REPUBBLICA ITALIANA

IL CAPO PROVVISORIO DELLO STATO

Visita la deliberazione dell'Assemblea Costituente, che nella seduta del 22 dicembre 1947 ha approvato la Costituzione della Repubblica Italiana;

Visita la XVIII disposizione finale della Costituzione;

PROMULGA

la Costituzione della Repubblica Italiana nel seguente testo:

PRINCIPÍ FONDAMENTALI

Art. 1.

L'Italia è una Repubblica democratica, fondata sul lavoro.
La sovranità appartiene al popolo, che la esercita nelle forme e nei limiti della Costituzione.

Art. 2.

La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale.

Art. 3.

Tutti i cittadini hanno pari dignità sociale e sono eguali davanti alla legge, senza distinzione di sesso, di razza, di lingua, di religione, di opinioni politiche, di condizioni personali e sociali.

È compito della Repubblica rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto la libertà e l'uguaglianza dei cittadini, impediscono il pieno sviluppo della persona umana e l'effettiva partecipazione di tutti i lavoratori all'organizzazione politica, economica e sociale del Paese.

Art. 4.

La Repubblica riconosce a tutti i cittadini il diritto al lavoro e promuove le condizioni che rendono effettivo questo diritto.

Ogni cittadino ha il dovere di svolgere secondo le proprie possibilità e la propria scelta, un'attività o una funzione che concorra al progresso materiale o spirituale della società.

Art. 5.

La Repubblica, una e indivisibile, riconosce e promuove le autonomie locali; attua nei servizi che dipendono dallo Stato il più ampio decentramento amministrativo; adotta i principi ed i metodi della sua legislazione alle esigenze dell'autonomia e del decentramento.

Art. 6.

La Repubblica tutela con apposite norme le minoranze linguistiche.

Art. 7.

Lo Stato e la Chiesa cattolica sono, ciascuno nel proprio ordine, indipendenti e sovrani.

I loro rapporti sono regolati dai Patti Lateranensi. Le modificazioni dei Patti, accettate dalle due parti, non richiedono procedimento di revisione costituzionale.

Art. 8.

Tutte le confessioni religiose sono egualmente libere davanti alla legge.

Le confessioni religiose diverse dalla cattolica hanno diritto di organizzarsi secondo i propri statuti, in quanto non contrastino con l'ordinamento giuridico italiano.

SECTION II Normes relatives à la juridiction Art. 111

1. La juridiction s'exerce au moyen du juste procès réglementé par la loi.
2. Tout procès a lieu **dans le respect du principe de la contradiction, dans d'égales conditions pour les parties**, devant un juge arbitre et impartial. La loi en garantit une durée raisonnable.
3. Dans le procès pénal, la loi garantit : que la personne accusée d'une infraction sera, dans le plus court délai, informée, dans le secret, de la nature et de la cause des accusations portées contre elle ; qu'elle disposera du temps et des facilités nécessaires à la préparation de sa défense ; qu'elle aura la possibilité, devant le juge, d'interroger ou de faire interroger les personnes qui font des déclarations à charge, et d'obtenir la convocation et l'interrogatoire de personnes à sa décharge dans les mêmes conditions que l'accusation ainsi que l'acquisition de tout autre moyen de preuve en sa faveur ; **qu'elle sera assistée d'un interprète si elle ne comprend pas ou ne parle pas la langue employée au procès.**
(omissis)



**DIRECTIVE 2012/29/UE DU PARLEMENT EUROPÉEN
ET DU CONSEIL
du 25 octobre 2012
établissant des normes minimales concernant les
droits, le soutien et la protection des victimes de la
criminalité et remplaçant la décision-cadre
2001/220/JAI du Conseil**

Dispositions spéciales de fond et de procédure pour la protection des droits des personnes handicapées dans les procédures pénales et civiles



- Loi sur l'administration de soutien (loi n° 6/2004), art. 404 et suiv. du code civil
- Art. 119 du code de procédure pénale
- Art. 190-bis du code de procédure pénale
- Art. 398 du code de procédure pénale
- Art. 498 du code de procédure pénale
- Art. 124 du code de procédure civile
- Décret-loi n° 216 du 9 juillet 2003
- Loi n° 67 du 1^{er} mars 2006

L'administration de soutien (art. 404 et suiv. CC, modifiés par la loi n° 6/2004)



Article 404 Administrateur

Toute personne qui se trouve dans l'impossibilité, même partielle ou temporaire, de pourvoir à son propre intérêt par effet d'une infirmité ou d'une atteinte physique ou psychique peut recevoir le soutien d'un administrateur, qui est désigné par le juge des tutelles du lieu où la personne intéressée a son domicile ou sa résidence.

L'administration de soutien (art. 404 et suiv. CC)



405. (Décret portant désignation d'un administrateur. Durée du mandat et publicité y afférente)

Lorsqu'il est saisi par une des personnes visées à l'article 406, le juge des tutelles adopte un décret dûment motivé et immédiatement exécutoire dans un délai de 60 jours à compter de la demande de désignation d'un administrateur.

(omissis)

Le décret portant désignation d'un administrateur doit mentionner :

- 1) l'identité de la personne bénéficiaire et de l'administrateur ;
- 2) la durée du mandat, la désignation pouvant également être faite pour une durée indéterminée ;
- 3) la nature du mandat et les actes que l'administrateur est habilité à accomplir au nom et pour le compte du bénéficiaire ;
- 4) les actes que le bénéficiaire ne peut accomplir qu'avec l'assistance de l'administrateur ;
- 5) le montant maximal des dépenses que l'administrateur peut effectuer par prélèvement sur les ressources dont le bénéficiaire dispose ou peut disposer, y compris sur une base périodique ;
- 6) la périodicité à laquelle l'administrateur doit faire rapport au juge des tutelles sur l'activité exercée et sur les conditions de vie personnelles et sociales du bénéficiaire.

