

## **Danish and British protection from disability discrimination at work – past, present and future**

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Disability discrimination in Denmark and Britain]

Abstract:

Denmark and the United Kingdom both became members of what is now the European Union in 1973 and are thus equally matched in terms of opportunity to bring their anti-discrimination laws into line with those of the EU and other supra-national bodies such as the United Nations and the Council of Europe. Our investigation, based on existing reports, academic analysis and case law rulings involving alleged discrimination on grounds of disability, has revealed some major differences in the level of protection provided by each country's legislature and judicature, but also by other mechanisms that extend beyond these traditional measures, such as workplace collective agreements. While the UK has a long history of supporting people with disabilities by legislating in all aspects of society, Denmark has been at the forefront with social mechanisms, but has been reluctant to ensure equality in the labour market. However, both countries have been equally unsuccessful in ensuring opportunities for disabled workers, and consideration is given here as to whether one system of dealing with this is better than another. We conclude that neither strict regulation imposed by the European Union or national governments, nor the *laissez-faire* method of leaving the level of protection to be decided by collective agreement is entirely satisfactory. A different perspective altogether would be to adopt the substantive diversity theory which would focus on a person's abilities and what they are able to do, and to gear society to embrace diversities, as the Danish employment agency *Specialisterne* has done so successfully

in the case of adults with autism. Countries such as Denmark and the UK have much to learn from each other to tackle successfully this last bastion of workplace inequality.

Key words: Equality, Disability, UK, Denmark, *Jette-Ring*.

## Introduction

Denmark and the United Kingdom (UK) have relatively parallel EU membership histories,<sup>1</sup> and both have ratified the Treaty of Amsterdam,<sup>2</sup> the starting point for disability equality in the EU. This similarity suggests a valid area for comparative examination in the area of discrimination law, specifically with regard to disability protection, with particular consideration given to the impact of national attitudes to workers with disabilities in the two Member States. The findings seem to suggest that the reasons behind the apparent disparities extend beyond the influence of the EU and are in fact deeply entrenched in national social attitudes and in the methods for implementing rights and duties in the workplace.

This article focuses on the national implementation of the European Council Directive 2000/78/EC (the Directive),<sup>3</sup> its enforcement and the ensuing substantive protection against discrimination based on disability in the UK and Danish labour

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\* This article is inspired by the success of the Danish Employment Agency *Specialisterne*, the first in the world to establish a business model specifically placing people with the psychological disability known as Autism Spectrum Disorder (ASD). The company focuses on the special skills of persons with ASD, <http://dk.specialisterne.com/en/> (accessed 15 May 2014).

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Jackie Lane presented the idea for this article at the LLRN conference in Barcelona in 2013. We have cooperated in developing the angle, framework analysis and conclusions, and have – naturally – worked individually on the sections from our home countries.

<sup>1</sup> Including reservations to treaties.

<sup>2</sup> Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October 1997, entered into force on 1 May 1999.

<sup>3</sup> European Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

markets respectively. It also reveals some of the differences in implementation measures and substantive protections in the light of a contextual societal perspective. The Council's aim was to combat discrimination on specific illegal grounds within employment, with a view to putting the principle of equal treatment into effect in the Member States.<sup>4</sup> Employment and occupation are viewed as key elements, thus direct or indirect discrimination based on disability in areas covered by the Directive is prohibited throughout the EU.<sup>5</sup> In the latest Danish survey from 2013,<sup>6</sup> roughly 17.5 per cent of the population reported a disability or long-term health problem, and the employment level of disabled adults<sup>7</sup> was 43.9 per cent, compared to 77.5 per cent for adults without a disability. In the UK there are over 11 million people out of a population of 64 million with a limiting long-term illness, disability or impairment. In 2012, just 46.3 per cent of working-age people with disabilities in the UK were in employment, compared with 76.4 per cent of working-age non-disabled people. There is therefore a 30.1 percentage point gap between the employment of disabled and non-disabled people, which is similar to the Danish experience.<sup>8</sup>

Despite similarities between the number of those with limiting disabilities in Denmark and the UK, their similar EU membership histories and socially responsible attitudes, the difference in the extent to which anti-discrimination laws have been implemented in the labour market and interpreted by courts in the two countries is surprisingly stark.

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<sup>4</sup> Ruth Nielsen, *EU Labour Law*, 2nd ed., DJØF 2013, p. 307.

<sup>5</sup> *Ibid.*, s. (12).

<sup>6</sup> Marie Møller Kjeldsen, Helle Sophie Houlberg & Jan Høgelund, *Handicap og beskæftigelse, udviklingen mellem 2002 og 2012* (SFI - Det nationale forskningscenter for velfærd, København 2013) (hereinafter SFI 13:01) (Disability and Employment, the development between 2002 and 2012, the Danish National Centre for Social Research).

<sup>7</sup> "Employed" includes all persons who have either worked for at least one hour for pay in the reference week, are self-employed, or have a contract to start work within the next three months, *ibid.*, at 51 note 18; cf. Statistics Denmark's Labour Force Survey <http://www.dst.dk/en/Statistik/dokumentation/metode/aku-arbejdskraftundersogelsen.aspx> (accessed 15 April 2014).

<sup>8</sup> Labour Force Survey UK 2012. <http://odi.dwp.gov.uk/disability-statistics-and-research/disability-facts-and-figures.php#gd>.

At the heart of these challenges lies the very concept of disability in a European setting, which is still evolving,<sup>9</sup> as is the concept of equality. Any hard evidential conclusions as to whether the objectives of the European Council have been met are therefore elusive. However, a tendency can be deduced from a comparison of the processes and consequences in the two countries, revealing information of interest for future political deliberations at the national and EU level, on issues involving individual rights, EU-regulation and the national labour markets. Although most people in general adhere to principles of equality, dignity and equal opportunities, the success (or failure) in their practical application when in competition with other fundamental principles tends to vary. The Directive's obligation for Member States to prohibit discrimination on grounds of disability at the workplace invoked a number of such conflicting principles and goals. This article will argue that the existence of such conflicting underlying goals in the area of application, combined with divergent legislative traditions and varying levels of enforcement, has resulted in a difference in the legal and substantive level of protection between the two countries.

The article allocates ample space to debating the developments in Denmark, since British developments and scholarly discussions are arguably better-known and more accessible at this point in time. The imbalance is not intended to promote one approach over the other, but the purpose of the article is to highlight obstacles and differences and learn from this critical comparison in order to provide indications for the future.

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<sup>9</sup> Maria Ventegodt Liisberg, *Disability and Employment*, 21 (Intersentia 2011), Anna Bruce, *Which Entitlements and for Whom? The Convention on the Rights of Persons with Disabilities and its Ideological Antecedents* (Dissertation, Department of Law, Lund University, 2014) summary in English available at <http://www.lunduniversity.lu.se/lup/publication/4317185> (accessed 25 November 2014), Opinion of Advocate General N. Wahl of 26 September 2014 in *Z v A Government Department and the Board of Management of a Community School*, Case C-363/12, para 83-98. Colin Barnes, Geoffrey Mercer, *The Social Model of Disability: Europe and the Majority World*, (The Disability Press 2005); B. Hvinden, *The Uncertain Convergence of Disability Policies in Western Europe*, Vol. 37, *Social Policy and Administration*, 609, (2003); Lisa Waddington, *Working Towards a European Definition of Disability*, Vol.2, *European Journal of Health Law*, 255, (1995); Anna Lawson, Caroline Gooding (eds), *Disability Rights in Europe: From Theory to Practice*, Hart (2005); B. Hepple, *Equality: The Legal Framework*, Hart: (2014).

## The EU and disability

The Amsterdam Treaty of 1997 extended the existing EU principle of non-discrimination, on grounds of gender, and its application in the labour market, to other criteria such as disability. Since then EU disability policy has had two motivating agendas: human rights and the economy.<sup>10</sup> People with disabilities are recognized not only in terms of basic human rights, but also as being of value in the contribution they can make to the economy.

