

The Unorthodox Relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and Secondary Rights in the Court of Justice Case Law on Disability Discrimination

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Court of Justice – Discrimination on the basis of disability – Article 21 and 26 of the Charter of Fundamental Rights – UN Convention on the Rights of Persons with Disabilities – Employment Equality Directive – Relationship between different sources of law protecting the right of persons with disabilities – Charter as interpretative aid – Charter as a parameter of validity – Scope of application of the Charter – Constitutionalisation of the UN Convention

INTRODUCTION

It is well known that the advancement of disability rights within the European Union was first prompted by the entry into force of the Treaty of Amsterdam,¹ which conferred on the former European Community the competence to combat discrimination on the basis, *inter alia*, of disability by virtue of Article 13 EC.² The rights of persons with disabilities were then made more visible within the Charter of Fundamental Rights of the European Union ('the Charter')

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¹L. Waddington, *From Rome to Nice in a Wheelchair. The Development of a European Disability Policy* (Europa Law Publishing 2006).

²The Treaty of Amsterdam also included a Declaration stating that the EU institutions must take account of the needs of persons with disabilities in drawing up measures under former Art. 95 EC (now Art. 114 TFEU).

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proclaimed in 2000. The Charter provides for an all-embracing prohibition on discrimination on the ground of disability among others (Article 21), and includes a provision on the integration of persons with disabilities (Article 26). With the entry into force of the Lisbon Treaty, in 2009, the Charter acquired constitutional status, and former Article 13 EC was recast as Article 19 TFEU.³ Article 10 TFEU was also introduced to support the mainstreaming of non-discrimination within all EU policies and actions. Alongside those constitutional developments, in 2010, the EU acceded to the UN Convention on the Rights of Persons with Disabilities, which has become an ‘integral part of EU law’.⁴ Furthermore, in the last 20 years, the EU has passed several regulations and directives that protect or address, often incidentally, the rights of persons with disabilities.⁵ Among those, Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive),⁶ which marked the first legislative intervention designed to address discrimination on the grounds of disability (among others), remains the cornerstone of EU disability legislation.⁷

Taking into account this complex and dynamic framework, this article interrogates the role of the Charter of Fundamental Rights vis-à-vis the UN

³This article refers to the Treaties and the Charter of Fundamental Rights as EU constitutional sources (*inter alia* Case C-621/18, *Andy Wightman*, ECLI:EU:C:2018:999, para. 44).

⁴ECJ 11 April 2013, Joined Cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab* (C-335/11) and *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation* (C-337/11) (*HK Danmark*), ECLI:EU:C:2013:222. On these aspects see L. Waddington, ‘The European Union’, in L. Waddington and A. Lawson, *The UN Convention on the Rights of Persons with Disabilities in Practice. A Comparative Analysis of the Role of Courts* (Oxford University Press 2018) p. 131.

⁵See ‘Annotated review of European Union law and policy with reference to disability prepared by Janina Arsenjeva, under the direction of Professor Lisa Waddington, on behalf of the Academic network of European disability experts 2019’ available at (<http://www.disability-europe.net/theme/eu-law-and-policy>), visited 5 September 2020.

⁶Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

⁷Furthermore, the EU has progressively undertaken a comprehensive policy approach to disability, currently revolving around the European Disability Strategy 2010-2020 (currently under revision). See Communication from the European Commission, *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, COM(2010) 636 final. The protection of the rights of persons with disabilities has also been embedded in the European Pillar of Social Rights, jointly proclaimed and signed by the European Parliament, the Council and the Commission on 17 November 2017 (Communication from the European Commission, ‘Establishing a European Pillar of Social Rights’ COM (2017) 250 final, and European Commission, ‘Commission Recommendation of 26 April 2017 on the European Pillar of Social Rights’, C(2017) 2600 final).

Convention on the Rights of Persons with Disabilities and EU legislation in ensuring the equal enjoyment of rights for people with disabilities. In doing so, it critically examines the extent to which the Luxembourg judges have engaged with the Charter, with a view to understanding its interplay with sub-constitutional and legislative sources in the Court of Justice case law related to disability discrimination. The overarching research question underpinning the analysis proposed is hence: to what extent and how do the Charter provisions protecting the rights of persons with disabilities interact with the UN Convention and with related EU legislation in this field within the case law of the European Court of Justice? This article, while building on existing scholarship on EU equality law⁸ and disability law,⁹ does not delve into substantive issues such as the definition of disability for the purpose of EU law, the ‘social-contextual model’,¹⁰ or reasonable accommodation,¹¹ nor does it focus on the impact of the UN Convention on EU anti-discrimination law per se,¹² or entertain the diverse scope and meaning of the non-discrimination norms in the UN Convention and in EU law, which have been

⁸Among many others see E. Muir, *EU Equality Law. The First Fundamental Rights Policy of the EU* (Oxford University Press 2018). For a recent analysis on the role of the Charter in case law on non-discrimination see A. Ward, ‘The Impact of the EU Charter of Fundamental Rights on Anti-discrimination Law: More a Whimper than a Bang?’, 20 *Cambridge Yearbook of European Legal Studies* (2018) p. 32.

⁹A. Lawson, ‘The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion’, in O.M. Árnadóttir and G. Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Brill 2009) p. 81; D. Ferri and S. Favalli, ‘Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints’, 22 *European Public Law* (2016) p. 537; D. Ferri and S. Favalli, ‘Tracing the Boundaries between Disability and Sickness in the European Union: Squaring the Circle?’, *European Journal of Health Law* (2016) p. 5; D. Schiek, ‘Intersectionality and the Notion of Disability in EU Discrimination Law’, 53(1) *Common Market Law Review* (2016) p. 35; L. Waddington, ‘The Influence of the UN Convention on the Rights of Persons with Disabilities on EU Anti-Discrimination Law’, in U. Belavusau and K. Henrard, *About EU Anti-Discrimination Law beyond Gender* (Hart Publishing 2018) p. 339.

¹⁰The term ‘social-contextual model’ has been used first by A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia 2015) p. 77, and by L. Waddington, ‘Saying all the right things and still getting it wrong: the Court of Justice’s definition of disability and non-discrimination law’, *Maastricht Journal of European and Comparative Law* (2015) p. 576.

¹¹See among others D. Ferri and A. Lawson, *Reasonable accommodation for disabled people in employment. A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway* (Publications Office of the European Union 2016); L. Waddington and A. Broderick, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (Publications Office of the European Union 2016).

¹²L. Waddington and A. Lawson, ‘The Unfinished Story of EU Disability Non-Discrimination Law’, in A. Bogg et al. (eds.), *Research Handbook on EU Labour Law* (Edward Elgar 2016) p. 474; J Clifford, ‘The UN Convention and its Impact on European Equality Law’, 6 *Equal Rights Review* (2011) p. 11.

extensively discussed by other scholars.¹³ By contrast, this article is concerned with whether the formal constitutionalisation of the Charter has provoked a shift in the way in which the Charter has been used in the disability case law after 2009, or whether sources of rights that are hierarchically inferior (at least formally) to the Charter, such as the Employment Equality Directive and the UN Convention, are primarily relied upon. In doing so, it aims to understand the reasons for the use or (non-use) of the Charter in judicial reasoning and unveil the contours of the multi-layered EU disability law traced by the Court of Justice. Ultimately, this article argues that the Court traces an overlapping – and often somewhat counterintuitive or ‘unorthodox’ – relationship between various layers of norms in its judicial reasoning.

The section immediately following these introductory remarks recalls the most relevant legal provisions. This section does not delve into a substantive examination of Articles 20, 21 and 26 of the Charter, as a constitutional source of disability rights, nor the UN Convention or the Employment Equality Directive, which have each been the subject of thorough doctrinal analysis.¹⁴ Rather, this section provides the context for the third section, which appraises the extent to which the Charter has been mentioned and relied upon in the Court’s decisions on disability vis-à-vis other sources since the 2000s. This third section maps the most relevant pre-Lisbon and post-Lisbon case law, and surveys the use of the Charter and its role in the Court’s decisions, comparing and contrasting the role played respectively by the Charter, the UN Convention and what have been termed ‘secondary rights’.¹⁵ The analytical mapping takes into account the three-fold function that the Charter can fulfil.¹⁶ It acknowledges that the Charter can act as an aid to the interpretation of EU secondary law (and national law falling within the scope of EU law); that it can be relied upon as grounds for judicial review, and EU legislation found to be in breach of the Charter ‘is to be held void and national law falling within the scope of EU law that contravenes the

¹³L. Waddington and A. Broderick, *Combating Disability Discrimination and Realising Equality: A Comparison of the UNCRPD and EU Equality and Non-discrimination Law* (Publications Office of the European Union 2018).

¹⁴On the Charter see M. Bell, ‘Article 20 – Equality before the Law’, in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014); C. Kilpatrick, ‘Article 21 - Non Discrimination’ in Peers et al.; and C. O’Brien, ‘Article 26 – Integration of Persons with Disabilities’ in Peers et al. On the Directive see, generally, L. Waddington and E. Muir, ‘Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation’, in E. Ales et al. (eds.), *International and European Labour Law. Article-by-Article Commentary* (Hart 2018) p. 520.

¹⁵E. Muir, ‘EU Citizenship, Access to “Social Benefits” and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit’, 3(3) *European Papers* (2018) p. 1353.

¹⁶K. Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’, 8(3) *EuConst* (2012) p. 375 at p. 403.

