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Enforcing the Rights and Freedoms of Disabled People: the Role of Transnational Law (Part II)

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1. Introduction

In Part I of this article we examined the actual and potential application of global international law (GIL) to the development of rights and freedoms for people with disabilities. We concluded that there is currently no *binding* and *accessible* GIL instrument that specifically relates to this group.[1] Instead, an emphasis was placed upon those instruments that have a generic application to human rights and a clear potential application to the protection of *disability* rights primarily through their provisions relating to non-discrimination. Moreover, we stressed that the instruments of GIL also have the potential to provide an indirect benefit to disabled people as tools of influence and persuasion in the development of non-discrimination and affirmative action empowerment programmes at both a national and international level. In Part II, we apply a similar analysis to the opportunities offered by European international law (EIL).

2. European International Law (EIL)

The most obvious difference between GIL and EIL is their relative geo-political spheres of influence. Whilst GIL applies in theory to the entire world, EIL is limited to those States of Europe that are members of the Council of Europe and/or the European Union.

A more important difference, however, lies in the relative level of impact each body of law might have upon the rights and freedoms of disabled people. In this respect, the continuing legislative and jurisprudential developments within the Council of Europe and the European Union coupled, in particular, with the pervasive nature of European Community Law, raise the potential of EIL to bring about positive change for people with disabilities within the European Region beyond that proffered by the GIL examined in Part I.

Under the heading EIL, we distinguish between the instruments that have been developed under the auspices of the Council of Europe and those emanating from the European Union.

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* We would like to acknowledge both the patience and editorial skills of Ms Deirdre Waters in reviewing the many drafts of this paper. Any errors remain our own.

1 While ILO Convention 159 *concerning vocational rehabilitation and employment (disabled persons)*, 1983, specifically relates to people with disabilities and is *binding* upon its Contracting States, its provisions - like that of the other ILO Conventions - cannot be described as *accessible* to the individual or groups of individuals in the manner described in Part I of this article.

2.1. Instruments emanating from the Council of Europe

Independent of the European Community, the Council of Europe (established in 1948) is an international organisation comprising 40 Member States. Through its Committee of Ministers and the Parliamentary Assembly, the Council of Europe has, in addition to developing the three major *binding* instruments (discussed below), passed three *non-binding* instruments specifically relating to disability.[2] These *non-binding* instruments provide a valuable insight into the approach and attitude of the Council of Europe to this area of human rights. In particular, Recommendation No.R (92) 6 *on a coherent policy for people with disabilities*, urges Member States of the Council of Europe to 'guarantee the right of people with disabilities to an independent life and full integration into society, and [to] recognise society's duty to make this possible' so as to ensure 'equality of opportunity' for people with disabilities. It further provides that to do otherwise would constitute a 'violation of human dignity'.[3]

Perhaps of greater significance, however, are the inferences that one may draw from such documents to clarify the possible application of certain provisions under the *binding* instruments that have emanated from the Council of Europe; documents such as the European Social Charters and the European Convention on Human Rights (discussed below).[4] It should be noted that uncertainties exist both regarding the inclusion of disability within the protective remit of these instruments and, if included, the nature and extent of such coverage. In this respect, encouragement may be gained from Recommendation 1185 (1992) where, in acknowledging the social nature of disability, it provides:

> 'A disability is a restriction caused by physical, psychological, sensory, social, cultural, legal or other obstacles that prevent disabled people from becoming integrated and taking part in family life and the community on the same footing as everyone else. Society has a duty to adapt its standards to the specific needs of disabled people in order to ensure that they can lead independent lives.'

The three *binding* instruments of the Council of Europe to be reviewed in this article are as follows:

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2 See in this respect, Resolution AP (84), adopted on 7 September 1984 by the Committee of Ministers, on *a coherent policy for the rehabilitation of handicapped people*; Recommendation No. R (92) 6 adopted 9 April 1992 by the Committee of Ministers on *a coherent policy for people with disabilities*, and Recommendation 1185 (1992) adopted by the Parliamentary Assembly of the Council of Europe on 7 May 1992.

3 It is interesting to note in this respect that Recommendation 1185 (1992) invites the government of each Member State to describe what steps have been taken to comply with Recommendation No. R (92)6.

4 In *Botta v. Italy*, Judgement of 24 February 1998 (153/1996/772/973), for example, the Court of Human Rights made reference to Recommendation No. R (92) 6 of the Committee of Ministers and Recommendation 1185 (1992) *ibid*, while interpreting certain provisions under the European Convention on Human Rights.