The enforcement of EU labour law rules takes place at the domestic level and according to domestic rules and procedures.<sup>11</sup> In order to achieve the required results, the principle of consistent interpretation requires national courts to apply their national implementation laws in light of the purpose of the EU directive.<sup>12</sup> In the Directive, the concept of disability was intentionally left to be developed by the domestic courts and the ECJ (now CJEU), as was the appropriate level of the duty on employers to make reasonable adjustments or accommodations.

The concept of disability has been the subject of study over decades from a social and political perspective. The earliest *medical* model defines a disability in terms of the medical condition of a person. Later research<sup>13</sup> separated the impairment (the condition) from the disability (the societal barriers) and introduced the *social* (relational or environmental)<sup>14</sup> model. According to this view, interaction with

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<sup>10</sup> Sarah D. Phillips, EU Policy and Implications for Disability Rights in Education and Employment in Bulgaria, Romania, Croatia, and the Former Yugoslav Republic of Macedonia, *Journal of Disability Policy Studies*, 2012, 22:208.

<sup>11</sup> Nielsen, *supra* n. 4, at 108.

<sup>12</sup> *Von Colson and Kamann v North-Rhine Westphalia*, Case 14/83, para. 26.

<sup>13</sup> The social model was introduced by British disability researchers with the Union of the Physically Impaired Against Segregation Manifesto of 1976, Steen Bengtsson, Dorte Laursen & Stigaard, *Aktuel Skandinavisk og britisk handicap-forskning: en kortlægning af miljøer* (SFI – Det nationale forskningscenter for velfærd, København 2011) (hereinafter SFI 11:44) 21 (Current Scandinavian and British Handicap Research: a mapping of environments, the Danish National Centre for Social Research).

<sup>14</sup> Some scholars distinguish between the social model and the environmental model, e.g. SFI 11:44, *supra* n. 13, at 21, and United Nations Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention, Initial Report of States Parties, Denmark* (CRPD/C/DNK/1) 6 (24 August 2011)(hereinafter DK UN Disability Report 2011), whereas some scholars do not distinguish between them, e.g.

society in certain situations can become disabling to persons with an impairment. The social model formed the basis for the World Health Organization definition of disability in 1980,<sup>15</sup> the United Nations (UN) Standard Rules of Equalization of 1996,<sup>16</sup> and the UN Convention on the Rights of Persons with Disabilities of 2006.

The first ECJ case on the concept of disability, *Chacon Navas* in 2006,<sup>17</sup> produced a very restrictive view on the concept of disability, focusing on the impairment and its causes. However, in 2007 the EU ratified the UN Disability Convention,<sup>18</sup> making it an integral part of the EU legal order, thus placing an obligation on the ECJ to interpret the Directive in a manner consistent with the Convention. In the joined Danish references to the CJEU, *Jette Ring*<sup>19</sup> and *Skouboe Werge*<sup>20</sup> (Ring and Skouboe Werge) in 2013, a new understanding of the concept of disability was given by the CJEU in light of the UN Disability Convention,<sup>21</sup> bringing the CJEU concept of disability much more into line with the social model. This approach was upheld in 2014 in the *Z-case*,<sup>22</sup> which nonetheless states that the protection against discrimination on grounds of disability in the Directive can only be applied to conditions constituting a barrier to participation in professional life. The Disability Convention's broader protection from discrimination in participation in society

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Nielsen *supra* n. 4, at 346, Liisberg *supra* n. 9, at 91. For the purpose of this article the terms social model, environmental model and relational model are used interchangeably.

<sup>15</sup> World Health Organization, *International Classification of Impairments, Disabilities, and Handicaps: A manual of classification relating to the consequences of disease* (Geneva 1980).

[https://extranet.who.int/iris/restricted/bitstream/10665/41003/1/9241541261\\_eng.pdf](https://extranet.who.int/iris/restricted/bitstream/10665/41003/1/9241541261_eng.pdf) (accessed 23 May 2014).

<sup>16</sup> United Nations General Assembly, *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, A/RES/48/96 (General Assembly 20 December 1993) <http://www.un.org/documents/ga/res/48/a48r096.htm> (accessed 14 April 2014).

<sup>17</sup> *Chacón Navas v Eurest Colectividades SA*, C-13/05.

<sup>18</sup> 2010/48/EC Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, vol. 53, *Official Journal of the European Union*, L 1, 35 (2010).

<sup>19</sup> *HK Danmark, acting on behalf of Jette Ring v Dansk Almennyttigt Boligselskab*, C-335/11.

<sup>20</sup> *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S*, C-337/11.

<sup>21</sup> Ring and Skouboe Werge, *supra* n. 19 and 20, para. 28-32, cf. Linda Rudolph Greisen, *Handicapbegræbet i EU-Domstolens praksis*, 3 2013 Juristen, 99 (2013) (The concept of disability in the ECJ's practice)(hereinafter Greisen 2013)

<sup>22</sup> *Z v A Government Department and the Board of Management of a Community School*, Case C-363/12.

cannot extend the protection given by the EU Directive.<sup>23</sup> The latest addition is the 2014 AG opinion in the *Kaltoft*-case,<sup>24</sup> which continues the social model approach.<sup>25</sup> The AG holds the view that in cases where obesity has reached a degree where in interaction with attitudinal and environmental barriers it hinders full participation in professional life on an equal footing with other employees, it can be considered a disability.<sup>26</sup> The focus is clearly on the barriers arising from interaction with society, not on the condition or the cause of the condition itself. The social model is now clearly preferred by the CJEU.

### **Protection against discrimination at the workplace in the UK**

The UK has a long history of legislating to protect people with disabilities,<sup>27</sup> but the UK courts' role is currently to apply and interpret domestic and EU legislation. Although the courts have occasionally raised questions relating to Parliament's transposition of EU Directives<sup>28</sup>, it is suggested here that, in the light of the current UK Government's antipathy towards the EU and its Guiding Principles for EU Legislation<sup>29</sup> which stress that the default position is to apply the *strictest* interpretation to Directive requirements, there is a distinct possibility that such instances may become more prevalent in the future, with the potential for reduced protection from discrimination in the workplace.

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<sup>23</sup> AG Wahl, *supra* n. 9, para. 90-91.

<sup>24</sup> Opinion of Advocate General Jääskinen, 17 July 2014, in *Karsten Kaltoft v the Municipality of Billund*, Case C-354/13

<sup>25</sup> *Ibid.* para. 41.

<sup>26</sup> *Ibid.* para. 55.

<sup>27</sup> For an interesting overview and timeline, see:

<http://www.disability-equality.org.uk/uploads/files/fb979acea0dfe4ec8163fc610ffcf305.pdf>.

<sup>28</sup> For example: *Commission v UK* (C-127/05) (Directive 89/391 art. 5(1) and 5(4) (Health and safety); *Commission v UK* C-373/92 [1994] IRLR 142 (Acquired Rights Directive); *Commission v UK* [1995] 1 CMLR 345 (Consultation over redundancy).

<sup>29</sup> Document BIS/13/774 <https://www.gov.uk/government/publications/guiding-principles-for-eu-legislation>.

In the UK, the Guiding Principles for EU legislation were announced on 15 December 2010 and apply to the transposition of all EU Directives.<sup>30</sup> These Guiding Principles are to ensure, *inter alia*, that the UK does not go beyond the minimum requirements of the measure that is being transposed (so-called “gold-plating”); that implementation is not done before the deadline; that businesses are not put at a competitive disadvantage compared to other EU countries and that “copy-out” should always be used as a means of transposition where available. In view of this vividly anti-EU guidance, the question arises as to the attitude of the current UK Government towards legislation that not only requires businesses to avoid discriminating against persons with disabilities, but that also requires them to make reasonable adjustments to enable them to take up work or continue in a job. This could also be viewed as a burden to business and the fear is that legislative protection will in the future be reduced to a minimum level. Unlike Denmark, where much of the protection is laid down in collective agreements and union membership is high, enabling more people to take advantage of it, in the UK legislation is the primary source of protection for people with disabilities and collective agreements serve merely to supplement terms and conditions.