Charter must be set aside'; or operate 'as a source of authority for the 'discovery' of general principles of EU law'. It deliberately focuses on decisions in which Articles 21 and 26 of the Charter have been referred as a ground for judicial review of EU legislation by national courts in their requests for preliminary ruling to the Court of Justice, or have been used as an aid to the interpretation of EU secondary law by the Court, but does not examine case law in which provisions of the Charter are cited but are not relevant to the *ratio decidendi*.¹⁷ As a result of the assessment conducted, the fourth section reflects on the elusive scope of application of the Charter as a hurdle for the application of the Charter vis-à-vis other sources, and examines in a critical fashion the interaction between the Charter and the UN Convention. The concluding section draws the various strands of analysis together.

DISABILITY EQUALITY IN THE EU CONSTITUTIONAL AND LEGISLATIVE FRAMEWORKS

As noted in the introduction, Article 19 TFEU remains the main provision conferring upon the EU the legislative competence to combat discrimination on the basis of disability, and underpins the EU regulatory powers in the field, tallying with the horizontal provision contained in Article 10 TFEU.

The Charter also enshrines the principle of equality and non-discrimination. Article 20 of the Charter provides for the principle of equal treatment.¹⁸ Article 21 establishes the principle of non-discrimination. As highlighted by Muir,¹⁹ the Court does not rigorously distinguish between Articles 20 and 21 of the Charter: both are understood as expressions of the general principle of equal treatment. Article 21(1) of the Charter lists disability as one of the grounds on which discrimination must be prohibited.²⁰ The wording, included in this provision, 'any discrimination based on any ground such as . . .' could be interpreted as allowing the protection of further categories of discrimination beyond those explicitly listed, within the scope of application of EU law. However, in line with Article 6(1) TEU and Article 51 of the Charter, the Explanations relating to the

¹⁷See e.g. ECJ 19 September 2018, Case C-312/17, *Surjit Singh Bedi v Bundesrepublik Deutschland*, ECLI:EU:C:2018:734.

¹⁸This principle, according to the Court of Justice's established case law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. See ECJ 5 March 2015, Case C-463/12, *Copydan Båndkopi*, ECLI:EU:C:2015:144, paras. 31 and 32.

¹⁹E. Muir, 'The Essence of the Fundamental Right to Equal Treatment: Back to the Origins', 20(6) *German Law Journal* (2019) p. 817, at p. 832.

²⁰M. Bell, 'The Right to Equality and Non-Discrimination', in T. Hervey and J. Kenner, *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart Publishing 2006) p. 91 at p. 97 ff.

Charter overtly state that ‘Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas’.²¹ Meaningfully located within Chapter III on Equality is also Article 26 of the Charter. This provision affirms that ‘the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community’.²² Despite the slightly outdated language, with reference to integration rather than inclusion,²³ and in spite of its ‘(probably deliberately) vague’ scope and effects,²⁴ Article 26 of the Charter can be considered reflective of the ‘social-contextual model of disability’,²⁵ in that it focuses on participation in society and the need to ensure the independence of persons with disabilities within their communities. The ‘social-contextual model’ has been considered the most refined elaboration of the ‘pure’ social model.²⁶ The latter focuses solely on the external barriers encountered by people with disabilities and conceives of those barriers as creating disability, and contrasts the medical model of disability – which views disability as a mere consequence flowing from impairment. The former conceives disability as an interactive process between people with impairments and societal barriers. Article 26 has been qualified by the European Court of Justice, in line with the Explanations to the Charter and with what commentators had previously argued,²⁷ as a principle rather than a right.²⁸ This means that Article 26 is intended to guide the EU institutions when they legislate, but

²¹Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/02.

²²Ibid. This provision is based on Art. 15 of the European Social Charter and draws inspiration from point 26 of the Community Charter of the Fundamental Social Rights of Workers, which establishes that ‘[a]ll disabled persons, whatever the origin and nature of their disablement, must be entitled to additional concrete measures aimed at improving their social and professional integration. These measures must concern, in particular, according to the capacities of the beneficiaries, vocational training, ergonomics, accessibility, mobility, means of transport and housing’.

²³See the distinction drawn by the UN Committee on the Rights of Persons with Disabilities, General Comment N. 4 on the right to education, 26 August 2016, UN Doc. CRPD/C/GC/4, para. 11. Notably the European Pillar on Social Rights has used a language that is more consistent with that of the UN Convention by referring to ‘Inclusion of people with disabilities’ (*supra* n. 7).

²⁴C. O’Brien, ‘Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability’, in D. Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) p. 509 at p. 514.

²⁵*Supra* n. 10.

²⁶A. Broderick and D. Ferri, *International and European Disability Law and Policy: Text, Cases and Materials* (Cambridge University Press 2019) chapter 1.

²⁷C. O’Brien, ‘Article 26 – Integration of Persons with Disabilities’ in Peers et al., *supra* n. 14, p. 709 at p. 713.

²⁸ECJ 22 May 2014, Case C-356/12, *Wolfgang Glatzel v Freistaat Bayern*, ECLI:EU:C:2014:350, para. 78.

that it does not oblige them to act and is not directly enforceable.²⁹ Those aspects were elucidated by the Court in *Glatzel*:³⁰

[. . .] although Article 26 of the Charter requires the [EU] to respect and recognise the right of persons with disabilities to benefit from integration measures, the principle enshrined by that article *does not require* the EU legislature to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such [. . .].

The Luxembourg judges seem to confirm the binding nature of Article 26 of the Charter. The prescriptive nature of a principle, as highlighted by Lock, ‘only removes the legislature’s discretion as far as the question is concerned *whether* it needs to comply’, but ‘leaves intact the legislature’s discretion as to *how* it should comply’.³¹

The UN Convention enjoys a sub-constitutional status within the EU legal order,³² and, by virtue of this status, EU legislation must be interpreted in a manner consistent with it.³³ Notably, the UN Convention provides for an extensive articulation of fundamental rights in light of disability which is underpinned by a social-contextual understanding of disability. Its text explicitly affirms that ‘disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others’.³⁴ The UN Convention is informed by the principle of equality which has been referred to as its ‘leitmotif’.³⁵ In particular, Article 2 of the Convention provides a broad definition of discrimination on the basis of disability, highlighting that such discrimination includes the denial of a reasonable accommodation, while Article 5 articulates the principle of equality and enshrines what has been termed by the UN Committee on the rights of persons with disabilities ‘inclusive equality’.³⁶ Inclusive equality embraces: a fair redistributive dimension, which requires that socio-economic disadvantages are addressed; a recognition dimension, which necessitates the combatting of stigma, stereotyping, prejudice and violence,

²⁹T. Lock, ‘Rights and Principles in the EU Charter of Fundamental Rights’, 56(5) *Common Market Law Review* (2019) p. 1201.

³⁰*Glatzel*, *supra* n 28, para. 78. Emphasis added.

³¹Lock, *supra* n. 29, p. 1222.

³²*HK Danmark*, *supra* n. 4.

³³ECJ 18 March 2014, Case C-363/12, *Z v A Government Department and The Board of management of a community school*, ECLI:EU:C:2014:159, para. 75.

³⁴Preamble para. (e), CRPD.

³⁵O.M. Arnardóttir, ‘A Future of Multidimensional Disadvantage Equality’, in Arnardóttir and Quinn, *supra* n. 9, p. 41.

³⁶UN Committee on the Rights of Persons with Disabilities, General Comment No. 6 on equality and non-discrimination, 9 March 2018, UN Doc. CRPD/C/GC/6, para. 11.

and the recognition of the dignity of human beings and their intersectionality; a participative dimension, which aims to reaffirm the social nature of people with disabilities as members of the society; and an accommodating dimension, which entails making ‘space for difference as a matter of human dignity’.³⁷

The constitutional rights of persons with disabilities and the CRPD sub-constitutional framework are closely intertwined with a range of secondary rights included in EU legislation. As noted above and widely acknowledged by scholarship, the most important secondary law addressing disability-based discrimination is the Employment Equality Directive.³⁸ This Directive applies to both public and private sectors, with regard to access to employment, working conditions, and access to vocational training and membership. It also applies to involvement in an organisation of workers or employers, or a professional organisation, and to the benefits provided by such bodies. Alongside prohibiting discrimination, this Directive imposes a duty on employers to provide reasonable accommodation for persons with disabilities. Furthermore, Article 7 of the Directive permits member states to maintain or adopt specific measures to prevent or compensate for disadvantages experienced by disabled persons, and to maintain or adopt measures relating to health and safety at work, or measures ‘aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment’.

On the whole, this brief recount has endeavoured to highlight that the constitutional character of disability equality is rooted in the Treaty and in the Charter, while the actual protection of the rights of persons with disabilities stems from multi-layered sources, which have a different – yet overlapping – normative content and exist at different levels in the hierarchy. In theory, the content and scope of rights provided in EU legislation should be fleshed out through the interpretation of EU constitutional norms, with the Charter playing a fundamental role in enhancing those rights. However, as it is discussed below, the extent to which the Luxembourg judges have engaged with the Charter, compared to these other sources, paints a rather different picture.

MAPPING THE CHARTER IN THE COURT OF JUSTICE CASE LAW ON DISABILITY DISCRIMINATION

After having presented in a succinct fashion the multi-layered legal context, this section surveys the body of case law on discrimination on the basis of disability adjudicated upon by the European Court of Justice, which has been, in general, scant and is mostly concerned with the Employment Equality Directive. This systematic mapping

³⁷Ibid.