L'administration de soutien (art. 404 et suiv. CC)



407. (Procédure)

La demande de désignation d'un administrateur doit mentionner l'identité du bénéficiaire, sa résidence habituelle, les raisons pour lesquelles la désignation d'un administrateur est demandée ainsi que, si le demandeur les connaît, le nom et le domicile du conjoint, des descendants, des ascendants, des frères et sœurs et des personnes membres du ménage du bénéficiaire.

Le juge des tutelles doit entendre personnellement la personne visée par la procédure et, au besoin, se rendre à l'endroit où elle se trouve et il doit prendre en considération les besoins et les souhaits de cette personne dans la mesure où ils sont compatibles avec les intérêts et les exigences de sa protection.

Le juge des tutelles statue après avoir obtenu les informations requises et entendu les personnes visées à l'article 406, y compris en cas de non-comparution.

(omissis)

L'administration de soutien



Les tâches d'un administrateur (ou d'un tuteur) incluent souvent la représentation du bénéficiaire dans les procédures civiles



TRIBUNAL DE BOLZANO

Bureau du juge des tutelles

Affaire d'administration de soutien n° 641/2008 R.G.V.G.

M^e Stefan Tappeiner, Juge des tutelles, prononce selon les termes ci-après un

DÉCRET

portant désignation d'un administrateur conformément aux articles 404 et suivants du Code civil

1. M. **XXXXX Markus**, né le 19.6.1971 à Merano, domicilié à, est désigné **administrateur** (art. 404 CC) de son frère, **YYYYY Felix** (bénéficiaire), né le 23.6.1982 à Bolzano et domicilié à, résidant de fait dans le service neurologique de l'hôpital de Bad Aibling (Allemagne).
2. Le mandat est attribué pour une durée indéterminée.
3. L'administration de soutien a pour but de garantir les bons soins et l'organisation des conditions de vie du bénéficiaire.
4. L'administrateur est chargé d'assister et de représenter le bénéficiaire dans la gestion de ses biens et d'accomplir tous les actes requis dans le cadre de la liquidation de la succession à la suite de la mère décédée, **ainsi que de représenter le bénéficiaire dans toute procédure judiciaire ouverte à ce sujet.**
5. **Il incombe en outre à l'administrateur d'accomplir toutes les démarches requises afin de faire valoir le droit à réparation en ce qui concerne l'accident de ski dont le bénéficiaire a été victime, de représenter le bénéficiaire dans toute procédure judiciaire ouverte à ce sujet et d'organiser l'organisation de la meilleure défense possible par un avocat.**

L'administrateur gère les biens du bénéficiaire et peut investir les liquidités excédentaires détenues sur le compte, sans autre autorisation, dans un placement à capital garanti au nom du bénéficiaire auprès du même établissement bancaire, l'ensemble des transactions de crédit et de débit devant être exécutées sur ledit compte.

- a. L'administrateur peut, sur une base indépendante et autonome, prélever un montant mensuel maximal de 2 500,00 EUR pour les dépenses courantes du bénéficiaire.



- b. L'administrateur a le droit de prélever et d'utiliser un montant annuel maximal de 3 000,00 EUR pour les frais imprévus et extraordinaires au profit du bénéficiaire. La destination du montant prélevé doit être expressément indiquée.
 - c. Excepté en cas d'urgence, tout prélèvement ou acte de disposition excédant les limites précitées, ainsi que les actes de disposition de biens immobiliers, requièrent l'autorisation préalable du juge des tutelles.
6. L'administrateur est habilité à adresser au nom du bénéficiaire tout type de demande à un organisme public ou privé qui peut apporter un avantage au bénéficiaire ou servir à la gestion ou à l'organisation de ses biens ainsi qu'à signer tout document y afférent, y compris toute déclaration d'engagement connexe qui peut être nécessaire.
 7. L'administrateur a le droit de prendre les mesures requises pour la prise en charge médicale et les soins du bénéficiaire et, le cas échéant, d'arrêter en son nom toute décision requise sur le traitement médical en concertation avec les médecins traitants.
 8. L'administrateur doit présenter au Tribunal un rapport annuel sur l'état du bénéficiaire, l'activité exercée et la gestion des biens, comprenant en particulier un relevé de compte détaillé.

Pour exécution immédiate.

Signification au bénéficiaire.

Notification au demandeur, au ministère public et à l'état civil.

Inscription au registre des administrations de soutien.

Si le bénéficiaire est propriétaire de biens immobiliers ou titulaire de droits réels sur des biens immobiliers, une copie partielle du présent décret (sans la motivation) doit être transmise au bureau du registre foncier afin qu'une inscription correspondante y soit effectuée.

Une copie du décret portant désignation d'un administrateur doit en outre être transmise à la banque ou à l'agence postale auprès de laquelle le compte au profit de M. est ouvert afin que l'engagement résultant de la présente décision sur le compte et sur les titres du bénéficiaire du soutien (lesquels doivent être convertis sous forme nominative) puisse y être inscrit.



La banque doit en outre indiquer dans les relevés de compte, au moyen d'une annotation propre, la personne (administrateur ou bénéficiaire du soutien) qui a exécuté chaque opération (p. ex. retrait d'argent).