However, the Disability Discrimination Act 1995 (DDA) preceded EU measures, and the fact that the UK has extensive legislation going considerably beyond what the EU requires by way of disability discrimination protection as a result of its own initiatives, gives hope for at least the current level of protection to be maintained - even if not further enhanced.<sup>31</sup> The DDA was brought in to protect the disabled at work and in other areas, including a duty imposed on service providers to make

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<sup>30</sup> *How to Implement EU Directives Effectively*,

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf) (Accessed 11 March 2014).

<sup>31</sup> Provisions in Schedule 1 to the Equality Act 2010 (Disability: Supplementary Provision) relate to severe disfigurement as a disability; certain medical conditions including cancer, HIV and multiple sclerosis are deemed automatically to be disabilities; progressive conditions and past disabilities are also included. The Autism Act 2009 imposes a duty on public authorities to make special provisions for autistic adults.



reasonable adjustments in the provision of access to goods, facilities, services and premises. There were provisions relating to education providers, and to public transport. The Act was designed to bring about an end to discrimination in these areas, and came about, not as a result of a push from Europe, but as a UK Parliamentary initiative. The Act made it unlawful to discriminate in recruitment, promotion, training, working conditions and dismissal for a reason relating to the person's disability. In addition, the employer was obliged to make reasonable adjustments to accommodate employees and job applicants, such as changes to company premises.

The definition of a disabled person shifted from an inability to do particular kinds of work, to an inability to carry out normal day-to-day activities, but that had to be both substantial and long-term, thus retaining the heavy burden of proof on the complainant.<sup>32</sup> The definition stemmed from the medical model of disability, as it focused "solely on the inability to perform certain physical or mental functions caused directly by the 'impairments' of an individual."<sup>33</sup> The more enlightened "social model", such as that adopted in the United States, recognizes that the problem lies with the discriminator and his own misconceptions and stereotypes, rather than with the disabled person.<sup>34</sup> The Act was criticised for the narrowness of its definition of disability, since employers could claim that discrimination was justified (and therefore lawful); also, no commission similar to the Equal Opportunities Commission was created to investigate complaints, or to assist individuals to enforce their legal rights.<sup>35</sup> The most serious criticism of the Act was that, under s.7, it only

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<sup>32</sup> Disability Discrimination Act 1995, s.1(1). "a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities." Evidence suggests that, since judicial attention is focussed on the functional limitations of the claimant, almost 20 per cent of cases fail because of the definition: N. Meagre et al, *Monitoring the Disability Discrimination Act 1995: Phase 3* (London: DRC, 2004).

<sup>33</sup> G. Gooding, *Disability Discrimination Act 1995*, 3 (London: Blackstone 1996).

<sup>34</sup> The Americans with Disabilities Act 1990: 3[2](c) includes within the definition of disability the fact of 'being regarded as having such an impairment'.

<sup>35</sup> The Disability Rights Commission, set up in 1999, did however have rights of investigation and review of disability legislation, and could advise employers on how to secure equal treatment of workers.

applied to employers with twenty or more employees, but the incoming Labour Government's Disability Rights Task Force addressed the shortcomings of the Act in its 1999 Report, *From Exclusion to Inclusion*, a task that was given a boost by the reaching of agreement on the Employment Directive. In addition the UK courts continued to give a wide interpretation to the definition of disability, strengthening the protection of the law towards disabled workers.<sup>36</sup>

Not only are disabled people less likely to be in work, but reports compiled between 2006 and 2008 showed that hourly wage rates were considerably lower for both men and women. Even with state benefits, a DDA disabled working-age man had a net median income 30 per cent lower than a non-disabled man.<sup>37</sup> Public perceptions of people with disabilities were also negative.<sup>38</sup> The reports showed that attitudes had improved since 2006, but continued to demonstrate a "benevolent prejudice." Four in ten people thought of disabled people as being less productive, and three-quarters thought that disabled people needed some element of care.<sup>39</sup>

The DDA, which pre-dated the Directive by five years, did, to a considerable extent, already satisfy the requirements of the Directive, despite its limited efficacy, although the Directive allowed no exception for small employers and this limitation was removed. The DDA was repealed and replaced by the Equality Act 2010 (although the DDA continues to operate in Northern Ireland). It continues to place an obligation on employers to make reasonable adjustments to the workplace to counteract a

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<sup>36</sup> In *Goodwin v Patent Office* [1999] IRLR 4 EAT, the Employment Appeal Tribunal held that a purposive approach to the interpretation of disability should be adopted; in *McNicol v Balfour Beatty Rail Maintenance* [2002] EWCA Civ 1074 the Court of Appeal held that the term 'impairment' may either result from an illness or consist of an illness; the requirement for the impairment to be substantial was held to mean 'more than minor or trivial' in *Goodwin v Patent Office* [1999] ICR 302; and the requirement for the impairment to have an effect on normal day-to-day activities was held to include such tasks as bed-making, cutting with scissors and ironing: these wide interpretations to the definition of disability helped substantially to ameliorate the original narrow scope as first drafted in the DDA.

<sup>37</sup> *An Anatomy of Economic Inequality in the UK: Report of the National Equality Panel, 2010.*

<sup>38</sup> *Public Perceptions of Disabled People: Evidence from the British Social Attitudes Survey, 2009.*

<sup>39</sup> *Ibid.*, at 9.

provision, criterion or practice that puts the disabled person at a disadvantage.<sup>40</sup> Although the majority of the provisions in the Act which relate to disability are firmly based on the medical model, there is provision for protection from discrimination based on *past* disabilities, recognizing that a person with a history of disability may continue to experience discrimination even when he or she is no longer disabled.<sup>41</sup> This is a move away from the purely medical model towards a social model of disability and had already been a feature of the earlier DDA. It is also worth noting that, as a result of amendments to the DDA, a number of conditions are regarded as amounting to disabilities even if they have no impact on function (for example cancer, past disabilities, or conditions controlled by drugs such as epilepsy). Additionally, in a positive move that benefits those with certain psychological disorders, the UK legislated in 2009 for the specific needs of adults with autistic spectrum disorders.<sup>42</sup> The Autism Act is the first UK Act of Parliament specific to one disability, and places a duty on public bodies to provide support services for autistic adults.

The Equality Act 2010<sup>43</sup> had two purposes: to harmonise discrimination law and to strengthen the law to support advances in equality. It largely repeals and consolidates all the anti-discrimination legislation, including the DDA, and has brought greater clarity to the law on disability. The Act provides for two special kinds of discrimination which only apply to the protected characteristic of disability. These

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<sup>40</sup> Equality Act 2010, ss. 13, 15, 19, 20.

<sup>41</sup> Ian Smith & Aaron Baker, *Smith and Wood's Employment Law*, 393 (Oxford University Press: Oxford 2013). Cases on past disability include: *British Gas Trading v Scott* UKEAT/O322/07/RN; *Slaney v Culina GmbH* UKEAT/O291/05/DM. See C. O'Brien, *E.L.Rev.* 2011, 'Equalities false summits: new varieties of disability discrimination, "excessive equal treatment" and economically constricted horizons' for analysis of disability provisions, asking whether they are now an excessive burden on the economy.

<sup>42</sup> Autism Act 2009.

<sup>43</sup> The Department for Communities and Local Government published a consultation paper in 2007 entitled *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*. In 2008 two Command Papers were published by the Government Equalities Office: *Framework for Fairer Future: The Equality Bill* (Cm. 7431) and *The Equality Bill: Government Response to the Consultation* (Cm.7454). The Equality Bill was introduced to Parliament in April 2009 and received Royal Assent on 8 April 2010, most of its provisions coming into force in October 2010.

are discrimination arising from disability under s.15 while the duty to make adjustments under s.20-22 has been carried over from the DDA.<sup>44</sup> Positive discrimination in favour of disabled people is also permitted, for example an employer can decide to appoint an applicant from a group sharing a protected characteristic if there is a reasonable belief that this group is disadvantaged because of something connected with this characteristic, or under-represented in the workforce, or if their participation in an activity is disproportionately low.<sup>45</sup> The employer can only use these ‘tie-break’ provisions when faced with a choice between two or more candidates who are equally well qualified. In addition, an employer can take steps to encourage people from groups with different needs or with a past track record of disadvantage or low participation to apply for jobs.<sup>46</sup>

Section 15 effectively eliminates the previous requirement for a comparator, and thereby rectified the situation created by the House of Lords’ decision in *Lewisham LBC v Malcolm*<sup>47</sup>, which overturned previous decisions<sup>48</sup> and insisted that a like-for-like comparison was required. The DDA, as originally enacted, also permitted justification of direct discrimination, but was modified in line with the Directive, and the Equality Act reflects this change.