³⁸*Inter alia* see A. Broderick and P. Watson, ‘Disability in EU Non-discrimination Law’, in D. Ferri and A. Broderick (eds), *Research Handbook on EU Disability Law* (Edward Elgar, forthcoming 2020).

exercise provides a critical appraisal of the relevance of the Charter in the European Court of Justice decisions vis-à-vis the UN Convention on the Rights of Persons with Disabilities and the Directive. Consistent with this approach, this section does not discuss in a detailed manner the content of Court's decisions, which have been extensively commented upon by scholars, nor does it explore the meaning of disability for the purpose of EU non-discrimination law, or the duty to provide reasonable accommodation, which are outside of the scope of this article.

The irrelevance of the Charter and the focus on the Employment Equality Directive in the 'pre-Lisbon' cases

The first, and most widely criticised judgment in this field,³⁹ *Chacón Navas*,⁴⁰ concerned a Spanish employee who, after being off work sick for eight months, was dismissed. In the case pending in front of the *Juzgado de lo Social* of Madrid, while the employer acknowledged that the dismissal was 'unlawful' under Spanish law and offered compensation, the employee argued that the dismissal was discriminatory and void. The Spanish court decided to stay the proceeding and requested a preliminary ruling from the European Court of Justice. The first core question asked of the Luxembourg judges concerned whether the employee's health condition could be considered a disability according to the Employment Equality Directive. It is well known that, in answering that question, the Court adopted a narrow interpretation of disability, based upon the medical model, and clearly distinguished the concept of sickness from that of disability.⁴¹ With its second question, the referring court asked 'whether sickness can be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination'.⁴² Along the lines traced by Advocate General Geelhoed,⁴³ the Court answered in the negative to this question, by relying on the fact that 'no provision of the EC Treaty prohibits discrimination on grounds of sickness as such'.⁴⁴ Interestingly, the Advocate General explicitly contrasted the closed list of the Treaty with open lists of prohibited grounds that pertain to 'classical international human rights treaties and, for example, Article II-81 of the Constitutional Treaty' (which is now Article 21 of the Charter).⁴⁵ The European Court of Justice did not mention the Charter (nor the failed Constitutional treaty): it acknowledged that

³⁹L. Waddington, 'Case C-13/05, *Chacón Navas v. Euresst Colectividades SA*, judgment of the Grand Chamber of 11 July 2006', 44 *Common Market Law Review* (2007) p. 487.

⁴⁰ECJ 11 July 2006, Case C-13/05, *Sonia Chacón Navas v Euresst Colectividades*, ECLI:EU:C:2006:456.

⁴¹*Chacón Navas*, *supra* n. 40, para .39 ff.

⁴²*Ibid.*, para. 53.

⁴³Opinion of AG Geelhoed delivered on 16 March 2006 Case C-13/05, *Sonia Chacón Navas v Euresst Colectividades*, ECLI:EU:C:2006:184.

⁴⁴*Chacón Navas*, *supra* n. 40, para. 57.

⁴⁵Opinion of AG Geelhoed, *supra* n. 43, para. 47.

fundamental rights 'which form an integral part of the general principles of [EU] law include the general principle of non-discrimination',⁴⁶ but emphasised the closed character of the list of grounds included in the Treaty, and its reasoning revolves around the limited scope of EU law. The Court recalled that the principle of non-discrimination is 'binding on Member States where the national situation at issue in the main proceedings falls within the scope of [EU] law', and concluded that the scope of the Employment Equality Directive could not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in its Article 1.⁴⁷

The subsequent decision, *Coleman*,⁴⁸ concerned a case of discrimination by association. The facts underpinning this decision are well-known: Ms. Coleman claimed that she had been dismissed from her employment and treated less favourably than her fellow employees due to her being a primary care-giver for her disabled son. In essence, the referring court asked the European Court of Justice whether the Employment Equality Directive must be interpreted as prohibiting discrimination on grounds of disability only in respect of an employee who is a person with a disability, or whether the Directive protects also employees who are not themselves disabled, but are treated less favourably on the grounds of their association with a person with a disability. Interestingly, the Luxembourg Court decided not to include any reference to the Charter of Fundamental Rights, which had been cursorily cited, in a footnote alongside relevant human rights instruments enshrining the principle of equality and non-discrimination, by Advocate General Maduro in his Opinion.⁴⁹

Chacón Navas and *Coleman* are the oldest rulings on disability discrimination. In spite of them being subsequent to the solemn proclamation of the Charter, no reference to Articles 20, 21 or 26 can be found in either of those decisions. In both cases, the reasoning of the Court revolves around the Employment Equality Directive, which was at the core of the questions asked by national courts.

Given that the UN Convention had not been yet ratified by the EU (and *Chacón Navas* even predates its approval by the UN General Assembly), it remained, predictably, immaterial to the judicial reasoning.⁵⁰ The irrelevance

⁴⁶*Chacón Navas*, *supra* n. 40, para. 56.

⁴⁷*Ibid.*, para. 56.

⁴⁸ECJ 17 July 2008, Case C- 303/06, *S. Coleman v Attridge Law and Steve Law*, ECLI:EU:C:2008:415.

⁴⁹Opinion of AG Maduro 31 January 2008, Case C-303/06, *S. Coleman v Attridge Law and Steve Law*, ECLI:EU:C:2008:61.

⁵⁰*Contra* Broderick and Watson argue the ECJ reasoning in *Coleman* 'reflects the Opinion of Advocate General (AG) Poiares Maduro in the case, an Opinion which refers to the CRPD and seems to have been taken into account by the CJEU in handing down its judgment' (Broderick and Watson, *supra* n. 38). Furthermore, it is interesting to note that some national constitutional courts started to cite or refer to the UN Convention even before the ratification. *See*, for example, the Italian Constitutional Court Judgment No. 251/2008.

of the Charter is also somewhat unsurprising, and is easily explained by its lack of binding legal effect and uncertain constitutional status at that time. Nevertheless, it cannot be forgotten that the Charter had in fact been cited in some pre-Lisbon cases as a codification of EU fundamental rights already recognised in the Treaties, legislation and case law.⁵¹ It is, for example, difficult to forget the 'pro-Charter' manifesto of Advocate General Mischo in *Booker Aquacultur*:

I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the [EU] legal order.⁵²

On the whole, it is interesting to note that, in both decisions, the Luxembourg judges cited point 26 of the Community Charter of the Fundamental Social Rights of Workers (albeit in a cursory manner), which was referred to in the former Article 136(1) EC and within the preamble to the Employment Equality Directive.⁵³ This point 26 is the direct antecedent of, and source of inspiration for, Article 26 of the Charter of Fundamental Rights. Thus, the Court could have arguably cited the Charter in that connection, and this would have possibly placed a greater emphasis on the social context and on the barriers faced by people with disabilities. The Court's focus on the Directive and the lack of engagement with the Charter did not impede the adoption of wider concept of discrimination to encompass discrimination by association. In fact, *Coleman* is said to represent 'a landmark ruling in the cause of the implementation of the principle of equal treatment in the Member States'.⁵⁴ Citing the Charter, and in particular Article 26 would have possibly buttressed a more thorough reasoning on role of carers in supporting the participation of people with disabilities in society.

Furthermore, looking retrospectively at those pre-Lisbon disability cases, it seems safe to state that a reference to Article 21 of Charter would not have changed the strict interpretation of the closed list of discrimination grounds in EU law. As will be further discussed in subsequent sections, that interpretation has been consistently endorsed by the European Court of Justice also in the

⁵¹CFI 30 January 2002, T-54/99, *Maxmobil Telekommunikation Service GmbH v Commission*, ECLI:EU:T:2002:20, paras. 48 and 57. See also ECJ 22 February 2005, Case C-141/02 P, *Commission v T-Mobile Austria GmbH*, ECLI:EU:C:2005:98, paras. 16 and 20.

⁵²Opinion of AG Mischo 20 September 2001, Joined Cases C-20/00 and C-64/00, *Booker Aquacultur Ltd (C-20/00) and Hydro Seafood GSP Ltd (C-64/00) v The Scottish Ministers*, ECLI:EU:C:2001:469, para. 126.

⁵³*Chacón Navas*, *supra* n. 40, para. 11; *Coleman*, *supra* n. 48, paras. 3 and 43.

⁵⁴T. Connor, 'Discrimination by association: a step in the right direction', 32 *Journal of Social Welfare and Family Law* (2010) p. 59 at p. 59.

post-Lisbon case law. This is inevitably linked to the scope of EU law and its nature of ‘derivative’ legal order, in which the exercise of EU powers depends upon the allocation of competences set out in the Treaties.⁵⁵ However, a reference to Article 26 of the Charter could have supported a more social-oriented and less medicalised reading of disability. It is worth recalling that the Advocate General in *Chacón Navas* did acknowledge the social model of disability and claimed that that ‘certain physical or mental shortcomings are in the nature of “disability” in one social context, but not in another’, although, in the end, he adopted a medical model approach.⁵⁶ Moreover, this ruling was released at a time in which the discourse on the social model had already crept into EU policies.⁵⁷ Hence, the use of the Charter as an interpretive aid could have allowed the Court to embrace a social understanding of disability, before the ratification of the UN Convention, and to look at the stigma faced by Ms Chacón Navas, as well as at the social context which ‘disabled’ her.

An ‘unexpected’ interplay of sources: the limited relevance of the Charter in ‘post-Lisbon’ case law and the surge of the UN Convention as pivotal normative reference

O’Brien and Koltermann suggest that, after the entry into force of the Lisbon Treaty, the European Court of Justice ‘warmed to the Charter quite quickly’, having relied on, or at least referred to, the Charter in several judgments.⁵⁸ They also argue that the Court’s decisions have come to include ‘more substantive deliberations on the scope and content of individual norms’ of the Charter.⁵⁹ In a general fashion, De Burca notes that the Luxembourg Court has placed increasing emphasis on the Charter in an expanding number of cases.⁶⁰ Most recently, Frantziou suggests that the Charter has become ‘an essential port of call for human rights discourse in the EU’ and ‘has, overall, been overwhelmingly more present in EU law since its entry into binding force than it had been pre-Lisbon’.⁶¹ However, this general trend is not confirmed in case law concerning the right of persons

⁵⁵Muir, *supra* n. 15, p. 1357, citing N. Walker. See also R. Schutze, *European Constitutional Law* (Cambridge University Press 2012).