Une copie du décret portant désignation d'un administrateur doit également être transmise à l'office des pensions compétent afin que l'engagement résultant de la présente décision sur la pension puisse y être inscrit. L'office des pensions doit verser directement la pension sur le compte du bénéficiaire du soutien.

L'administrateur doit, dans un délai de 30 jours à compter de sa prestation de serment, déposer au greffe du tribunal des tutelles un rapport écrit démontrant qu'il a accompli les actes précités, accompagné des documents pertinents.

Base procédurale

- Demande du aux fins de la désignation d'un administrateur au sens des articles 404 et suivants du Code civil pour le bénéficiaire susmentionné, comprenant les documents médicaux annexés.

Motifs de la décision

- Ainsi que le font apparaître les documents médicaux déposés, M. a subi de graves blessures à la tête lors d'un accident de ski survenu le 10 mai 2008. Deux jours après l'accident, un œdème cérébral grave s'est formé et, depuis cette date, M. est plongé dans le coma. Il a été transféré des soins intensifs de l'hôpital de Bolzano au service de réhabilitation neurologique de Bad Aibling (Allemagne) et une invalidité civile de 100 % a déjà été reconnue à son égard.
- Les conditions légales relatives à la désignation d'un administrateur pour la personne concernée, telle que demandée, conformément aux articles 404 et suivants du Code civil sont donc remplies.
- Il convient de désigner en qualité d'administrateur pour la personne concernée son frère, lequel paraît approprié pour cette fonction et jouit par ailleurs de la confiance du bénéficiaire du soutien.

Bolzano, le

Le juge des tutelles
M^e Stefan Tappeiner

Dispositions du CPP italien



Art. 119 du code de procédure pénale

Participation aux actes de procédure d'une personne sourde, muette ou sourde-muette

1. Lorsqu'une personne sourde, muette ou sourde-muette souhaite ou doit faire une déclaration, les questions, les informations et les admonitions sont adressées à la personne sourde sous forme écrite et celle-ci y répond verbalement, les questions, les informations et les admonitions sont adressées à la personne muette sous forme verbale et celle-ci y répond par écrit, et les questions, les informations et les admonitions sont adressées à la personne sourde-muette sous forme écrite et celle-ci y répond sous forme écrite.
2. Si la personne sourde, muette ou sourde-muette ne sait pas lire ou écrire, l'autorité en charge de la procédure désigne un ou plusieurs interprètes, qui sont de préférence choisis parmi les personnes accoutumées aux relations avec l'intéressée.

Arrêt n° 391/1999 de la cour constitutionnelle



“Per violazione dell'art. 24, comma secondo, Cost. - assorbito ogni altro profilo della questione - l'art. 119 cod. proc. pen., nella parte in cui non prevede che l'imputato sordo, muto o sordomuto, indipendentemente dal fatto che sappia o meno leggere e scrivere, ha diritto di farsi assistere da un interprete, deve essere dichiarato illegittimo”

L'article 119 du code de procédure pénale est déclaré illégal, en raison de la violation de l'article 24, 2^e alinéa, de la constitution, dans la mesure où il ne reconnaît pas à une personne sourde, muette ou sourde-muette le droit à l'assistance d'un interprète sans distinction qu'elle soit ou non capable de lire et d'écrire.

Dispositions du CPP italien



Une disposition correspondante pour les aveugles fait défaut dans le CPP !

Arrêt de mai 2014 du tribunal de Torre Annunziata : une personne accusée aveugle n'a pas droit à une traduction des actes en écriture braille et il n'y a pas violation des dispositions des articles 3, 24 et 111 de la constitution.

Dispositions du CPP italien



Article 190 bis du code de procédure pénale

Exigences relatives aux preuves dans les cas particuliers

1. Dans les procédures engagées pour les délits établis à l'article 51, paragraphe 3 bis, s'il est demandé d'entendre un témoin ou l'une des personnes visées à l'article 210 et que ce témoin ou cette personne a déjà fait une déclaration dans une procédure d'acquisition des preuves ou dans la procédure au principal, dans le respect du contradictoire, avec la personne à charge de laquelle la déclaration doit être utilisée, ou une déclaration dont le procès-verbal a été porté au dossier au sens de l'article 238, un nouvel interrogatoire n'est admis que s'il a pour objet d'autres faits ou éléments que ceux faisant l'objet de la déclaration antérieure ou si le juge ou l'une des parties l'estime nécessaire sur la base d'exigences particulières.

1-bis. La même disposition est applicable dans les procédures engagées pour l'une des infractions établies aux articles 600-bis, 1^{er} alinéa, 600-ter, 600-quater, y compris en ce qui concerne le matériel pornographique selon l'article 600-quater1, 600-quinquies, 609-bis, 609-ter, 609-quater, 609-quinquies et 609-octies du code pénal, lorsque l'audition concerne un témoin qui est âgé de moins de 16 ans et, dans tous les cas, **lorsque l'audition de témoin demandée concerne une victime particulièrement vulnérable** (en italien, « persona offesa in condizione di particolare vulnerabilità »).