The Equality Act 2010, however, is an example of opportunities seized and lost.<sup>49</sup> While the definition of disability had already been widened since the DDA was first drafted, the opportunity to remove the requirement for the impairment to have a long-

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<sup>44</sup> Recent cases have interpreted the requirement for reasonable adjustment fairly narrowly: *General Dynamics IT v Carranza* UKEAT/0107/14/KN (final warnings as reasonable adjustment); *Paulley v First Group* [2014] EWCA Civ 1573 (demanding that a non-disabled person vacate a seat for disabled passengers); *Hainsworth v MoD* UKEATPP/0227/13/GE (no obligation to make reasonable adjustment for those only associated with a disabled employee).

<sup>45</sup> Equality Act 2010, s.159.

<sup>46</sup> Equality Act 2010, s.158.

<sup>47</sup> [2008] UKHL 43.

<sup>48</sup> *Clark v Novacold* (1999) All ER 977 laid down guidelines on the comparator requirement and was subsequently interpreted leniently in accordance with these guidelines until *Lewisham LBC v Malcolm*.

<sup>49</sup> For further discussion, see A. Lawson, *Industrial Law Journal*, Disability and employment in the Equality Act: opportunities seized, lost and generated, 2011.

term or substantial effect was missed and the definition remained almost unchanged. The requirement for the impairment to have an effect on normal day-to-day activities has also been retained, even though in other jurisdictions such as Australia and Ireland there is no similar requirement.<sup>50</sup> On the positive side, employers are now prohibited from requiring pre-employment health checks or asking questions specifically about an applicant's health.<sup>51</sup> This is possibly one of the most important new provisions for disabled workers.

Legislation can serve to lay down the foundation of the objectives of a modern, liberal country, and the courts can act to refine the correct meaning and scope of the legislation on a case-by-case basis but more is needed to educate society into changing ingrained attitudes. The legislation has been woefully ineffective in improving rates of unemployment for disabled people in the workplace.<sup>52</sup> People with disabilities also have low levels of representation in public appointments – one in 20, despite one in five people of working age having a disability.<sup>53</sup> The public sector equality duty<sup>54</sup> is also disappointing in that the former specific duty under the DDA which required public sector bodies to draw up equality schemes with the *involvement* of disabled people has now been severely curtailed.<sup>55</sup> This is designed to free public sector organisations from the 'burdens' of unnecessary bureaucracy, but is a retrograde step and puts still greater distance between the policy-makers and those whom they purport to help.

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<sup>50</sup> Australian Disability Discrimination Act 1992, s.4 and Irish Employment Equality Act 1998, s.2(1).

<sup>51</sup> Section 60 EqA 2010.

<sup>52</sup> <https://www.gov.uk/government/publications/disability-facts-and-figures/disability-facts-and-figures>

<sup>53</sup> Cabinet Office Press Release, 14 July 2008:

[http://www.cabinetoffice.gov.uk/newsroom/news\\_releases/2008/080714\\_diversity.aspx](http://www.cabinetoffice.gov.uk/newsroom/news_releases/2008/080714_diversity.aspx)

<sup>54</sup> EqA 2010 s.149.

<sup>55</sup> See C. Pearson et al, 'Don't get Involved: An Examination of How Public Sector Organisations in England are Involving Disabled People in the Disability equality Duty' (2011) 26 *Disability and Society* 255, 266.

## Protection against discrimination at the workplace in Denmark.

Denmark is a constitutional monarchy, and State powers are divided between three branches: legislative power rests with the parliament, executive power with the government, and judicial power with the courts. The rule of law is a fundamental principle in the Danish legal system.<sup>56</sup> International co-operation is consistently evident through accurate and timely implementation of EU-directives,<sup>57</sup> and the country's willing participation in international humanitarian causes.<sup>58</sup> Yet the government is often the target of criticism for failing to provide substantive protections closer to home.<sup>59</sup>

Within the area of labour law, the Danish model provides that working conditions are determined by way of negotiation between the (private) labour market parties. Collective agreements play a major role in establishing substantial rights and principles.<sup>60</sup> Parliament has traditionally been hesitant to interfere with this arrangement through legislation, and will do so only when other avenues of

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<sup>56</sup> e.g. Denmark ranked world first in the 2014 World Justice Project Rule of Law index, <http://data.worldjusticeproject.org/#/index/DNK> (accessed 23 May 2014).

<sup>57</sup> e.g. Denmark ranks among the best in the EU Internal Market Scoreboard, surveying Member States biannually across a number of implementation factors, [http://ec.europa.eu/internal\\_market/score/index\\_en.htm](http://ec.europa.eu/internal_market/score/index_en.htm) (accessed 23 May 2014).

<sup>58</sup> e.g. Denmark ranks fourth in the world regarding concessional financing for development as share of GNI (%), <http://www.oecd.org/dac/dac-global-relations/non-dac-reporting.htm> (accessed 23 May 2014).

<sup>59</sup> Re: Health and environment, Dorte Sindbjerg Martinsen, *Danmarks implementering af EU-politik*, 45 *Politica* 438-456 (2013) (Denmark's implementation of EU-policy); The Uneven Legal Push for Europe, 10 *European Union Politics* 63-88 (2009). Re: Racial discrimination, Tore V. Olsen, *Discrimination and anti-discrimination in Denmark: Analysis of the legal challenges. A European Approach to Multicultural Citizenship: Danish Report – WP4 Legal challenges*, 6, (*EMILIE project, CIT5-CT-2005-028205, 2008*) (hereinafter Olsen 2008).

<sup>60</sup> 80% of workers are covered by a collective agreement, Jesper Due, Jørgen Steen Madsen & Mie Palskov Pihl, *Udviklingen i den faglige organisering: årsager og konsekvenser for den danske model, LO-dokumentation nr. 1/2010, 81* (Landsorganisationen i Danmark 2010) (The development in industrial organization: causes and consequences for the Danish model, LO (The Danish Confederation of Trade Unions) documentation no. 1/2010)). Collective agreements are binding and cannot be changed by individual agreement, Ole Hasselbalch, *Labour law in Denmark*, 44 (3rd ed., DJØF, Wolters Kluwer 2013), *International Encyclopedia of Laws/Labour Law and Industrial Relations* (Ed. Roger Blanpain)(hereinafter Hasselbalch 2013). Further on the Danish model, see e.g. Ole Hasselbalch, *The Roots – the History of Nordic Labour Law*, 43 *Scandinavian Studies in Law* 11-35 (2002), Reinhold Fahlbeck, *Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features*, 43 *Scandinavian Studies in Law* 87-133. (2002), Niklas Bruun, Boel Flodgren, Marit Halvorsen, Håkan Hydén & Ruth Nielsen, *The Nordic Labour Relations Model* (Ashgate 1992) (hereinafter Nielsen 1992).

negotiation or conflict have been exhausted,<sup>61</sup> in areas of public interest or of social security, or for certain groups of workers.<sup>62</sup> Regulation that is imposed top-down, such as EU directives, is in conflict<sup>63</sup> with the procedural model of negotiation and with the delegation of powers to decide on provisions. The procedural option of implementing selected directives by way of collective agreement, with statutory legislation as the default mechanism is, it is suggested, only a solution in part.<sup>64</sup>

The Danish Parliament's reluctance to interfere in matters of labour law extends to the issue of discrimination and has a long history. In 1969 a parliamentary committee decided to leave the prohibition of racial discrimination in private workplaces to the trade unions.<sup>65</sup> Legislation was passed as late as 1996, following a statement by the Ombudsman that failure to protect against discrimination in private workplaces rendered Denmark in breach of international obligations.<sup>66</sup> The 1996 Anti-Discrimination Act<sup>67</sup> prohibited discrimination on the basis of race, skin colour, religion, political view, sexual orientation or national, social or ethnic origin. In 2004, the 1996 Anti-Discrimination Act was broadened to implement the Directive. Protected characteristics now included age and disability, placing an obligation on employers to adjust the workplace in order to accommodate persons with disabilities, and extending the types of unlawful behaviour.