⁵⁶Opinion of AG Geelhoed, *supra* n. 43, para. 58.

⁵⁷C. O’Mahony and S. Quinlivan, ‘The EU Disability Strategy and the Future of EU Disability Policies’, in Ferri and Broderick, *supra* n. 38.

⁵⁸K. O’Brien and B. Koltermann, ‘The Charter of Fundamental Rights of the EU in Practice’, 4 *ERA Forum* (2013) p. 457.

⁵⁹*Ibid.*

⁶⁰G. de Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’, 20(2) *Maastricht Journal of European and Comparative Law* (2013) p. 168.

⁶¹E. Frantziou, ‘The Binding Charter Ten Years on: More than a “Mere Entreaty”?’, 38 *Yearbook of European Law* (2019) p. 73.

with disabilities not to be discriminated against. It is true that the Court has started to engage with the Charter but, as yet, with the exception of *Glatzel*,⁶² Articles 20, 21 and 26 of the Charter have not played a significant role in this strand of case law.

In *HK Danmark*,⁶³ which was not only the first post-Lisbon case, but also the first decision following the EU accession to the UN Convention, the Court elaborated a definition of disability based on the social-contextual model conceptualisation enshrined in Article 1 of the UN Convention. The case has attracted a great deal of scholarly attention because, for the first time, the Court interpreted (albeit reluctantly)⁶⁴ the Employment Equality Directive in a manner consistent with the UN Convention.⁶⁵ In that vein, the Luxembourg judges recognised that ‘if a curable or incurable illness entails a 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, such an illness can be covered by the concept of “disability” within the meaning of Directive 2000/78’.⁶⁶ The Court revised the definition of disability embraced in *Chacón Navas*, but did not overrule that decision in all respects, as it still held that an illness cannot be considered a disability. According to Schiek, the Court ‘only modified the *Chacón Navas* ruling as far as absolutely necessary to pay respect to the [UN Convention]’.⁶⁷ In *HK Danmark*, the European Court of Justice also stated that a reduction in working hours can constitute a reasonable accommodation for the purpose of the Directive as interpreted in light of and in compliance to the UN Convention.⁶⁸ In line with the questions of the referring court, the judicial reasoning revolves around the interpretation of the Directive. The UN Convention represents the main point of reference in that reasoning; no reference to the Charter is made. Given that the Charter is part of the EU constitutional framework alongside the Treaty, it seems startling that, at the outset of the decisions, when the relevant legal provisions are mentioned, no reference to the Charter is made. Furthermore, the Charter could have arguably been mentioned when referring to the principle of equality, and Article 26 could

⁶²*Glatzel*, *supra* n. 28.

⁶³*HK Danmark*, *supra* n. 4.

⁶⁴N. Betsh, ‘The Ring and Skouboe Werge Case: A Reluctant Acceptance of the Social Approach of Disability’, 4 *European Labour Law Journal* (2013) p. 135.

⁶⁵Among others see L. Waddington, ‘HK Danmark (Ring and Skouboe Werge): Interpreting EU Equality Law of the UN Convention on the rights of persons with disabilities’, *European Antidiscrimination Law Review* (2013) p. 11.

⁶⁶*HK Danmark*, *supra* n. 4, para. 41.

⁶⁷Schiek, *supra* n. 9, p. 55.

⁶⁸*Ibid.*, para. 48 ff.

have also been used to support the interpretation of the concept of reasonable accommodation, as cornerstone of an inclusive workplace, alongside the UN Convention.

In *Commission v Italy*,⁶⁹ which arose from an infringement procedure against Italy for failure to correctly implement Article 5 of Employment Equality Directive (on reasonable accommodation), the reasoning of the European Court of Justice focused (quite obviously) on the interpretation of the Directive. Significantly, following the line of reasoning of *HK Danmark* (which is widely cited), the Court refers several times to the UN Convention, in light of which it interprets the Directive. In other post-Lisbon disability cases originating from requests for preliminary ruling, such as *Ruiz Conjero*,⁷⁰ and, more recently, in *DW v Nobel Plásticos Ibérica SA*,⁷¹ similar to *HK Danmark*, the Court did not refer to the Charter. Without exploring the details of those decisions, which have been thoroughly discussed by scholars elsewhere,⁷² it suffices to point out that the Charter did not feature in the questions raised by the national court and the Court did not cite the Charter *motu proprio*, not even cursorily or *a fortiori* or within the relevant legal context.

In two decisions (*Kaltoft*⁷³ and *Daouidi*⁷⁴), as will be discussed further in the next section, the (limited) scope of application of the Charter prompted the Court to focus on EU secondary law (namely on the Employment Equality Directive),⁷⁵ and on its interpretation in light and in compliance with the UN Convention, rather than on the Charter. By contrast, in the case of *Milkova*,⁷⁶ the Court engaged briefly with the Charter, which was used de facto as an aid to the interpretation of the Employment Equality Directive, in order to assess whether the Bulgarian legislation at stake contravened that Directive and should be set aside.

⁶⁹ECJ 4 July 2013, Case C-312/11, *Commission v Italy*, ECLI:EU:C:2013:446.

⁷⁰ECJ 18 January 2018, Case C-270/16, *Carlos Enrique Ruiz Conejero v Ferroservicios Auxiliares SA and Ministerio Fiscal*, ECLI:EU:C:2017:788.

⁷¹ECJ 11 September 2019, Case C-397/18, *DW v Nobel Plásticos Ibérica SA*, ECLI:EU:C:2019:703.

⁷²See the literature cited *supra* at n. 9. For a recent account see Broderick and Watson, *supra* n. 38.

⁷³EC 18 December 2014, Case C-354/13, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, ECLI:EU:C:2014:2463.

⁷⁴ECJ 1 December 2016, Case C-395/15, *Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal*, ECLI:EU:C:2016:917.

⁷⁵Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁷⁶ECJ 9 March 2017, Case C-406/15, *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol (Milkova)*, ECLI:EU:C:2017:198.

In *Z v A Government Department*⁷⁷ and in *Glatzel*⁷⁸ the Charter was essentially invoked by the national court as parameter to assess the validity of EU legislation. However, in *Z v A Government Department*, as it will be further explained in the subsequent section, having excluded that Mrs Z's legal situation fell within the scope of EU law, the Court did not have jurisdiction to rule on the validity of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation and of the Employment Equality Directive vis-à-vis the Charter.

In *Glatzel*, contrary to what occurred in the *Z* case, the Court did assess EU secondary legislation vis-à-vis the Charter. The case originated from a request from preliminary ruling of the *Bayerischer Verwaltungsgerichtshof* in the proceeding between Mr Glatzel and Freistaat Bayern, concerning the refusal to Mr Glatzel of a driving licence for heavy goods vehicles, on the ground that his visual acuity in one of his eyes did not reach the minimum level required by point 6.4 of Annex III to Directive 2006/126. In essence, the German court asked the Court whether the physical conditions to be complied with by drivers constituted discrimination on the grounds of disability and violated Article 20, Article 21(1) and Article 26 of the Charter.⁷⁹ Ultimately, the Court concluded that there was not 'any information capable of affecting the validity of point 6.4 of Annex III to Directive 2006/126 in the light of Articles 20, 21(1) or 26 of the Charter'.⁸⁰ With regards to Article 21(1), the Court, first, stipulated that a difference in treatment on the basis of visual acuity necessary to drive power-driven vehicles is not, in principle, contrary to that provision of the Charter, in so far as such a requirement actually fulfils a public interest objective, is necessary and is proportionate in achieving its objective.⁸¹ The Court contended that the minimum threshold of visual acuity provided for in Directive 2006/126 was specifically designed to improve road safety, which is an objective of general interest for the EU.⁸² It then went on to state that the principle of proportionality requires the principle of equal treatment to be reconciled, as far as possible, with the requirements of road safety which determine the conditions for driving motor vehicles.⁸³ In that vein, the Court examined whether point 6.4 of Annex III to Directive 2006/126 was disproportionate in relation to the objective pursued. It highlighted that the EU legislature, which has a broad discretion in adopting decisions involving complex medical issues, drafted the provision at stake 'in the light of that knowledge

⁷⁷*Z v A Government Department*, *supra* n. 33.

⁷⁸*Glatzel*, *supra* n. 28.

⁷⁹*Ibid.*, para. 37.

⁸⁰*Ibid.*, para. 86.

⁸¹*Ibid.*, para. 51.

⁸²*Ibid.*, para. 52.