(point ajouté par le décret-loi n° 212 du 15 décembre 2015)

Dispositions du CPP italien



Article 498 du code de procédure pénale (dans la version en vigueur, après la modification par le décret-loi 38/09, la loi 93/2013 et le décret-loi 212/15)

Interrogatoire direct et contre-interrogatoire de témoins

1. Les questions sont posées directement par le ministère public ou par le plaidant qui demande l'audition du témoin.
2. D'autres questions peuvent ensuite être posées par les parties qui n'ont pas demandé l'audition, dans l'ordre indiqué à l'article 496.
3. La partie qui a demandé l'audition peut poser des questions supplémentaires.
4. L'audition d'un mineur en qualité de témoin est conduite par le président sur la base des questions d'interrogatoire et de contre-interrogatoire proposées par les parties. Le président peut, aux fins de l'audition, recourir à l'aide d'un membre de la famille du mineur ou d'un spécialiste de la psychologie de l'enfant. Si le président est d'avis, après consultation des parties, que l'audition directe ne porte pas atteinte à la qualité du témoignage du mineur, il prescrit par voie d'ordonnance la poursuite des dépositions selon les formes prévues aux paragraphes précédents. Cette ordonnance peut être révoquée au cours de l'audition.

Dispositions du CPP italien



Article 498 du code de procédure pénale (dans la version en vigueur, après la modification par le décret-loi 38/09, la loi 93/2013 et le décret-loi 212/15)

4-bis. Si une des parties le demande, les dispositions de l'article 398, paragraphe 5-bis, sont applicables.

4-ter. Si la procédure concerne les délits établis aux articles 572, 600, 600-bis, 600-ter, 600-quater, 600-quinquies, 601, 602, 609-bis, 609-ter, 609-quater, 609-octies ou 612-bis du code pénal, l'audition de la victime mineure **ou de la victime majeure atteinte d'aliénation (en italien « infermo di mente ») est conduite, à la demande de celle-ci ou de son défenseur, à l'aide d'un miroir sans tain et d'une installation d'intercommunication.**

4-quater. Sans préjudice des dispositions des paragraphes précédents, **si le juge doit entendre une personne particulièrement vulnérable (en italien « persona particolarmente vulnerabile »), il peut décider, à la demande de la victime et de son avocat, de modes d'audition offrant une protection particulière.**

Arrêt n° 283 du 30 juillet 1997 de la cour constitutionnelle



“È costituzionalmente illegittimo, per violazione dell'art. 2 Cost., l'art. 498 cod. proc. pen., nella parte in cui non consente, nel caso di testimone maggiorenne infermo di mente, che il presidente, sentite le parti, ove ritenga che l'esame del teste ad opera delle parti possa nuocere alla personalità del teste medesimo, ne conduca direttamente l'esame su domande e contestazioni proposte dalle parti, in quanto - posto che la disciplina della testimonianza e delle modalità per raccoglierla risponde anzitutto all'esigenza di assicurare la genuinità della prova, ma non può essere insensibile all'esigenza di tutelare la persona del teste nel delicato momento in cui è chiamato a deporre sui fatti e le circostanze dedotti in contraddittorio fra le parti; e che il vigente ordinamento processuale non consente in nessun caso, nell'assunzione della testimonianza di un maggiorenne, di derogare alla regola dell'art. 498 del codice, secondo cui "le domande sono rivolte direttamente dal pubblico ministero o dal difensore che ha chiesto l'esame del testimone" (comma 1), e altre domande possono essere rivolte sempre dalle parti (commi 2 e 3) - la garanzia del diritto fondamentale al rispetto della personalità esige che la stessa regola sia derogabile, non già in via generale, bensì in relazione alla concretezza delle circostanze, nel caso della testimonianza di persona inferma di mente”

Les dispositions de l'article 498 du code de procédure pénale doivent être jugées anticonstitutionnelles en raison de la violation de l'article 2 de la constitution dans la mesure où il n'est pas prévu que lors de l'audition d'un témoin majeur atteint d'aliénation, le président peut, après consultation des parties, conduire directement l'audition du témoin par dérogation aux règles générales de l'article 498 du code de procédure pénale selon lesquelles les questions sont posées directement par le ministère public ou par le plaidant qui a demandé l'audition du témoin.

Dispositions du CPP italien



Article 398 du code de procédure pénale Dispositions relatives à la demande d'une procédure d'acquisition des preuves

(omissis)

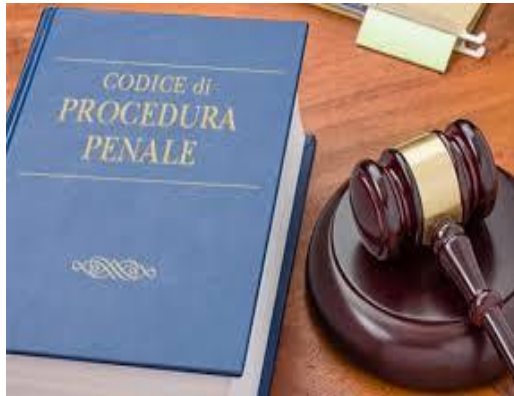
5-bis. Si les investigations concernent les délits établis aux articles 572, 600-bis, 600-ter, y compris en ce qui concerne le matériel pornographique selon l'article 600-quater¹, 600-quinquies, 601, 602, 609-bis, 609-ter, 609-quater, 609-octies, 609-undecies et 612-bis du code pénal, le juge peut, si les personnes concernées par la collecte des preuves sont **mineures**, décider d'un lieu particulier, d'un moment particulier ou de formes particulières selon lesquelles l'acquisition des preuves doit avoir lieu s'il l'estime nécessaire ou opportun.

À cette fin, l'audience peut également se dérouler **à l'extérieur du palais de justice et le juge peut utiliser des aménagements particuliers s'il en existe ou conduire l'audition au domicile de la personne concernée.**

Les témoignages doivent être **enregistrés** dans leur intégralité **sous forme phonographique et audiovisuelle** (omissis).