- The European Convention on Human Rights and Fundamental Freedoms 1950
- The European Social Charter 1961
- The European Social Charter (Revised) 1996

2.1.1 European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR)

The ECHR came into effect in 1953 and established a *binding* international standard of human rights that are primarily civil and political in nature; rights, therefore, closely mirroring those contained in the International Covenant on Civil and Political Rights 1966 (ICCPR, see Part I). Founded under the auspices of the Council of Europe, the ECHR places an obligation on its signatories to ensure that such rights are reflected at a national level and that a remedy is available from national courts in the event of a breach. In addition to its *binding* nature, the ECHR can also be described as *accessible* to the individual as each of the Contracting States have voluntarily recognised the right to individual petition.[5]

Be that as it may, the ECHR and its amending Protocols are limited in at least two respects. The first limitation is that the Convention can only be enforced against a Contracting State and 'emanations thereof' [6] and does not, therefore, impose any direct obligations upon private individuals or organisations.[7] A right of petition, however, is available to State parties, individuals and groups of individuals provided that the alleged violation *concerns them directly*. Unfortunately, representative organisations or pressure groups that are *not directly affected* by a State's actions but wish to litigate on behalf of nameless individuals will not have sufficient standing under the ECHR. Nevertheless, pressure groups are now regularly given an opportunity to submit *amicus curiae* briefs that can provide the Court of Human Rights with a broader picture against which to assess the details of an individual's claim.

The second limitation is that, despite the incorporation of the ECHR in the majority of Contracting States, there will still be occasions necessitating application proceedings to the Commission of Human Rights. However, such an application - which may then be passed on to the Court of Human Rights - can only take place once all domestic remedies have been exhausted and the procedure, therefore, to bring an infringing State before the Court of Human Rights is both time-consuming and expensive.[8]

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5 An increase in *accessibility* will be achieved through the implementation of Protocol No. 11. This amendment will reduce the political influence that is currently exerted when an application under the Convention is being considered in terms of its 'admissibility'.

6 For an examination of what may be considered an emanation of the State under European Community law, see V Kvjatkoviski, 'What is an Emanation of the State? An Educated Guess', 3 *European Public Law*, 1997, 3, 329. It is submitted that one can draw similar inferences in this respect to the ECHR and its application.

7 It should be noted that the protected rights under the Convention can also have an indirect influence on the rights of individuals in the 'private' sphere; a possibility recently confirmed in *Botta v. Italy*, *infra*.

8 Financial assistance, however, can be sought from the Commission's own financial support facility.

Despite these limitations, the ECHR, its Protocols, and the developing associated jurisprudence, provide a promising foundation to further advance the rights and interests of people with disabilities within Contracting States. While neither the Convention nor its Protocols specifically address questions pertaining to disability, it is clear that neither do they specifically exclude the application of disability rights from their consideration.[9]

As regards the right to non-discrimination, the relevant provision under the ECHR can be found in Article 14. This article lists a number of prohibited grounds of discrimination and concludes with the words 'or other status', thus:

> 'The enjoyment of the rights and freedoms *set forth in this Convention* shall be secured without discrimination *on any grounds such as* sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth *or other status* (Emphasis added).'

The following points should be made in relation to this provision. Firstly, due to the inclusion of the words 'set forth in this Convention', Article 14, in contrast to Article 26 ICCPR, cannot be pleaded in isolation. It prohibits discrimination only in respect of one or more of the other rights and freedoms enshrined within the Convention and cannot, therefore, be described as 'autonomous'. The extent of this limitation on Article 14 is fully appreciated when one considers that its lack of autonomy will prevent the Court of Human Rights from considering issues relating to non-discrimination if the facts of a given case do not fall within another article's remit of application.[10] It is worth noting, therefore, that one should not interpret Article 14 as being inherently inapplicable to people with disabilities merely because the Court of Human Rights has failed to consider this article in previous cases brought by such applicants.[11]

Secondly, the use of the words 'on any grounds such as' renders Article 14, like Article 26 of the ICCPR (see Part I), 'open-ended' and it therefore prohibits any distinction on any ground unless 'a reasonable and objective justification' can be made by the State concerned. Moreover, the indication from the case law in this respect is that, in assessing the justification made by the defendant Contracting State, the Court of Human Rights will look to see whether the distinction is in pursuance of a 'legitimate aim' and whether or not there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[12]

Thirdly, it is possible that the Court of Human Rights may interpret Article 14 - and

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9 Similarities can be drawn in this respect with the ICCPR and the ICESCR, examined in Part I of this article.

10 See *Karheinz Schmidt v. Germany* judgment of 18 July 1994, Series A no. 291-B, p. 32, para 22. Equal to the position, therefore, in respect of Article 2(2) of the ICESCR. Note that although the right to non-discrimination in Article 14 has no independent existence, breach of this article can make unlawful what might otherwise be lawful in terms of the other rights guaranteed by the Convention; see, for example, Case of *Larkos v. Cyprus* judgment of 18 February 1999 (application no. 29515/95), and the *Belgian Linguistics* case 1 EHRR 252.