⁸³*Ibid.*, para. 56.

and attempted to limit as much as possible any interference with the rights of persons suffering from visual defects'.⁸⁴ The Court also emphasised that it 'cannot substitute its assessment of scientific and technical facts for that of the legislature on which the founding treaties have conferred that task'.⁸⁵ It therefore concluded that the requirement included in point 6.4 of Annex III was not disproportionate.⁸⁶ Furthermore, the Court briefly examined the validity of point 6.4 of Annex III vis-à-vis Article 26 of the Charter.⁸⁷ After highlighting that Article 26 of the Charter includes a principle, which is not justiciable per se, it confirmed the validity of the Annex under review. In that regard, Ward contends that the approach taken by the European Court of Justice diminishes the impact of Article 26 of the Charter in the field on non-discrimination.⁸⁸ She also argues that:

to the extent to which a right listed in Article 21(1) of the Charter is additionally supported by a principle, as is the case with respect to the prohibition on discrimination on the basis of disability, the [European Court of Justice] has interpreted the relevant provision – that is Article 26 of the Charter on the integration of persons with disabilities – in such a way that its influence in relevant litigation is light.⁸⁹

While the overall outcome of the analysis of the European Court of Justice in *Glatzel* has been harshly criticised by several scholars,⁹⁰ the Luxembourg judges looked at the aim of the Directive under review (which was that of making 'it easier for physically disabled persons to drive vehicles'),⁹¹ and held that that Directive did in fact implement Article 26 of the Charter. From this decision it can be inferred that the Court retains some leeway to intervene and assess EU implementing legislation vis-à-vis Article 26. It is to be expected (and would indeed be desirable) that, in the future, the Court will engage in a deeper manner with the content of Article 26 of the Charter, and that might consider specific disability legislation, such as, for example, the European Accessibility Act, to

⁸⁴Ibid., para. 62.

⁸⁵Ibid., para. 64.

⁸⁶The Luxembourg judges refused to assess the validity of point 6.4 of Annex III vis-à-vis Art. 2 of the UN Convention, because the latter did not display direct effect. See para. 68 ff.

⁸⁷Ibid., para. 74 ff.

⁸⁸Ward, *supra* n. 8, p. 41.

⁸⁹Ibid., p. 33-34.

⁹⁰Among others C. O'Brien, 'Driving Down Disability Equality? Case C-356/12 *Wolfgang Glatzel v. Freistaat Bayern*, Judgment of 22 May 2014', *Maastricht Journal of European and Comparative Law* (2014) p. 723.

⁹¹*Glatzel*, *supra* n. 28, para. 75.

be an implementing act of Article 26.⁹² Finally, the Court turned its examination to Article 20 of the Charter.⁹³ It recalled that under Annex III of Directive 2006/126, certain drivers who do not satisfy the standards relating to visual acuity, the issue of a driving licence may be envisaged in 'exceptional cases', where a driver submits to an individual examination to test his fitness to drive. This possibility is not provided for drivers under point 6.4 of that Annex. The European Court of Justice stated this differentiation does not constitute a difference in treatment contrary to Article 20 as the situations at stake are not comparable. Without delving into the details of the decision, for the purpose of the current analysis, it suffices to point out that the Luxembourg Court did assess the validity of the legislation at stake vis-à-vis the Charter. Yet, it does not engage with the substance and the wide-ranging implications of the open-textured provisions of the Charter. This is particularly true for Article 26, which could have a transformative potential when it comes to ensuring 'inclusive equality' for people with disabilities. However, as widely discussed by O'Brien, 'the content or implications of Article 26 of the Charter went unexamined'.⁹⁴

On the whole, compared to the pre-Lisbon scenario, the Charter has commenced to display some (quite limited) influence on case law of the European Court of Justice on disability discrimination. However, the Employment Equality Directive (or more broadly secondary law) remains the anchor of the judicial reasoning, with the UN Convention playing an interpretive role to ensure an unambiguous and uniform meaning of secondary rights, and supporting legal certainty. The visibility of the Charter in the Court of Justice's case law concerning disability is minimal. This observation tallies with Ward's more general arguments that the Charter has had 'a muted impact on the evolution of EU equality law',⁹⁵ and that the influence of Articles 20 and 21 of the Charter in the development of general EU equal treatment law has been a 'low profile' one.⁹⁶

A number of findings emerge from the survey conducted in this section. First, the Court does not cite the Charter *motu proprio*, not even as a rhetorical flourish. When the national court does not refer to the Charter in its questions, the Luxembourg judges do not engage with it. Second, even when the referring court presents questions related to the Charter or uses the Charter as a parameter of validity for EU legislation (such as in *Daouidi*), the Court avoids answering those questions. Third, in the only instance (*Glatzel*) in which the Court has actually used the Charter as parameter of validity of EU legislation, it has not fully engaged

⁹²D. Ferri, 'Disability in the EU Charter of Fundamental Rights', in Ferri and Broderick, *supra* n. 38.

⁹³*Glatzel*, *supra* n. 28, para. 80 ff.

⁹⁴O'Brien, *supra* n. 90, p. 727.

⁹⁵Ward, *supra* n. 8, p. 41.

⁹⁶*Ibid.*, p. 59.

with the substance of the Charter provisions. Finally, this appraisal also shows that the Charter has not offered to the Court a foothold with regard to the interpretation of the ground of 'disability', which is a key point in several decisions. The 'paradigm shift' (more formal than substantial) that has occurred since *HK Danmark* revolves only around the UN Convention as a main legal and conceptual benchmark. In that connection, the Court, with the purpose of offering a univocal interpretation of disability to secure the uniform application of EU law, has drawn the contour of an interesting and unorthodox relationship between the Charter and the UN Convention itself, which will be explored in the subsequent sections.

EXPLORING THE 'UNORTHODOX' RELATIONSHIP AMONG SOURCES OF EU DISABILITY LAW: THE ELUSIVE BOUNDARIES OF THE SCOPE OF APPLICATION OF THE CHARTER AND THE IMPLICIT CONSTITUTIONALISATION OF THE UN CONVENTION

In general, as noted by Frantziou, the Charter has 'steadily (and not that slowly) assumed a constitutional place at the apex of the EU hierarchy of norms', and the Court has tended to affirm the 'Charter's prominence as the primary source of fundamental rights protection in the Union', often replacing references to the European Convention on Human Rights with mentions of the Charter.⁹⁷ By contrast, the survey conducted above seems to show that, in disability discrimination case law, the Court has downplayed the constitutional status of the Charter, referring to the UN Convention as a source *par excellence* of the rights of persons with disabilities. Certainly, the UN Convention with its extensive articulation of disability rights, overt embracing of the social-contextual understanding of disability, and wide-ranging formulation of the equality principle, constitutes a safe and easy interpretive anchor. However, the unwillingness of the Court to engage with the Charter seems rooted in systemic reasons (rather than on its substance, which, as mentioned before, align to the rational of the UN Convention). It is argued here that the elusive notion of 'implementing EU law', purported by Article 51(1) of the Charter, *de facto*, has been used by the Court as a shield to avoid engaging with delicate questions related to the scope *ratione personae* of EU non-discrimination law.

It is well known that the Charter applies to all EU institutions, bodies, offices and agencies, but it is applicable to member states only when 'they are implementing Union law', as specified by Article 51(1) CFR. Article 51(2) CFR, in a similar vein to the second indent of Article 51(1) CFR, provides that the Charter cannot extend the competences which have been conferred onto the EU by the Treaties.

⁹⁷Frantziou, *supra* n. 61, p. 89.

Fontanelli contends that Article 51 CFR is ‘the key provision of the Charter’s self-restraint vis-à-vis Member States’,⁹⁸ while Lenaerts highlights that scope of application of the Charter is ‘the keystone which guarantees that the principle of conferral is complied with’.⁹⁹ The Explanations to the Charter in relation to Article 51(1) elucidate that ‘the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law’.¹⁰⁰ Those explanations rely on pre-Lisbon cases such as *Wachauf*¹⁰¹ and *ERT*.¹⁰² In the post-Lisbon context, the renowned decision in *Åkerberg Fransson* marks an important watershed as the Court stated that ‘the applicability of [EU] law entails applicability of the fundamental rights guaranteed by the Charter’.¹⁰³ In essence, Article 51(1) CFR requires a connection with EU law.¹⁰⁴ This connection is said to exist when member states are applying a provision of EU law (apart from the Charter itself), or are applying a national law that transposes EU legislation, or that is otherwise intended to implement EU law or pursues its objectives.¹⁰⁵ However, in disability case law, the necessary connection between the situation at stake and EU law remains somewhat elusive.

The applicability of the Charter in Milkova and a nuanced constitutionalisation of the UN Convention

Milkova is the only case in which the European Court of Justice adopts a broad understanding of the notion of ‘implementing EU law’ for the purposes of Article 51(1) in line with the *Åkerberg Fransson* jurisprudence. Consequently, this case

⁹⁸F. Fontanelli, ‘National Measures and the Application of the EU Charter of Fundamental Rights – Does *curia.eu* Know *iura.eu*’, 14(2) *Human Rights Law Review* (2014) p. 231 at p. 233. On the scope of application see also B. De Witte, ‘The Scope of Application of the EU Charter of Fundamental Rights’, in G. González Pascual and A. Torres Perez, *The Right to Family Life in the European Union* (Routledge 2017) p. 29; D. Sarmiento, ‘Who’s Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe’, 50 *Common Market Law Review* (2013) p. 1267. For critical overview on the interpretation of the scope of the Charter by the ECJ see also J. Snell, ‘Fundamental Rights Review of National Measures: Nothing New under the Charter?’, 21 *European Public Law* (2015) p. 285.

⁹⁹Lenaerts, *supra* n. 16, p. 377.

¹⁰⁰Explanations relating to the Charter of Fundamental Rights, *supra* n. 21, *ad articulum*.

¹⁰¹ECJ 13 July 1989, Case 5/88, *Wachauf*, ECLI:EU:C:1989:321.

¹⁰²ECJ 18 June 1991, Case C-260/89, *ERT*, ECLI:EU:C:1991:254.

¹⁰³ECJ 26 February 2013, Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 21. Emphasis added. See also Opinion of AG Sharpston, 14 November 2013, Case C-390/12, *Robert Pfleger and Others*, ECLI:EU:C:2013:747, para. 41.