5-ter. À la demande des parties, le juge peut appliquer les dispositions prévues au paragraphe 5-bis s'il se trouve parmi les personnes concernées par la collecte de preuves des personnes majeures en situation de vulnérabilité particulière.

Dispositions du CPP italien



Article 398 du code de procédure pénale Dispositions relatives à la demande d'une procédure d'acquisition des preuves

5-quater. Sans préjudice des dispositions du paragraphe 5-ter, **les dispositions de l'article 498, paragraphe 4-quater, sont applicables pour l'audition de victimes particulièrement vulnérables.**

Audition de témoins/victimes dans une « pièce à miroir » (en italien « sala specchio »)



- La pièce où se tient l'interrogatoire doit donner l'impression d'une ambiance agréable et conviviale (à la différence d'un prétoire).
- Seuls un(e) juge et un(e) psychologue se trouvent dans la pièce avec la victime qui doit être interrogée.
- Toutes les autres parties à la procédure se tiennent dans une pièce annexe et suivent l'audition à travers la glace sans tain.

Audition de témoins/victimes dans une pièce à miroir



- L'audition est documentée au moyen d'un enregistrement vidéo.
- L'interrogatoire est mené directement par le juge.
- Le ministère public et les plaidants ne peuvent pas poser de questions directes.
- Il n'y a pas d'audition contradictoire.

Code de procédure civile italien

Art. 124 du code de procédure civile **Audition d'une personne sourde ou muette**

Si une personne sourde, muette ou sourde-muette doit être entendue dans une procédure, l'interrogatoire et les réponses peuvent revêtir la forme écrite.

Au besoin, le tribunal peut désigner un interprète, qui doit prêter serment conformément à l'article 122, dernier paragraphe.

Dispositions spéciales de fond et de procédure pour la protection des droits des personnes handicapées dans les procédures pénales et civiles



Décret-loi n° 216 du 9 juillet 2003

- **L'article 4 prévoit des normes procédurales spécifiques pour la protection des personnes handicapées contre la discrimination sur le lieu de travail.**

Loi n° 67 du 1^{er} mars 2006

- **Les articles 3 et 4 prévoient des normes procédurales spécifiques pour la protection juridique contre les discriminations de toute nature des personnes handicapées.**

Décret-loi n° 212/15

- **Dispositions spéciales pour la protection des victimes d'actes criminels**

Accessibilité pour tous aux palais de justice



Arrêt n° 3376/2001 de la cour de cassation

“Deve considerarsi legittimo l'impedimento a comparire, con conseguente nullità dell'ordinanza dichiarativa della contumacia, da parte dell'imputato disabile che non possa accedere ai locali di udienza per la presenza di barriere architettoniche, che dovrebbero essere rimosse ai sensi della legge 5 febbraio 1992, n.104 e del DPR 24 luglio 1996, n.503, e per il quale l'ufficio giudiziario non abbia altrimenti provveduto a consentire il dignitoso esercizio del diritto di difendersi presenziando al dibattimento”

L'absence d'une personne accusée doit être jugée excusée si elle était dans l'impossibilité, en raison de son handicap et de l'existence d'obstacles architecturaux qui auraient dû être éliminés conformément à la loi n° 104/92 et au DPR n° 503/96, d'accéder à la salle d'audience.

La procédure conduite en son absence doit donc être réputée nulle.

Accessibilité pour tous aux palais de justice

DPR n° 503/1996



Étude de cas pour l'atelier



Procédure pénale contre P.H. et A.G.