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<sup>61</sup> i.e. the Danish or Nordic Model, e.g. Hasselbalch 2013, n. 54, at 23, and Nielsen 2013, *supra* n. 4, at 112.

<sup>62</sup> Similarly until recently in the UK, Simon Deakin & Gillian S. Morris, *Labour Law*, 26 (6th ed., Hart Publishing 2012).

<sup>63</sup> Olsen 2008, *supra* n. 59, at 39-40. On Danish reluctance towards international obligations in the area of labour law, Nielsen 2013, *supra* n. 4, at 112.

<sup>64</sup> On challenges of implementing by collective agreements see e.g. Ruth Nielsen, Implementation of EC directives in Denmark, 18 *IJCLIR* 459-478 (2002), and Ole Hasselbalch, Den danske arbejdsret, Bind I - Arbejdsrettens almindelige del, 255-265 (*DJØF* 2009) (Danish labour law, vol. I, General issues in labour law).

<sup>65</sup> *Betænkning nr. 553 af 1969 om Forbud mod Racediscrimination*, 30-32 (1969) (*Report of the 1969 parliament committee on the prohibition of racial discrimination*). The committee's reflections included a referral to the UK exemption of employment relations from the Racial Discrimination Acts until 1968.

<sup>66</sup> *Folketingets Ombudsmands Udtalelse FOU 1995.46* (Ombudsman opinion no. 46 in 1995) on Danish obligations under International Labour Organization Convention No. 111 on Discrimination (Employment and Occupation), 1958, ratified by Denmark in 1961, and under *United Nations International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, ratified by Denmark in 1971.

<sup>67</sup> *Lov nr. 459 om forbud mod forskelsbehandling på arbejdsmarkedet m.v.* (12 June 1996), now *Lovbekendtgørelse nr. 1349* (16 December 2008) (Anti-Discrimination Act).

However, this late inclusion of disability should not be taken as evidence that the issue of disability and employment was ignored in society.<sup>68</sup> Since the 1960s,<sup>69</sup> measures enabling disabled persons to exercise their work skills on an equal footing with others have been on the political agenda.<sup>70</sup> From early on, Danish disability policy became based on the compensation principle.<sup>71</sup> Social legislation established a range of supports to overcome barriers in interaction in society, including the workplace. The focus was neither on the condition of the person, nor on individual rights or adjusting society.<sup>72</sup>

The issue of legislating by way of a general anti-discrimination act or by measures involving force frequently surfaced.<sup>73</sup> This was rebutted by several commentators who referred to the traditional Danish model of negotiation, the Danish mentality of voluntarism, a fear of increased stigmatization if legislation were to focus on individuals, and the existing detailed level of legislation. Others held that Denmark was indeed in need of a general prohibition on any discrimination in any situation.<sup>74</sup> However, the Directive was implemented by way of amendments to existing labour

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<sup>68</sup> Birgitte Kofod Olsen, Maria Ventegodt Liisberg & Morten Kjærum, *Personer med funktionsnedsættelser i Danmark, Udredning nr. 3, Institut for Menneskerettigheder 2005*, (Persons with impairments in Denmark, Report no. 3, Danish Institute of Human Rights 2005)(DIHR 03.05) 8-10, and SFI 11:44, *supra* n. 13, 20-21.

<sup>69</sup> Currently the social and labour market schemes include wage subsidies, part-time employment subsidies, personal assistants, physical aids, priority schemes after an education and in public employment, mentoring and job-try-outs.

<sup>70</sup> Disability organisations continually influence governmental disability through formalised dialogue, e.g. via seats in parliament committees, e.g. *Betænkning nr. 1070/1986, De handicappede og arbejdsmarkedet* (Parliament report no 1070 of 1986, The disabled and the labour market)(Bet. 1070/1986).

<sup>71</sup> DK UN Disability Report 2011, *supra* n. 14, at 5.

<sup>72</sup> The latest *contemporary disability model* aims to adjust society in order to embrace substantial differences, instead of eliminating differences, Liisberg 2011, *supra* n. 9, at 47.

<sup>73</sup> *Folketingsbeslutning B43 fra 2. april 1993 om ligestilling og ligebehandling af handicappede med andre borgere* (Parliament Resolution B43 of 1993 on equalization and equal treatment of disabled people compared to other citizens, april 1993)(B43 of 1993), <http://www.clh.dk/index.php?id=1030> (accessed 19 June 2014); T. Clausen, J. Greve Pedersen, B. Marianne Olsen, S. Bengtsson: *Handicap og beskæftigelse - et forhindringsløb? (Disability and employment – an obstacle race)*. Socialforskningsinstituttet 04:03. (SFI 04:03) at 9-10; *Fælles mål for LO og DA i forbindelse med videreudvikling af den sociale indsats for et mere rummeligt arbejdsmarked* (8 March 2000) 6-7 (Common Goals for the LO (The Danish Confederation of Trade Unions) and the DA (the Confederation of Danish Employers) in the development of a more adaptive labour market). <http://www.da.dk/bilag/dalo%207.3.00.htm> (accessed 19 June 2014).

<sup>74</sup> Olsen, *supra* n. 59, at 29-30; DIHR e.g. at <http://menneskeret.dk/emner/handicap/10-stoerste-udfordringer> (accessed 10 March 2014).



legislation and, although there was an option to implement by way of collective agreement, the trade unions generally did not take this matter further.<sup>75</sup>

In the preliminary works of the 2004 Anti-Discrimination Act<sup>76</sup> the Minister of Labour remarked that with regard to the concept of disability the Directive did not alter the Danish understanding. A definition was not included in the 2004 Anti-Discrimination Act, but the minister referred to the concept of disability as laid down in the existing social and labour market legislation,<sup>77</sup> where disability means a physical, mental or intellectual disability, entailing a *need for compensation* in the sense of accommodation in order for the person to function on an equal footing with others in similar life situations. Reference was made to the Danish Disability Council's Paper of 2001,<sup>78</sup> Parliament Resolution B43 of 1993,<sup>79</sup> and the UN Standard Rules of 1993.<sup>80</sup> According to the minister, a specific need for compensation was, however, not a requirement for protection against discrimination, and also the cause of the disability was irrelevant in this context.<sup>81</sup>

Complaints were assessed by the civil courts until 2009, when the administrative Board of Equal Treatment (the Board) covering all protected criteria in all discrimination laws inside and outside the workplace was established.<sup>82</sup> The legislators left further interpretation of the 2004 Act to the courts, and a fairly

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<sup>75</sup> One major collective agreement has implemented the Directive, *Bilag 23 til Industriens Funktionæroverenskomst mellem Dansk Industri og CO-industri, Protokollat af d. 2. oktober 2004 mellem Dansk Industri og CO-industri*. Olsen 2008, *supra* n. 59, at 28, takes the view, that anti-discrimination provisions in collective agreements are practically non-existent because of opposition by the DA (the confederation of Danish Employers).

<sup>76</sup> *Bemærkninger til lovforslaget, almindelige bemærkninger, 4.1. Handicapkriteriet* (L92 2004-2005) 16-17 [http://www.ft.dk/samling/20041/lovforslag/192/html\\_som\\_fremsat.htm](http://www.ft.dk/samling/20041/lovforslag/192/html_som_fremsat.htm) (accessed 19 June 2014).

<sup>77</sup> *Ibid.*, at 16-17, 4.1. *Handicapkriteriet*, and at 23-25, *Bemærkninger til lovforslagets enkelte bestemmelser, til nr. 2 Handicapkriteriet*. This was later criticized as causing confusion, Pia Justesen, *Handicap og discrimination på arbejdsmarkedet*, 2008B Ugeskrift for Retsvæsen (UfR) 302-310, 305-306 (Handicap and discrimination at the work market)(Justesen 2008).