¹⁰⁴ECJ 10 July 2014, Case C-198/13, *Victor Manuel Julian Hernández and others*, ECLI:EU:C:2014:2055, para. 34.

¹⁰⁵ECJ 6 March 2014, Case C-206/13, *Siragusa*, ECLI:EU:C:2014:126, para. 25. See also Opinion of AG Bobek 7 September 2017, Case C-298/16, *Ispas*, ECLI:EU:C:2017:650.

represents also a notable exception in that the Court actually engages with the Charter, while still referring widely to the UN Convention and interpreting the Employment Equality Directive in light of that Convention. The engagement with the Charter seems even more exceptional if we consider that the referring court did not explicitly mention to the Charter in its questions but only briefly cited it in its order, without ‘spell[ing] out how that instrument of EU law might be relevant to the facts of the dispute in the main proceeding’.¹⁰⁶

The decision in *Milkova* followed from a request for preliminary ruling from the Supreme Administrative Court of Bulgaria and concerned the interpretation of Articles 4 (on occupational requirements) and 7 (on positive action) of the Employment Equality Directive and of Article 5 of the UN Convention (on non-discrimination). That request was raised in the proceedings brought by Ms Milkova in relation the decision to terminate her employment relationship. In particular, Ms Milkova, a person with a disability, had alleged that the Bulgarian legislation was discriminatory in conferring on employees with certain disabilities a specific protection in the event of dismissal, without extending such protection to civil servants with the same disabilities. Advocate General Saugmandsgaard Øe suggested that the Employment Equality Directive was not applicable in circumstances similar to those of the dispute in the main proceedings, ‘where the differentiation at issue was based on a criterion other than those exhaustively listed in Article 1’ of the Directive.¹⁰⁷ Consequently, he argued that the Directive could not be interpreted in the light of the provisions of the Charter.¹⁰⁸ Notably, however, he presented in his Opinion ‘a number of observations in the alternative to cater for the eventuality that the Court does not follow that recommendation’, without focusing on the Charter in those observations.¹⁰⁹ The Court did not follow the former indication of the Advocate General, but considered that the Bulgarian legislation at issue in the main proceedings comes within the scope of Article 7(2) of the Employment Equality Directive.¹¹⁰ As a consequence, the Luxembourg judges established the applicability of the Charter, by holding that the Bulgarian legislation pursues an objective covered by EU law. They highlighted that, even though Article 7(2) of the Directive does not require member states to adopt positive measures, such a discretion ‘does not permit the conclusion that rules adopted by Member States, such as those at issue in the main proceedings, fall outside the scope of EU

¹⁰⁶Opinion of AG Saugmandsgaard Øe 27 October 2016, Case C-406/15, *Milkova*, ECLI:EU:C:2016:824, para. 60.

¹⁰⁷Ibid., para. 64.

¹⁰⁸Ibid., para. 65.

¹⁰⁹Ibid.

¹¹⁰*Milkova*, para. 36 ff.

law'.¹¹¹ Ultimately, the European Court of Justice stated that Article 7(2) of the Directive, 'read in the light of the UN Convention and in conjunction with the general principle of equal treatment enshrined in Articles 20 and 21 of the Charter', allows for a national legislation which confers on employees with certain disabilities specific protection in the event of dismissal, without conferring such protection on civil servants with the same disabilities, unless it is established that there has been an infringement of the principle of equal treatment,¹¹² but left it to the referring court to ascertain whether a violation of the principle of equal treatment occurred.¹¹³

In *Milkova*, the Luxembourg judges relied heavily on the UN Convention, but still applied the Charter. In that regard, they remind us that the application of the Charter must be triggered by another EU legal provision, and that the connection between the Member State action and the EU provision still exists when member states enjoy a margin of discretion within the framework of EU law and are acting within that margin left by EU law, as already stated in *N.S.*¹¹⁴ Even though it was not obvious from the Bulgarian's court reference that the legal situation at stake fell within scope of EU law, as the alternative options proposed in the Opinion of Advocate General Saugmandsgaard Øe (who focuses in a first place on the ground of the differentiation purported by the Bulgarian legislation) show, the Charter was relied upon by the Court. Yet, the European Court of Justice suggests that the Directive (a secondary source) must be read *in conjunction* with a constitutional source (the Charter) and *in light* of a sub-constitutional source (the UN Convention). The Court seems implicitly to suggest a reversal of hierarchy between the UN Convention and the Charter. In the words of the Court, the UN Convention subtly becomes the (constitutional) point of reference for the protection of the rights of persons with disabilities.

Tracing a 'thin red line': Z v A Government Department

Z v A Government Department originated from a request for preliminary ruling raised by the Irish Equality Tribunal. That national court asked the European Court of Justice whether the refusal of paid leave from employment equivalent to maternity leave and/or adoptive leave to a woman who conceived a child through surrogacy could constitute a discrimination on the ground of sex for the purpose of Directive 2006/54/EC on the implementation of the principle

¹¹¹Ibid., para. 51.

¹¹²Ibid., para. 64.

¹¹³Muir, *supra* n. 19, p. 838.

¹¹⁴ECJ 21 December 2011, Joined Cases C411/10 and C493/10, *N. S. and Others*, ECLI:EU:C:2011:865.

of equal opportunities and equal treatment of men and women in matters of employment and occupation interpreted, *inter alia*, in light of the Charter. If that was not the case, it asked whether that Directive was valid vis-à-vis, *inter alia*, Article 21 of the Charter. In response to those first questions, the European Court of Justice, in a nutshell, held that the subject matter of the case did not fall within the scope of that Directive,¹¹⁵ and that it was unnecessary to assess the validity of Directive 2006/54 in the light of the Charter.¹¹⁶ The other questions, which are the most relevant for the purpose of this analysis, concerned, in essence, whether the Employment Equality Directive, interpreted in the light of the UN Convention, must be understood as meaning that a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker, who is unable to bear a child and who has availed herself of surrogacy, constitutes a discrimination on the ground of disability, and, if the answer is in the negative, whether that Directive is valid in the light of, *inter alia*, Articles 21 and 26 of the Charter. In answering the question, the European Court of Justice focused on whether Mrs Z could be considered a person with a disability and concluded that ‘the inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment’.¹¹⁷ In that vein, it held that Mrs Z’s condition did not entail a disability for the purpose of the Employment Equality Directive. As a consequence, the Court, without even making a reference to the well-rooted jurisprudence on Article 51 of the Charter, deemed it unnecessary to examine the validity of the Employment Equality Directive in light of the Charter.

The laconic approach of the Court to the Charter’s applicability does not offer many opportunities for speculation. However, this point was discussed by Advocate General Wahl in his Opinion. He only examined it with reference to Directive 2006/54, and then stated that those remarks applied *mutatis mutandis* to the Employment Equality Directive.¹¹⁸ The Advocate General recalled that ‘invoking a Charter provision will not suffice to transform a situation otherwise falling within the ambit of national law into a situation covered by EU law’.¹¹⁹ He also stated that ‘while the Charter (and the primary law as a whole) must undoubtedly be observed in the interpretation of EU secondary legislation’, it cannot be deployed in such a way as to extend the scope *ratione materiae* of secondary

¹¹⁵*Z v A Government Department*, *supra* n. 33, para. 65.

¹¹⁶*Ibid.*, para. 66. A very similar reasoning can be found in ECJ 18 September 2019, Case C-366/18, *José Manuel Ortiz Mesonero*, ECLI:EU:C:2019:757.

¹¹⁷*Z v A Government Department*, *supra* n. 33, para. 81.

¹¹⁸Opinion of AG Wahl 26 September 2013, Case C-363/12, *Z v A Government Department and The Board of management of a community school*, ECLI:EU:C:2013:604, para. 113 referring to paras. 71-75.

¹¹⁹*Ibid.*, para. 71.

legislation.¹²⁰ He then went on by stating that ‘a specific legislative instrument reflecting a fundamental legislative choice to enhance substantive equality . . . cannot be construed, simply by evoking fundamental rights, as covering other (possible) forms of discrimination’.¹²¹ This is the same rationale underpinning the decision in *Chacon Navas* (as well as *Kaltoft*) that the list of grounds included in Article 19 TFEU is exhaustive.¹²² In the *Z* case, however, what is striking is that the Court is not really confronted with a prospective additional ground of discrimination (such as sickness or obesity). By contrast, as noted elsewhere, Mrs Z could in fact be considered a person with a disability, but, according to the European Court of Justice, not for the purpose of the Employment Equality Directive.¹²³ The Court relied on the limited scope of the Directive *ratione materiae*, and explicitly and deliberately narrowed down the definition of disability.¹²⁴ In its reasoning, the Court did not use the Charter (as it could have) to support an approach to disability discrimination capable of ensuring substantive equality. Article 26, by virtue of its reference to ‘measures designed to ensure their independence, social and occupational integration’, could have bolstered the view that, as noted by Waddington, the barriers experienced by Mrs Z were ‘the absence of a statutory regime providing for a period of paid leave following the birth of a child through surrogacy’,¹²⁵ i.e. the absence of measures to enhance occupational integration.

On the whole, this heavily criticised decision, which paid lip service to the UN Convention and embraced a medicalised view of disability revolving around the role of the physical impairments rather than social barriers,¹²⁶ shows (once again) that the Court refers preferably to the Convention as a benchmark for the protection of disability rights, rather than to the Charter. Such reluctance to use the Charter is unequivocally linked to the willingness on the side of the Court to limit the reach of EU non-discrimination law, as well as to protect member states’ prerogatives in an area which is ethically sensitive and when the widening of the scope of application has potentially far-reaching economic and financial consequences. In fact, we cannot but remember that surrogacy remains a controversial practice and raises concerns of commodification of women’s bodies, and that Mrs Z’s case revolves around an economic entitlement.¹²⁷

¹²⁰Ibid., para. 73.