Numéro de dossier 463/09 affaires générales

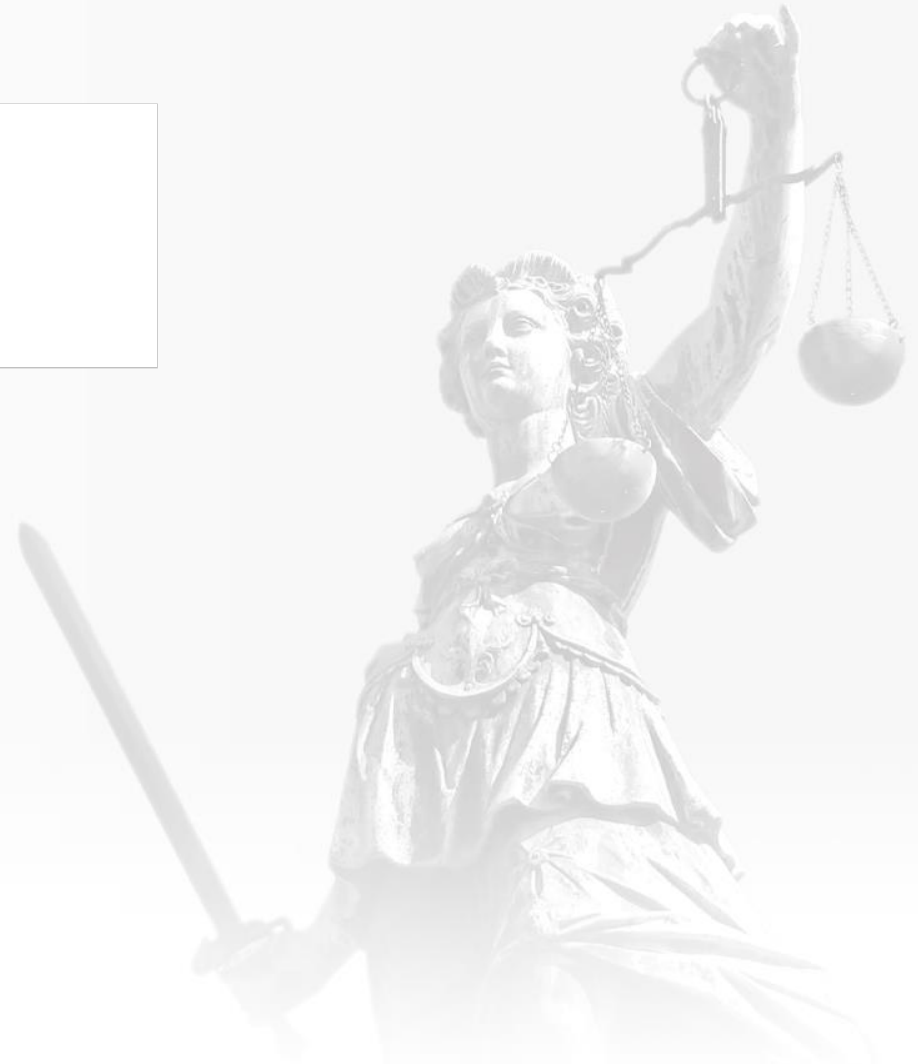
Tribunal de Bolzano

au motif des délits



- 1) **Art. 81, par. 2, 110 et 572 du code pénal**
- 2) **Art. 40, par. 2, 110, 609bis, 609ter, par. 1, n° 1 et 5, par. 2, 609quater et 609octies du code pénal**
- 3) **Art. 40, par. 2, 81, 110, 609bis, 609ter, par. 1, n° 1 et 5, 609quater et 609octies du code pénal**

**Merci de votre
attention !**





“Disability” in EU Law

Seminar for members of the judiciary

Trier, 13 June 2016

Ioanna Dervisopoulos

Overview



- Equal treatment in EU law
- Charter of Fundamental Rights
- ECHR
- International treaties
- Directive 2000/78 and prohibition of discrimination based on disability

Historical development



- Beginning: prohibition of discrimination based on nationality
- Prohibition of discrimination based on sex
- CJEU jurisprudence on fundamental rights
- Treaty of Amsterdam establishes broader powers: new directives
- Charter of Fundamental Rights

Discrimination based on sex



- Art. 157 TFEU “Equal pay ... for equal work or work of equal value” (since the Treaties of Rome)
- Directive 1975/117: Equal pay
- Directive 76/207: Equal treatment of men and women in employment (recast by Directive 2006/54)

C-104/09, Roca Álvarez (time off from work for infant care, ‘breastfeeding’ leave)

C-167/12, CD (maternity leave for surrogate mothers)

- Directive 79/7: Equal treatment of men and women in social security matters

236/09, Test-Achats

Broadening of the scope of EU legislation



- Art. 13 TEC (introduced by the Treaty of Amsterdam in 1999, now Art. 19 TFEU)
- Introduction of competence to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation

Broadening of the scope of EU legislation



Directive 2000/43: Equal treatment of persons irrespective of racial or ethnic origin

Directive 2000/78 establishing a general framework for equal treatment in employment and occupation

CJEU jurisprudence on fundamental rights



- Initially no guarantee of fundamental rights specified in writing
- Court of Justice makes first mention in 1969 of “fundamental human rights” enshrined in the general principles of law (Stauder case, C-29/69)
- When protecting fundamental rights, the Court of Justice was guided by the constitutional traditions common to the Member States and the ECHR (Nold case, C-4/73)

Charter of Fundamental Rights



Development

- Result of a special procedure, a convention chaired by Roman Herzog was instructed to draw up a draft
(convention comprised of representatives of governments, of the national parliaments, of the European Parliament and of the Commission)
- Treaty of Nice: promulgation of the Charter
- Since the Treaty of Lisbon
(1 December 2009): legally binding

Charter of Fundamental Rights



- Charter prohibits discrimination:

Chapter III provisions regarding equality

Article 21 Non-discrimination

(1): “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.”

Charter of Fundamental Rights



- Scope: Article 51(1) Charter of Fundamental Rights
- “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”
- Implementation of EU law = national legislation within the scope of European Union law, confirmation of previous CJEU case law; see judgment of 26th February 2013, Åkerberg Fransson, C-617/10, recital 19

Accession of EU to ECHR



- Art. 6(2) Treaty on EU (Lisbon)
 - “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.”
 - CJEU Report 2/13, planned accession is incompatible with Art. 6(2) TEU and Protocol No. 8 to Art. 6(2)

International treaties



- United Nations Convention on the Rights of Persons with Disabilities
 - ratified by EU, provisions of the agreement therefore an "integral part of EU law"
 - therefore, Directive 2000/78 must "as far as possible, be interpreted in a manner that is consistent with that Convention".

International treaties



- Art 267(1)(b) TFEU control of validity of EU legal acts by the yardstick of international treaties?
 - Only when the relevant provisions are, as regards their content, unconditional and sufficiently precise; CJEU in the light of UNCRPD: no (Judgment Z, C-363/12, recital 87 et seqq.)
 - Examination of whether type and structure of the international treaty permit a control of the validity of EU legal acts on the basis of international law is therefore unnecessary.