<sup>78</sup> *Handicap og Ligebehandling* 2001.

<sup>79</sup> B43 of 1993, *supra* n. 73.

<sup>80</sup> UN Standard Rules 1993, *supra* n. 16.

<sup>81</sup> L92 2004-2005, n. 75, at 24-25. Both statements were overruled in the first judicial rulings on the act.

<sup>82</sup> *Lov nr. 387 om Ligebehandlingsnævnet* (27 May 2008), now *Lovbekendtgørelse nr. 905 om Ligebehandlingsnævnet* (3 September 2012). The establishment of the Board was a procedural improvement, creating one administrative procedure for all types of discriminations. Earlier, gender discrimination cases were assessed by the Equality Board and racial discrimination cases by the Complaints Committee for Ethnic Equality.

restrictive interpretation of what constitutes a disability was developed in a series of judicial decisions. The Board and the courts established that a permanent disability *and* a need for compensation were both necessary criteria in order to be covered by the concept of disability in the Act. Further, only certain types of compensation needs were recognized.<sup>83</sup> As a result, the protection under the Act was granted only in the most limited of circumstances.

Unsurprisingly, fierce criticism of the rulings followed.<sup>84</sup> Proposals were also put forward to Parliament to improve the situation, including:

- a general ban on discrimination, recommended by several commentators,<sup>85</sup> to enhance legal certainty, and to make the legislation more transparent: opponents argued that this would not fit the Danish legislative tradition, that it would be stigmatizing, and that force would result in counterforce, which is counter-productive;<sup>86</sup>
- a change in terminology, replacing the term “handicapped” with “disabled”<sup>87</sup> since the popular understanding of “handicapped” was too narrow in Denmark,<sup>88</sup> and did not include the range of impairments intended to be covered by the Directive or the 2004 Act. The narrow interpretation of the terminology hindered the full application of the protections, since it limited the coverage intended both in the Directive and in the UN Disability Convention.

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<sup>83</sup> e.g. not a reduction in hours, 2008 UfR 306 VL.

<sup>84</sup> Justesen 2008, *supra* n. 77, at 307; Mogens Wiederholt, *Kommentar til Vestre Landsrets to afgørelser om personkredsen i forskelsbehandlingsloven*, 7 *Juristen* (2008) (Commentary on two decisions by the Western High Court on the personal scope of the Anti-Discrimination Act); Olsen 2008, *supra* n. 59, at 29-30; Anne Mortensen & Maria Topholm Skarum, *Forskelsbehandlingslovens handicapbegreb*, 2010B UfR 115, at 123. Positive is Linda Rudolph Greisen, *Handicapbegrebet i forskelsbehandlingsloven*, 6 *Juristen* (2008), and same in Greisen 2013, *supra* n. 21.

<sup>85</sup> DIHR 03.05, *supra* n. 68, at 14-16, Olsen 2008, *supra* n. 59, at 32, Justesen 2008, *supra* n. 77, at 310.

<sup>86</sup> Olsen 2008, *supra* n. 59, at 33, quoting John Wrench, *Diversity Management and Discrimination - Immigrants and Ethnic Minorities in the EU*, 34-35, Aldershot: Ashgate, 2007, suggesting that precisely on the issue of stigmatization, legislating directly on the practice is more efficient than trying to change attitudes.

<sup>87</sup> DIHR 03.05, *supra* n.68, at 16-18.

<sup>88</sup> *Ibid.*, and SFI 04:03, *supra* n. 73, at 36.

Nonetheless, the courts, and later the Board, continued with a strict application of the Act. For instance, to be considered disabled there had to be a specific need for compensation; a reasonable accommodation did not include a reduction in working hours; considerable certainty was required that the condition was permanent or long-term, and not caused by illness. Legislation could have been enacted to remedy these negative restrictions, but the legislature did not intervene. The ensuing case law was not only inconsistent in its interpretation of “disability”, it also led to an extremely narrow view of what constituted a disability and what reasonable accommodation might be. Impairments not covered by the Act, according to the judiciary, were injuries following electric shock,<sup>89</sup> epilepsy,<sup>90</sup> Asperger’s syndrome,<sup>91</sup> cognitive impairments,<sup>92</sup> stress<sup>93</sup> and sclerosis.<sup>94</sup> The conditions found to be protected by the Act<sup>95</sup> included brain damage after a traffic accident,<sup>96</sup> epilepsy,<sup>97</sup> dyslexia,<sup>98</sup> cerebral thrombosis,<sup>99</sup> and sclerosis.<sup>100</sup> The judicial bodies implemented the rulings of the ECJ (as it was then known),<sup>101</sup> and the courts assessed the reasonableness of the adjustments provided, and whether the person would be competent, capable and

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<sup>89</sup> 2009 UfR 1966 VL.

<sup>90</sup> Board decision no 19/2010.

<sup>91</sup> Board decision no 275 / 2012.

<sup>92</sup> Board decision no 224/2012.

<sup>93</sup> Board decision no 427 /2012.

<sup>94</sup> Eastern High Court 11/1 2013 – B-58-12, unpublished ruling, ØL 11/1 2013 – B-58-12, <https://www.djoef-forlag.dk/services/ARonline/>.

<sup>95</sup> Similarly, one case concerning an alleged breach of the protection implemented by *collective agreement*, Industrial Arbitration Case no. 0116 of 8 September 2009, <https://www.djoef-forlag.dk/services/ARonline/>, found muscular dystrophy to be covered. For views and the development in application of the protection by the Board, see *Årsberetning 2012, Ligebehandlingsnævnet, 22-29* (Annual Report 2012, Board of Equal Treatment), English summary, at 30-32.

<sup>96</sup> 2010 UfR 1748 VL.

<sup>97</sup> 2010 UfR 2303 ØL.

<sup>98</sup> Board decision no 425 / 2012.

<sup>99</sup> 2013 UfR 2435 VL.

<sup>100</sup> 2013 UfR 2473 ØL.

<sup>101</sup> e.g. the ECJ principle established in *Coleman v. Attridge Law and Steve Law*, Case C-303/06, was applied in the Danish case 2010 UfR 2610 VL.

available to work with the application of suitable measures.<sup>102</sup> In many later cases, the employers were found not to have fulfilled their obligations.<sup>103</sup>

The CJEU in the *Jette Ring and Skouboe Werge* in 2013<sup>104</sup> examined the Danish application of the concept of disability and accommodation measures, and further developed the concept of disability. The CJEU stated<sup>105</sup> that the origin of the condition and the nature of the accommodation are irrelevant; that the limitation should be long-term, whereas the cause of the limitation can be either curable or incurable. Furthermore,<sup>106</sup> a reduction in working hours may constitute an accommodation, though whether the burden is disproportionate was left to the national courts to determine.<sup>107</sup> Since April 2013 the Danish judicial bodies have applied the clarified definitions and principles, thus extending the concept of disability.<sup>108</sup> Interestingly the latest *Kaltoft*-case was referred to the CJEU by a Danish court, and the opinion of the AG states that in some instances severe obesity may constitute a disability protected by the Directive, further extending the protections. The scope of the protection for the disabled workers in Denmark is gradually being extended. However, as the starting point was low, the way forward has proved to be long and continually reactive to European developments.

The equality model of the EU is based on equality of opportunity.<sup>109</sup> To this end, the Directive aims for equal access to employment as a key element in achieving equality for people with disabilities. Observing levels of employment among persons with

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<sup>102</sup> The Directive, *supra* n. 3, at Preamble, no 17. Danish cases, e.g. Industrial Arbitration case 0116 of 2009, and 2010 UfR 1748 VL.

<sup>103</sup> e.g. 2010 UfR 1748 VL, 2010 UfR 2303 ØL, 2011 UfR 2880 ØL, 2013 UfR 2435 VL, 2013 UfR 2473 ØL.