¹²¹Ibid.

¹²²Schiek, *supra* n. 9, p. 42.

¹²³Favalli and Ferri, ‘Defining Disability’, *supra* n. 9, p. 559.

¹²⁴Ibid.

¹²⁵Waddington, *supra* n. 10, p. 585.

¹²⁶Ibid.

¹²⁷M. Finck and B. Kas, ‘Surrogacy Leave as a Matter of EU Law: CD and Z’, 52(1) *Common Market Law Review* (2015) p. 281.

Kaltoft and Daouidi: leaving the Charter behind

While in *Z* the European Court of Justice held that the situation did not fall within the scope of EU law, in *Kaltoft* and *Daouidi*, the Court essentially declined to answer the questions related to the Charter as the national court did not demonstrate that the situation at issue came within the scope of EU law.

In *Kaltoft*,¹²⁸ the Court considered that the Charter as such was not applicable. Mr Kaltoft worked as a child-minder in Billund, Denmark, but was dismissed from his employment. He claimed that he was a victim of discrimination on the basis that he was obese. The Danish district court, examining the complaint, decided to stay the proceedings and sought a preliminary ruling from the European Court of Justice. It asked four questions to the Luxembourg judges. The first three questions, in essence, enquired whether obesity can be considered to be a protected ground of discrimination under EU law. With its fourth question the Danish court queried whether obesity can be deemed to be a disability covered by the Employment Equality Directive. In none of these questions did the Danish court refer overtly to the Charter. However, the first question is relevant for the purpose of this analysis, as the national court explicitly asked whether it is 'contrary to EU law, as expressed, for example, in Article 6 TEU concerning fundamental rights' to discriminate on the grounds of obesity. Following well-established case law, the Court recalled (exactly as it had done in *Chacon Navas*) that 'fundamental rights which form an integral part of the general principles of EU law include the general principle of non-discrimination'.¹²⁹ However, the Luxembourg judges denied that EU law lays down a general principle of non-discrimination on the grounds of obesity.¹³⁰ The Court also held that there was no evidence suggesting 'that the situation at issue in the main proceedings, in so far as it relates to a dismissal purportedly based on obesity as such, would fall within the scope of EU law',¹³¹ stating that the Charter was not applicable.¹³² While the list of grounds in Article 21 of the Charter is non-exhaustive and wider than that included in Article 19 TFEU, the Charter cannot expand the EU's competences. Advocate General Jääskinen, echoing Advocate General Wahl's words in *Z v A Government Department*, and citing *Chacon Navas*, recalls that that 'a generalised link between Member State and EU labour markets law' is not sufficient to engage EU fundamental rights protection at national level, as this 'would breach the

¹²⁸*Kaltoft*, *supra* n. 73.

¹²⁹*Ibid.*, paras. 33-35.

¹³⁰*Ibid.*

¹³¹*Ibid.*, para. 38.

¹³²*Ibid.*, para. 39.

established boundary on the outer limit of EU fundamental rights law'.¹³³ Ultimately, the Court concluded that obesity per se does not amount to a disability, but when an employee's obesity does entail a limitation that, in interaction with various barriers, hinders his equal participation on the workplace then obesity can be included in the concept of disability.¹³⁴

In the subsequent case of *Daouidi*, the European Court of Justice did not examine the questions related to the Charter that the referring court had posed. Rather, it focused on the Employment Equality Directive.¹³⁵ The decision originated from a request for a preliminary ruling raised by the Social Court of Barcelona, in the course of the disability discrimination on the dismissal of Mohamed Daouidi by Bootes Plus SL. The Social Court asked five questions, which concerned the Charter and the Employment Equality Directive. First, it asked whether, essentially, the decision of an employer to dismiss a worker due to his temporary incapacity (of uncertain duration) constitutes a discrimination for the purpose of Article 21(1) of the Charter. Second, it asked whether Article 30 of the Charter, on the protection against unjustified dismissal, requires national law on manifestly arbitrary dismissal to be applied when the discharge infringes a fundamental right. In addition, it enquired whether a dismissal for temporary incapacity, such as that at stake, would come under the scope of the Charter, and in particular of Articles 3, 15, 31, 34(1) and 35(1), and in such a case, whether those Articles could be directly applied by the national court. Last, the Social Court queried whether a dismissal for temporary incapacity could amount to a direct discrimination on the grounds of disability under the Employment Equality Directive. In his Opinion, Advocate General Bot focused only the fifth question as to whether or not the dismissal could have been considered discriminatory on the ground of disability for the purpose of the Directive.¹³⁶ In a similar fashion, the Court answered only the fifth question posed by the referring court with the view of allowing it to determine whether the condition of Mr Daouidi, i.e. a temporary incapacity of uncertain duration, could be deemed to be a disability within the meaning of the Employment

¹³³Opinion of AG Jääskinen 17 July 2014, Case C-354/13, *Kaltoft*, ECLI:EU:C:2014:2106, para. 25.

¹³⁴For a comment on the relationship between obesity and disability, see D. Hosking, 'Fat Rights Claim Rebuffed: *Kaltoft v Municipality of Billund*', 44 *Industrial Law Journal* (2015) p. 460; G. de Beco, 'Is Obesity Disability: The Definition of Disability by the Court of Justice of the European Union and its Consequences for the Application of EU Anti-discrimination Law', 22(1) *Columbia Journal of European Law* (2016) p. 381.

¹³⁵For a full account of the case see D. Ferri, 'Daouidi v Bootes Plus SL and the Concept of "Disability" in EU Anti-Discrimination Law', 10(1) *European Labour Law Journal* (2019) p. 69.

¹³⁶Opinion of AG Bot 26 May 2016, Case C-395/15, *Daouidi v Bootes Plus SL*, ECLI:EU:C:2016:371.

Equality Directive. The Court, after concluding that when a situation of temporary incapacity for work is ‘long-term’ it can amount to a disability for the purpose of the Directive,¹³⁷ recalled that, in light of Article 6(1) TEU and Article 51(2) of the Charter, the Charter does not extend the scope of EU law. The Court held that it could not be established that the situation falls within the scope of a provision of EU law other than those set out in the Charter, because the fact that a person finds him or herself in a situation of temporary incapacity for work does not automatically imply that the limitation suffered by that person may be classified as ‘long-term’ and, therefore, does not fall squarely within the notion of ‘disability’ referred to by the Employment Equality Directive.¹³⁸ The Court, hence, concluded that it did not have jurisdiction to answer the first four questions.¹³⁹

In both *Kaltoft* and *Daouidi*, the Court only focused on the interpretation of the Directive in light of the UN Convention and ignored the Charter. Even though the facts included implicit connections with EU law, this different approach to the Charter (compared to *Milkova*) is linked to the quite evident refusal to use Article 21 of the Charter to enlarge the material scope of the prohibition of discrimination beyond the grounds listed in Article 19 TFEU and in the Employment Equality Directive. As noted by Ward, the European Court of Justice is yet ‘to adopt an approach pursuant to which an assessment is first made as to whether a substantive provision of EU law applies to a dispute, and then allowing categories of discrimination concerning the application of that provision of EU law to be prohibited going beyond the list in Article 21(1)’.¹⁴⁰ A few scholars suggest that the European Court of Justice has indeed missed the opportunity to emphasise the innovative value of the Charter and to exploit its potential to extend the scope of non-discrimination *ratione personae*.¹⁴¹ By contrast, through the reference to the UN Convention, the Court engages with an extensive interpretation of disability, in lieu of adding additional distinct grounds of discrimination. The UN Convention (more than the Charter) has allowed the Court to slowly extend the reach of EU non-discrimination law without questioning its formal scope deriving from the strong link between the Employment Equality Directive and Article 19 TFEU (i.e. the closed list of grounds included therein). From a substantive point of view, the Court is still far away from complying with

¹³⁷*Daouidi*, para. 59.

¹³⁸*Ibid.*, para. 65.

¹³⁹*Ibid.*, para. 68.

¹⁴⁰Ward, *supra* n. 8, p. 36.

¹⁴¹Gualco, for example, suggests that the CJEU has gone too far in attempting to include obesity within the ground of disability and should have ‘accommodated the legal value of the Charter by acknowledging its enforceability within the situation at stake’: E. Gualco, ‘The Development of Age and Disability Equality Within the European Union: The Court of Justice and the (Mis)implementation of EU General Principles’, 4 *Diritto pubblico comparato ed europeo* (2019) p. 979 at p. 987.

the social contextual model. However, this attempt shows once again that the UN Convention (and not the Charter) has become the (constitutional) cornerstone to amplify the reach of EU law.

Glatzel and beyond: the constitutionalisation of the UN Convention?

Despite the mismatch that still exists between EU law and the UN Convention,¹⁴² the latter has undoubtedly influenced, as indicated above, the interpretation of the concept of disability. This is arguably because the UN Convention, with its disability-sensitive enunciation of rights, has offered to the Court an important conceptual base upon which to articulate the contours of the prohibition of discrimination on the ground of disability in EU law. Interestingly, the European Court of Justice has also implicitly traced a synergetic relationship between the Charter and the UN Convention,¹⁴³ tacitly constitutionalising the UN Convention. This, as noted above, emerged in *Milkova*, but is more explicit in *Glazel*. In the latter case, the Court stated that:

as far as concerns the issue of discrimination on grounds of disability, . . . Article 21(1) of the Charter requires the EU legislature, in particular, not to apply any difference in treatment on the basis of a limitation resulting, in particular, from *long-term 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 persons, unless such a difference in treatment is objectively justified.¹⁴⁴

In referring to disability for the purpose of the Charter, the Luxembourg judges used the wording of Article 1(2) of the UN Convention, as elaborated in *HK Danmark*. The Court de facto uses the Convention (which is a sub-constitutional source within the EU legal order) to interpret a (formally) hierarchically superior source. Interestingly, the Court has always held (including in *Glatzel*)¹⁴⁵ that the principle of consistent interpretation applies only with regard to EU secondary law,¹⁴⁶ highlighting the hierarchal relation between international agreements

¹⁴²Waddington and Broderick, *supra* n. 13.