CJEU case law on discrimination based on disability – Dir 2000/78



- Judgment of 11th July 2006, Chacon Navas, C-13/05:
 - Disability not defined in Directive but to be interpreted autonomously and consistently
 - Definition of 'disability' = "a limitation which results, in particular, from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life" and, as distinct from 'illness', "it must be probable that the limitation will last for a long time".
 - 'Illness' - no further unwritten prohibition of discrimination

CJEU case law on discrimination based on disability – Dir 2000/78



- Judgment of 11th April 2013, Ring, C-335/11:
 - UNCRPD approved by EU (2009), Directive must be interpreted in the light of the Convention
 - Therefore: change to the definition of disability
 - “Limitation which results in particular from physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one.”
 - Therefore not only congenital disabilities or ones that stem from accidents, but also disabilities caused by illness.

CJEU case law on discrimination based on disability – Dir 2000/78



- Judgments of 18th March 2014, Z and CD, C-363/12 and C-167/12:
 - Clarification of definition in Ring case: “not only impossibility of exercising a professional activity, but also a hindrance to the exercise of such an activity”
 - Absence of womb = disability?
 - Ring: “full and effective participation in professional life on an equal basis with other workers”
 - UNCRPD: “full and effective participation in society on an equal basis with others”
 - No control of validity by yardstick of UNCRPD

CJEU case law on discrimination based on disability – Dir 2000/78



- Judgment of 18th December 2014, FOA, C-354/13:
- Discrimination due to obesity?
- Directive must not be extended to unwritten prohibitions of discrimination. No general prohibition of discrimination due to obesity in EU law. Therefore, fundamental rights of EU not applicable either.
- But: discrimination due to obesity may be discrimination due to disability. Unlike Advocate General, no definite BMI. Not only impossibility of professional activity, but also hindrance to such activity.

CJEU case law on discrimination based on disability – Dir 2000/78



- Obesity is a disability whereby, owing to his obesity, an employee would be hindered from full and effective participation in professional life, and would be so because of limited mobility or the occurrence of symptoms which prevent him from carrying out his work or impede him in his work.

CJEU case law on discrimination based on disability – Dir 2000/78



- Judgment of 17th July 2008, Coleman, C-303/06: Discrimination by association. See also Judgment of 16th July 2015, CHEZ Razpredelenie, C-83/14



Thank you for your attention!



Le « handicap » dans le droit de l'Union

Séminaire pour les acteurs de la justice

Trèves, le 13 juin 2016

Ioanna Dervisopoulos

Aperçu



- L'égalité de traitement dans le droit de l'Union
- La Charte des droits fondamentaux
- La Convention européenne des droits de l'homme
- Les traités internationaux
- La directive 2000/78 et l'interdiction de la discrimination fondée sur le handicap

Évolution historique



- Début : interdiction de la discrimination fondée sur la nationalité
- Interdiction de la discrimination fondée sur le sexe
- Arrêts de la Cour de justice européenne sur les droits fondamentaux
- Élargissement des compétences par le traité d'Amsterdam : nouvelles directives
- Charte des droits fondamentaux

Discrimination fondée sur le sexe



- Art. 157 du TFUE : « égalité des rémunérations (...) pour un même travail ou un travail de même valeur » (depuis le traité de Rome)
- Directive 1975/117 : égalité des rémunérations
- Directive 76/207 : égalité de traitement entre hommes et femmes en matière d'emploi (abrogée par la directive de refonte 2006/54)
 - C-104/09, Roca Álvarez (droit à un congé d'allaitement)
 - C-167/12, CD (droit à un congé de maternité pour les mères porteuses)
- Directive 79/7 : égalité de traitement entre hommes et femmes en matière de sécurité sociale
 - C-236/09, Test-Achats

Élargissement du champ d'application du droit de l'Union



- Art. 13 du traité CE (introduit en 1999 par le traité d'Amsterdam, désormais art. 19 du TFUE)
- Attribution d'une compétence pour l'adoption des mesures nécessaires en vue de combattre toute discrimination fondée sur le sexe, la race ou l'origine ethnique, la religion ou les convictions, un handicap, l'âge ou l'orientation sexuelle

Élargissement du champ d'application du droit de l'Union



Directive 2000/43 : égalité de traitement
entre les personnes sans distinction de
race ou d'origine ethnique

Directive 2000/78 : création d'un cadre
général en faveur de l'égalité de
traitement en matière d'emploi et de
travail

Arrêts de la Cour sur les droits fondamentaux



- Initialement, aucune garantie expresse des droits fondamentaux
- En 1969, la Cour de justice européenne mentionne pour la première fois les « droits fondamentaux de la personne » compris dans les principes généraux du droit communautaire (C-29/69, Stauder)
- Pour assurer la sauvegarde des droits fondamentaux, la Cour s'inspire des traditions constitutionnelles communes aux États membres et de la CEDH (C-4/73, Nold)

Charte des droits fondamentaux



Évolution

- Aboutissement d'une procédure spéciale : une convention présidée par Roman Herzog a été chargée de rédiger un projet
(La convention était composée de représentants des gouvernements et des parlements nationaux, du Parlement européen et de la Commission)
- Traité de Nice : proclamation de la Charte
- Depuis le traité de Lisbonne (1^{er} décembre 2009) : juridiquement contraignante

Charte des droits fondamentaux



- Interdiction de la discrimination dans la Charte :

Dispositions sur l'égalité au Titre III

Article 21 : Non-discrimination

Paragraphe 1 : « Est interdite toute discrimination fondée notamment sur le sexe, la race, la couleur, les origines ethniques ou sociales, les caractéristiques génétiques, la langue, la religion ou les convictions, les opinions politiques ou toute autre opinion, l'appartenance à une minorité nationale, la fortune, la naissance, un handicap, l'âge ou l'orientation sexuelle. »