<sup>104</sup> *Ring and Skouboe Werge*, *supra* n. 19 and 20..

<sup>105</sup> *Ring and Skouboe Werge*, *supra* n.19 and 20, at 34-47, questions 1 and 2 on the concept of handicap.

<sup>106</sup> *Ring and Skouboe Werge*, *supra* n. 19 and 20, at 48-64, question 3 on accommodation measures.

<sup>107</sup> In the ensuing national cases, 2014 UfR 0013 SH (*Ring*) and 2014 UfR 0019 (*Skouboe Werge*) the court found a reduction of hours not to be a disproportionate burden, and awarded both complainants 12 months' compensation.

<sup>108</sup> From June 2013 to May 2014, 22 cases on disability have been heard by the Board, all applying the CJEU definitions from *Ring and Skouboe Werge*, <http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/default.aspx> (accessed 19 June 2014). Also, since May 2013, the Danish Supreme Court has made its first ruling on disability, 2013 UfR 2575 H, applying the new CJEU definitions, creating a solid precedent.

<sup>109</sup> The EU has expressly endorsed the equal opportunities approach as the EU model of equality, Catherine Barnard, *EU Employment Law*, 4th ed., (Oxford University Press 2012) 293-4.

disabilities can therefore shed light on the impact of the national implementation of the Directive. In Denmark, a 2004 survey<sup>110</sup> found that 20 per cent of the participants described themselves as having a disability; 42 per cent of these disabled persons were unemployed, while only six per cent of non-disabled persons were unemployed. The popular understanding of disability was also found to be relatively narrow, for example, not including cognitive or mental disorders.<sup>111</sup>

The aim of the Directive would certainly be to bring about an improvement in those figures, yet recent statistics paint a bleak picture. In the latest Danish survey from 2013,<sup>112</sup> 17 per cent of the population was shown to have a disability or long-term health problem. Of that group, 56 per cent were unemployed, compared to 22 per cent of those without a disability. Thus far fewer people than before were willing to describe themselves as disabled, while an increased percentage of these were unemployed compared with the 2004 cohort. Within the group, 14 per cent suffered from a cognitive disorder, and in the case of this sub-group the employment rate is only 24 per cent. This report concludes that the employment levels of persons with a disability has not risen over the last ten years, and did not rise considerably in the decade from 1995 to 2005,<sup>113</sup> leading to the conclusion that neither legislation nor alternative social methods have had any significant impact on enabling disabled persons to take up employment. In a further survey on social attitudes from 2013<sup>114</sup> there was an indication that 92 per cent of persons with a disability encounter negative discrimination in general, and 50 per cent encounter discrimination in work situations. With these attitudes so ingrained in the Danish psyche, it is clear that legislation alone cannot bring about sufficient change in the protection for disabled

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<sup>110</sup> SFI 04:03, *supra* n. 73.

<sup>111</sup> SFI 04:03, *supra* n. 73, at 36.

<sup>112</sup> SFI 13:01, *supra* n. 6.

<sup>113</sup> SFI 13:01, *supra* n. 6 at 27.

<sup>114</sup> Pernille Skovbo Rasmussen og Katrine Schepelern Johansson, *Oplevet diskrimination og stigmatisering blandt mennesker med psykisk sygdom. Led i evalueringen af kampagnen EN AF OS* (KORA, Det nationale institut for kommuners og regioners analyse og forskning, 2013)(Perceived discrimination and stigmatization among persons with mental disorders, KORA, the National Institute for Analysis and Research of Local and Regional authorities).

workers without a fundamental shift in the way they are viewed and dealt with in the workplace.

Denmark has an impressive range of social support mechanisms for people with disabilities. In employment, however, the legal protection against discrimination at the workplace has traditionally been limited. The 2004 Act did not address the possibility that the pursuit of the goals of the Directive could be in direct competition with the traditional principles of the Danish labour market. The preliminary works of the Act did not give any guidance on how to deal with this conflict. Instead, the introduction of several views of the concept of disability opened up a wide range of options, and left a considerable vacuum to be filled by the civil courts in the first judicial rulings.

This void existed in an area of law traditionally infused by principles of voluntarism and worker solidarity. The courts filled the void by leaning on a traditional view of disability and referring to the terminology used in the existing legislation. In that, the courts utilized the social/relational and compensatory terminology in the existing legislation retrospectively, and established that a need for reasonable accommodation constituted a legal criterion. In this, the courts overruled the ministers' limited deliberations in the preliminary works on the scope of the protection.

The legal protection against discrimination in Denmark initially suffered from the tension between the well-meaning liberal and inclusive terminology used in early social legislation (including the stated aim of not stigmatizing the group any further), and the lack of substantive direction in the balancing of the goals in the anti-discrimination legislation and the courts.

## **Comparison**

Denmark and the UK display significant differences in their legislative approach to labour rights. In Denmark anti-discrimination provisions in the workplace in the

private sector were introduced relatively recently and legislative interference was minimal. Social legislation regarding people with disabilities was extensive, focusing on limiting barriers to employment, and establishing a number of schemes to accommodate for impairments. This approach was preferred over resorting to coercion or anti-discrimination legislation. In the UK, anti-discrimination legislation was introduced significantly earlier than in either Denmark or the EU generally; an initially conservative approach to disability rights has been liberalized by the English courts, which have been relatively consistent in giving a broad interpretation to the definition of disability and to the concept of reasonable adjustments.

In Denmark, the initial approach was restrictive, setting a high threshold for those seeking protection.<sup>115</sup> This stance has developed over a decade, always in line with the ECJ/CJEU definitions, but coupled with restrictive Danish domestic views, until 2013 when the CJEU overruled the Danish practice and at the same time adopted a new wider definition of the concept of disability. Between 2009 and 2013 the Board considered 71 cases of alleged disability discrimination but found in only seven of them that the complainant had been discriminated against and awarded compensation.<sup>116</sup> However, in the ten cases considered in the second half of 2013, after the European ruling, the Board of Equal Treatment found the condition to constitute a disability in 50 per cent of these, a significant increase compared to the first half of the year when only two out of seven fulfilled the criteria for being considered a disability under the Anti-Discrimination Act. Prior to this, the Board had failed to find that epilepsy, Asperger's syndrome and cognitive impairments were disabilities under the Act. In the civil courts, even multiple sclerosis was recently

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<sup>115</sup> It is a principle in human rights law not to limit the scope of protective legislation by interpretation, e.g. DIHR 03.05, *supra* n. 68, at 53. This explains why the limiting interpretation by the Danish courts could indicate that the Anti-discrimination Act was (at least then) not perceived as establishing human rights.

<sup>116</sup> Data taken from the 2012 report and the 2013 cases from the website of the board where all cases are published, <http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/default.aspx> (accessed 19 June 2014).

considered not to be covered by the disability concept of the Act, as the claimant did not need any accommodating measures at the point of dismissal.<sup>117</sup>

By contrast, UK courts hearing employment cases have had no difficulty in accepting that the following wide-ranging disorders are disabilities under the Equality Act 2010: personality disorder,<sup>118</sup> dyslexia,<sup>119</sup> mental impairment and major depression,<sup>120</sup> multiple sclerosis,<sup>121</sup> and post-traumatic stress disorder.<sup>122</sup>

It would be simplistic to attribute the difference in protection entirely to the variations in legal traditions, or to consider the equality of disabled persons in employment in the two countries to be based only on legal formal protection, since there are societal factors at work which add further dimensions to any direct comparison. First, there is a difference in the approach to social research. The Danish social research on disability issues, including employment, was – and still is – not concerned with opinions, unlike the British tradition founded on a more normative theory. The Danish research approach follows Nordic critical realism.<sup>123</sup> Traditionally, Danish researchers do not talk as much about oppression as the British. In Scandinavia “one assumes, that society wants to create equal opportunity”, and as a result “the research questions often are how disabilities in practice can be compensated.”<sup>124</sup> There is less discussion in Denmark about what is wrong in society, and more talk about the mechanisms, and how one can influence them.<sup>125</sup> Social research is used as a basis for governmental campaigns educating the general public (including employers and co-workers) on disability issues. The assumptions about how society reacts will no doubt influence the shape of any future legislation – normatively and on the rights of

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<sup>117</sup> Eastern High Court decision, ØLD of 11/1-2013, case no. B-58-12, and same court later 2013 UfR 2473 ØL .