¹⁴³D. Ferri, 'Disability in the EU Charter of Fundamental Rights', in Ferri and Broderick, *supra* n. 38.

¹⁴⁴*Glatzel*, *supra* n. 28, para. 46.

¹⁴⁵In *Glatzel*, when it refused to assess the validity of point 6.4 of Annex III vis-à-vis Art. 2 of the UN Convention, the Court reiterated that the principle of consistent interpretation requires secondary law to be interpreted in a manner consistent to that Convention. See *Glatzel*, *supra* n. 28, para. 69 ff.

¹⁴⁶CFI 17 September 2007, Case T-201/04, *Microsoft Corp v Commission*, ECLI: EU:T:2007:289, para. 798.

concluded by the EU and EU secondary law.¹⁴⁷ By contrast, in *Glatzel*, while explicitly endorsing its own previous jurisprudence, the Court interpreted the definition of disability included in Article 21(1) of the Charter in light of and in compliance with the UN Convention. The implicit approach adopted by the Court seems to indicate that the Convention, which is indeed the first human rights treaty ratified by the EU has in fact become part of the EU's fundamental rights system, and of the EU constitutional fabric.¹⁴⁸ In other terms the European Court of Justice has considered the UN Convention a constitutional source within the hierarchy of sources. Such an approach tallies with the observation that the Charter is regularly cited in policy documents and features in the non-binding preamble of relevant legislation¹⁴⁹ alongside (and seemingly on the same footing as) the UN Convention. For example, the European Disability Strategy 2010-2020 aims to 'harness the *combined potential* of the . . . Charter of Fundamental Rights, the Treaty on the Functioning of the European Union, and the UN Convention'.¹⁵⁰

In 2018, a request for a preliminary ruling was issued by the *Tribunal d'Instance de Sens*.¹⁵¹ This request focused on the Charter and on whether Article 21 CFR and Article 39(2) CFR allow the right to vote for the European Parliament to be withdrawn because a person has been placed under a guardianship measure due to his or her mental disability. Importantly, the *Tribunal d'Instance de Sens* explicitly asked whether 'Article 21 of the Charter, interpreted in the light of the United Nations Convention on the Rights of Persons with Disabilities' allows the right to vote in European parliamentary elections to be withdrawn as a consequence of a guardianship. Regrettably the request was withdrawn by *Tribunal d'Instance de Sens* in May 2019,¹⁵² but it would have been extremely interesting to see whether the Court would have confirmed the progressive constitutionalisation of the Convention.

An important opportunity to further consolidate the UN Convention as a constitutional source of disability rights could be offered by a recent request for preliminary ruling. This request, raised by a Bulgarian administrative court in Case

¹⁴⁷On consistent interpretation, see F. Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation', in E. Cannizzaro et al. (eds.), *International Law as Law of the European Union* (Martinus Nijhoff 2012) p. 395.

¹⁴⁸D. Ferri, 'The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective', in L. Waddington and G. Quinn (eds.), *European Yearbook of Disability Law* vol. 2 (Intersentia 2010) p. 47.

¹⁴⁹Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services [2019] OJ L 151/70, preamble para. 103.

¹⁵⁰Communication from the European Commission, European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final, p. 11. Emphasis added.

¹⁵¹Request for a preliminary ruling from the *Tribunal d'Instance de Sens* (France) lodged on 30 August 2018 (Case C-562/18).

¹⁵²Case C-562/18, Order of Cancellation issued on 13 June 2019 EU:C:2019:506.

C-824/19,¹⁵³ does not mention the Charter, but revolves around (once again) the Employment Equality Directive and the UN Convention (and namely Article 5 of the Convention on the principle of equality). The national court asks in essence whether, in light of the UN Convention, it is permissible for a person without the ability to see to be able to work as a court assessor and participate in criminal proceedings, or whether ‘the specific disability of a permanently blind person a characteristic which constitutes a genuine and determining requirement of the activity of a court assessor, the existence of which justifies a difference of treatment and does not constitute discrimination based on the characteristic of “disability”’.¹⁵⁴ It remains to be seen to what extent the Court will engage with the UN Convention, and whether the Charter will eventually play a role in the reasoning.

CONCLUDING REMARKS

This article has discussed the role of the Charter in the European Court of Justice’s case law on disability, unveiling the ambiguous, counterintuitive and somewhat unorthodox relationship that exists between the Charter, the UN Convention and the Employment Equality Directive.

The ‘quantitative’ appraisal conducted reveals that references to the Charter in case law on disability discrimination are scant. While the irrelevance of the Charter has come to an end after the entry into force of the Lisbon Treaty, Articles 20, 21 and 26 have yet to play a significant role in the case law of the European Court of Justice. Referring courts themselves have generally failed to invoke the Charter to a great extent. Even when the Charter was in fact invoked by national courts as a parameter for validity of EU legislation, the Court either declared that the Charter was not applicable or, as in *Glatzel*, did not really delve into the content of the provisions invoked. By contrast, the UN Convention has become the main normative point of reference for the protection of the rights of persons with disability and the enhancement of disability equality.

In exploring the reasons for such a limited role of the Charter (a limited role already criticised by scholars such as O’Brien with regard, in particular, to the concept of disability),¹⁵⁵ and in contrasting it with the major role played by

¹⁵³Request for preliminary ruling Case C-824/19, *Komisia za zashtita ot diskriminatsia*.

¹⁵⁴*Ibid.* Along these lines, a Lithuanian tribunal has recently asked the Luxembourg judges whether the Employment Equality Directive must be interpreted as precluding provisions of national law which provide that ‘impaired hearing below the prescribed standard constitutes an absolute impediment to work as a prison officer and that the use of corrective aids to assess compliance with the requirements is not permitted’. In answering this question, the Court will inevitably have to consider the meaning of disability and the role that stigma and prejudice play in this kind of provision (Request for preliminary ruling Case C-795/19, *Tartu Vangla*).

¹⁵⁵O’Brien, *supra* n. 24.

the UN Convention, the article contends that a major hurdle hampering the relevance of Charter is the elusive way in which the Court has interpreted the notion of ‘implementing EU law’ for the purpose of Article 51. Case law on disability confirms that the *Åkerberg Fransson* formula leaves considerable uncertainty in situations where the issue is, at least to some extent, governed by EU law or the facts of the case show some kind of connection with EU law.¹⁵⁶ In *Daouidi* and *Kaltfof*, the uncertain boundaries of the scope of application of the Charter unveil an evident aversion on the part of the Court to include new standalone grounds of discrimination. However, the Court does attempt to engage with an extensive interpretation of disability in lieu of adding such additional distinct grounds of discrimination relying on the UN Convention. This approach might still amplify the reach of EU non-discrimination law if, echoing Waddington’s words,¹⁵⁷ the European Court of Justice keeps ‘saying all the right things’ and eventually stops getting them wrong by focusing more on the role of external barriers in disabling an individual. In *Z*, the approach of the Court is rather ambiguous and eventually seems an attempt to assuaging fears about ‘competence creep’ in a sensitive area with deep ethical implications and wide-ranging financial issues. In this case, Article 51(1) of the Charter was, de facto, used as a shield to avoid engaging with those delicate issues. However, developments that open up to a more extensive use of the Charter and to a social-contextual interpretation of disability when it comes to situations akin to that of Mrs *Z*, are not to be excluded. After all, the Court has already shown signs of a more open attitude towards the role that the Charter can play in other fields, such as that of EU citizenship, in cases like *Chavez*.¹⁵⁸

The limited relevance of the Charter is counterbalanced by the growing importance of the UN Convention on the Rights of Persons with Disabilities, which has been consistently highlighted by several scholars. This article, however, adds to that scholarship by arguing that the Court has opened up a new relationship between the Charter and the UN Convention. It maintains that the European Court of Justice, with its usual ‘stone by stone’ approach,¹⁵⁹ subtly constitutionalised the UN Convention. Should the Luxembourg Court interpret the Charter in light of the UN Convention in other future cases beyond *Glatzel*, the UN Convention (and not the Charter) would *de iure* become the primary constitutional benchmark within the EU law legal order when it comes to the promotion

¹⁵⁶De Witte, *supra* n. 98, p. 29.

¹⁵⁷Waddington, *supra* n. 10.

¹⁵⁸ECJ 17 May 2017, Case C-133/15, *Chavez-Vilchez v Raad van Bestuur van de Sociale Verzekeringsbank*, ECLI:EU:C:2017:354.

¹⁵⁹K. Lenaerts, ‘EU citizenship and the European Court of Justice’s “stone-by-stone” approach’, 1 *International Comparative Jurisprudence* (2015) p. 1.

of the rights of persons with disabilities. This might further downplay the role of the Charter in non-discrimination case law. It may, however, also trigger a process of a more extensive interpretation of the Charter in tandem with the UN Convention, based on the synergistic approach evident in *Glatzel*. This would actually enhance the potential and the reach of the Charter, and in particular of Article 26.