Charte des droits fondamentaux



- Champ d'application : article 51, paragraphe 1, de la Charte
 - « Les dispositions de la présente Charte s'adressent aux institutions, organes et organismes de l'Union dans le respect du principe de subsidiarité, ainsi qu'aux États membres uniquement lorsqu'ils mettent en œuvre le droit de l'Union. En conséquence, ils respectent les droits, observent les principes et en promeuvent l'application, conformément à leurs compétences respectives (...) »
 - Mise en œuvre du droit de l'Union = législation nationale dans le champ d'application du droit de l'Union européenne, confirmation de la jurisprudence antérieure de la Cour, cf. arrêt du 26 février 2013, Åkerberg Fransson, C-617/10, point 19

Adhésion de l'Union à la CEDH



- Article 6, paragraphe 2, du TUE (Lisbonne)
 - « L'Union européenne adhère à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales. »
 - Avis 2/13 de la Cour : l'adhésion envisagée n'est pas compatible avec l'article 6, paragraphe 2, TUE ni avec le protocole (n° 8) relatif à l'article 6, paragraphe 2

Traités internationaux



- Convention des Nations unies relative aux droits des personnes handicapées
 - Approuvée par l'Union. Les dispositions de cette convention font donc « partie intégrante de l'ordre juridique de l'Union »
 - En conséquence, la directive 2000/78 doit faire l'objet, « dans la mesure du possible, d'une interprétation conforme à ladite convention »

Traités internationaux



- Article 267, premier alinéa, point b), du TFUE : examen de la validité des actes de droit de l'Union au regard des traités internationaux ?
 - Uniquement si les dispositions en cause sont, du point de vue de leur contenu, inconditionnelles et suffisamment précises. La Cour au sujet de la Convention NU : non (arrêt Z, C-363/12, points 87 et suiv.)
 - Il n'est donc pas nécessaire de vérifier si la nature et l'économie du traité international permettent un contrôle de la validité des actes du droit de l'Union à la lumière du droit international

Jurisprudence de la Cour sur la discrimination fondée sur le handicap - Directive 2000/78



- Arrêt du 11 juillet 2006, Chacón Navas, C-13/05 :
 - Le handicap n'est pas défini dans la directive, mais doit faire l'objet d'une interprétation autonome et uniforme
 - Définition d'un « handicap » : « limitation, résultant notamment d'atteintes physiques, mentales ou psychiques et entravant la participation de la personne concernée à la vie professionnelle » et distinction avec la « maladie » : « il doit être probable que la limitation soit de longue durée »
 - « Maladie » : pas d'autre interdiction de la discrimination non écrite

Jurisprudence de la Cour sur la discrimination fondée sur le handicap - Directive 2000/78



- Arrêt du 11 avril 2013, Ring, C-335/11 :
 - L'Union a approuvé (2009) la Convention NU, la directive doit être interprétée à la lumière de cette Convention
 - Conséquence : modification de la définition du handicap
 - « Limitation, résultant notamment d'atteintes physiques, mentales ou psychiques, dont l'interaction avec diverses barrières peut faire obstacle à la pleine et effective participation de la personne concernée à la vie professionnelle sur la base de l'égalité avec les autres travailleurs et si cette limitation est de longue durée »
 - Conséquence : pas seulement les handicaps de naissance ou d'origine accidentelle, mais aussi ceux causés par une maladie

Jurisprudence de la Cour sur la discrimination fondée sur le handicap - Directive 2000/78



- Arrêts du 18 mars 2014, Z et CD, C-363/12 et C-167/12 :
- Clarification de la définition donnée dans l'arrêt Ring : « pas uniquement une impossibilité d'exercer une activité professionnelle mais également une gêne à l'exercice d'une telle activité »
- Absence d'utérus = handicap ?
- Ring : « pleine et effective participation à la vie professionnelle sur la base de l'égalité avec les autres travailleurs »
- Convention NU : « pleine et effective participation à la société sur la base de l'égalité avec les autres »
- Pas d'examen de la validité au regard de la Convention NU

Jurisprudence de la Cour sur la discrimination fondée sur le handicap - Directive 2000/78



- Arrêt du 18 décembre 2014, FOA, C-354/13 :
- Discrimination fondée sur l'obésité ?
- La directive ne doit pas être étendue à des motifs de discrimination non mentionnés, le droit de l'Union ne consacre pas de principe général de non-discrimination en raison de l'obésité, les droits fondamentaux de l'Union ne sont donc pas applicables
- Mais : la discrimination fondée sur l'obésité peut être une discrimination fondée sur le handicap. À la différence des conclusions de l'AG, pas d'IMC précis, pas seulement impossibilité d'exercer une activité professionnelle, mais aussi gêne à l'exercice d'une telle activité

Jurisprudence de la Cour sur la discrimination fondée sur le handicap - Directive 2000/78



- Obésité = handicap si l'obésité du travailleur fait obstacle à sa pleine et effective participation à la vie professionnelle du fait d'une mobilité réduite ou de la survenance, chez cette personne, de pathologies qui l'empêchent d'accomplir son travail ou qui entraînent une gêne dans l'exercice de son activité professionnelle

Jurisprudence de la Cour sur la discrimination fondée sur le handicap - Directive 2000/78



- Arrêt du 17 juillet 2008, Coleman, C-303/06 : discrimination par association, cf. également arrêt du 16 juillet 2015, CHEZ Razpredelenie, C-83/14



Merci de votre attention !