<sup>118</sup> *The Carphone Warehouse Ltd v Mr S Martin* UKEAT/0371/12/JOJ and UKEAT/0372/12/JOJ.

<sup>119</sup> *Price v Transport for London* UKEAT/0005/11/JOJ.

<sup>120</sup> *Jennings v Barts and the London NHS Trust* [2013] Eq. L.R. 326.

<sup>121</sup> *Burke v College of Law* [2012] EWCA Civ 37.

<sup>122</sup> *Abbey National Plc v Dutton* UKEAT/0879/04/CK.

<sup>123</sup> SFI 11:44, *supra* n. 13, at 19. The same research approach is recognizable in the area of gender equality, Nielsen 1992, *supra* n. 64, at 184.

<sup>124</sup> SFI 11:44, *supra* n. 13, at 20.

<sup>125</sup> *Ibid.*



the individual being oppressed by society, or on the measures necessary to compensate for barriers which hinder equality.

Second, a difference in the socio-political approach is notable. In Denmark, disability and employment issues have attracted political interest for decades and continue to do so, with the government involving stakeholders through dialogue and consultation. There seems to be an absence of opposition between the disability organizations and the government, unlike the situation in the UK, where the disability organizations tend to have a more activist history.<sup>126</sup>

On the substantive levels of success, the social statistics drawn from official social surveys in the two countries are instructive. The employment rate of adults with disabilities in the two countries is comparable, at least superficially, although the indices measure different factors. The UK index counts only full-time employment, whereas the Danish survey counts everyone doing just one hour of paid work in the reference week as being employed. The difference in official measuring methods could potentially indicate a difference in ideals. The Danish survey, which measures employment broadly, could be said to be more in line with the reality of disabled persons in work, as they often require reasonable accommodation precisely in the form of reduced hours. The indices nevertheless indicate that both countries have some way to go in improving on these rather dismal statistics.

The final difference that is apparent concerns the collective labour market situation. In the UK, the area of labour law has already become largely individualized, with a decline in union membership, and fewer than 30 per cent of workers currently covered by a collective agreement.<sup>127</sup> In Denmark, around 80 per cent of all workers are covered by collective agreements, and the system of collective bargaining still

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<sup>126</sup> *Ibid.*

<sup>127</sup> In the UK the Labour Force Survey 2012 indicated that 29.2% of workers were covered by a collective agreement. <http://www.worker-participation.eu/National-Industrial-Relations/Countries/United-Kingdom/Collective-Bargaining>

largely sets the standards for conditions of work, with legislation acting as a supplement. Because of this, the Directive could have engendered a more substantive conflict between competing purposes in Denmark than in the UK, as the equality goals of the Directive are individual, protective and normative in character, whereas the labour market in Denmark is characterized by principles of solidarity, voluntarism and negotiation, and by a delegation of power to the private labour market actors in determining substantive conditions in the workplace.

### **Conclusions and perspectives**

Achieving equality for workers with disabilities has proved to be a struggle in both countries. The role played by legal measures was relatively limited in Denmark, while other, less formal, measures were adopted extensively and intensively. It could be argued that the 2004 Act and its enforcement in its first decade played only a minor role in protecting against discrimination at the workplace. At the same time, social indicators suggest that the general societal attitude in Denmark is more inclusive of people with disabilities than in the UK, and that in general discrimination in the workplace is less common in Denmark than in the UK. The question therefore arises as to why the Act seemed to play such a small role in tackling disability discrimination, when it is generally acknowledged that Denmark tries to take the lead in international humanitarian work and the protection of individual rights. It is suggested that the search for the appropriate balance between the rights of disabled workers and employers has been left to play out in the workplace rather than in the courts or through legislation, to the detriment of those who most need protection.

In terms of taking a positive stance against discrimination generally, Danish labour organizations have been active in promoting equality in gender issues, but less sure when it comes to the promotion of equality on ethnic and religious grounds.<sup>128</sup> Issues

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<sup>128</sup> Olsen 2008, *supra* n. 59, at 38.

such as individual rights and adjustment schemes are not in line with the traditional labour values of negotiation, collectivism and solidarity. The fact that the workplace is the forum in which protection against discrimination takes place does not make the issue a private matter: equality and non-discrimination are matters of concern for all of society and to leave such issues solely in the hands of private actors is not the most effective means to further such ideals on a nationwide basis. In fact, the problems faced by those with a disability seeking equality highlight the drawbacks of leaving matters of individual rights in the hands of private actors,<sup>129</sup> even when those actors represent a system that determines most of the working conditions in the labour market. Equality and non-discrimination as societal values probably need the strength, the general applicability, the stated necessity and the enforceability of legislation to ensure their successful promotion.

The field of labour law encompasses both social and economic aims, requiring a constant balancing act in the workplace. If the law is not clear on the goals to be prioritized and to what extent, the balancing act will become subject to continual *ad hoc* assessments in the day-to-day management by the employer. This hardly constitutes consistent or reliable protection against discrimination, or the securing of equality and individual rights and full participation in society. In future, discrimination protection legislation aimed at the workplace could be made more effective by making clear provisions on the duties of the employer under the legislation. These provisions should not be subject to implementation and interpretation by the Member States, and there is a strong argument in favour of the use of Regulations rather than Directives to ensure greater uniformity.

However, it could also be argued that direct legislation on prohibited behaviours could, depending on societal values, result in a tendency *only* to follow the rules and go no further, because failure to do so would result in harmful consequences for the

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<sup>129</sup> Pia Justesen quoted by Olsen, *ibid.*

employer, but this approach may be less successful in changing general attitudes. The system of legislation is perhaps more incisive in the UK, despite the illusion of democracy. New rights are created by the legislature, that will embrace many conflicting interests of commerce and society, justice and control. In the UK context, creating legally binding rights and obligations is more of an imperative than in the Danish system, characterized as it is by dialogue and shared goals.

The definition of disability was adopted conservatively in UK legislation, but the courts have played an active role in generously interpreting the definition to reach a liberal level of protection. . In Denmark, there is no definition of disability in legislation, and the courts have been less eager to develop the concept of disability. Until recently Danish courts lagged behind the UK courts in providing protection. The Danish Supreme Court laid down a legal standard in its ruling of 2013. Whether the definition finds its way into legislation remains to be seen, but the ruling will act as a substantial reference point for the rest of the judiciary, as well as a procedural reference point for the inclusion of the concept of disability as developed in the human rights arena.

A complete change of perspective was promoted by Justesen in 2008<sup>130</sup> and by Liisberg in 2011.<sup>131</sup> A new generation of equality theory, *substantive diversity equality*, aims at obtaining real equality by gearing society to embrace diversities. The theory inverts the earlier view of comparing a person's abilities to a theoretical "normal",<sup>132</sup> categorizing a lack of certain abilities as disabilities. Substantive diversity equality would mean focusing on the value and abilities contributed by any person, instead of focusing on compensating the disabilities of some persons. This view is reflected in the applied approach of *Specialisterne*, assisting employers in recognizing the special advantages of persons with autism, rather than focusing on

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<sup>130</sup> Justesen 2008, *supra* n.77, at 310.

<sup>131</sup> Liisberg 2011, *supra* n. 9.

<sup>132</sup> *Ibid.*, at 47.

their shortcomings compared to other workers.<sup>133</sup> Whether this approach would only be successful when applied at the level of an individual employer remains to be seen, as there is still much work to be done in the pursuit of equal opportunity in the form of equal access to employment for all, as required by the Directive, and both Denmark and the UK have some way to go before true equality for people with disabilities in the workplace becomes a fact of life.

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<sup>133</sup> *Specialisterne* reports that attitudes among employers are in fact changing, the positive approach does make a difference in creating employment opportunities for persons with autism, albeit slowly (telephone interview with Johnny Krarup, *Specialisterne*, 13 December 2013).