11 One example in this respect is the case of *Botta v. Italy*, examined below.

12 *Gaygusuz v. Austria* judgement of 16 September 1996 (39/1995/545/631), para 42.

its application - in the same way that it has interpreted Article 8 of the Convention (see below). Such an interpretation would therefore impose a duty upon Contracting States to introduce positive State action (distinct from affirmative action measures) to ensure compliance with the right to non-discrimination.[13] The potential impact of such a duty on the rights and freedoms of people with disabilities (an impact that may even extend to the private sphere) has previously been identified in relation to Article 26 ICCPR (see Part I). It should be noted, however, that due to Article 14's lack of autonomy, such a duty will only apply within the context, or remit of application, of the other rights and freedoms protected by the ECHR and its protocols.

In terms of affirmative action measures, it is unlikely that Article 14 would be interpreted as imposing a positive duty upon the State for the introduction of such measures that, by their very nature, discriminate in favour of a protected group. Nevertheless, this would not prevent an acceptance of affirmative action measures under the Convention as Article 14, like Article 26 ICCPR, will only prohibit State action if it cannot be 'reasonably and objectively justified'. Given the purpose behind affirmative action measures, it is difficult to foresee circumstances that would prevent such a justification being established in defence of State action that favours under-represented groups; groups that would therefore include people with disabilities.

The inadequacy, however, of non-discrimination provisions such as Article 14 becomes most salient when one considers that the present jurisprudence under this Article requires inequality of treatment before discrimination is said to exist.[14] Thus, a government measure introducing an employment policy that treats all people equally but fails to compensate for the existence of disability and, as a result, has an adverse impact on disabled people, would not fall foul of Article 14 ECHR. It would appear, therefore, that Article 14 does not demand anything over and above the concept of 'formal equality' and, as a consequence, will be of limited value in combating 'indirect' forms of discrimination; forms constituting the majority of disability discrimination cases. This apparent limitation is also reflected in the European Social Charters (see below), and the ICCPR (see Part I). Moreover, with the exception of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR, see Part I), doubt also surrounds the relevance of 'reasonable accommodation' to the application of the non-discrimination principle in these treaties. An announcement, therefore, by the relevant treaty committees clarifying these issues would clearly be a positive step in the right direction.[15]

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13 See, for example, *Botta v. Italy* examined below and *Airey v. Ireland*, op cit. A similar interpretation has been placed upon both the ICCPR and the ICESCR; see in this respect the discussion surrounding Article 2(2) of the ICCPR and the General Comment No. 5 by the Committee on Economic, Social and Cultural Rights in respect of Article 2(2) of the ICESCR in Part I of this article.

14 See *Observer and Guardian v. UK* 14 EHRR 153.

15 It should be noted in this respect that a working group within the Council of Europe is currently revising the scope of application of Article 14 ECHR and it is hoped that its limitations and uncertainties, as identified herein, will be fully addressed in any forthcoming amendments to the non-discrimination provision.

Nonetheless, despite these limitations, a number of articles exist within the ECHR and its Protocols that would arguably provide the necessary scope for challenging State practice and laws both independently of, and in conjunction with, Article 14. Thus, by applying the facts of a recent case in the United Kingdom, the following discussion aims to demonstrate the potential of the Convention, its Protocols, and other relevant instruments of the Council of Europe in both protecting and advancing the rights and freedoms of people with disabilities.

In *ex parte* Barry,[16] the House of Lords held by a majority decision that local authorities may take their resources into consideration when determining which 'needs' *necessitate* intervention in respect of the disability support services listed under s2 of the Chronically Sick and Disabled Persons Act 1970 (CSDPA). As a result of this decision, Mr Barry no longer receives assistance with shopping, laundry, cleaning and collecting his pension. Given that the absence of such services would make it very difficult for Mr Barry to remain in his home, one may argue that the cessation of 'community care' has constructively violated Article 8(1) ECHR, which provides:

> 'Everyone has the right to respect for his *private* and *family life*, his *home* and his correspondence (Emphasis added).'

Clarification in respect of Article 8 and its potential application to the rights and freedoms of disabled people has been provided by a recent decision of the Court of Human Rights. In *Botta v. Italy*,[17] a disabled applicant sought to compel the Italian Government to ensure the realisation of a national law that would consequently require the removal of the barriers preventing the applicant from gaining access to a private beach. While the applicant in *Botta* was unsuccessful, there are three main elements that can be extracted from this decision which are relevant to future applications under Article 8 ECHR.

In terms of the first element, the Court reiterated that the meaning of the words '*private.. life*' in Article 8 (1) should encompass, *inter alia*, an individual's 'physical and psychological integrity'. In the context of *ex parte* Barry, therefore, this interpretation would arguably include the ability of an individual to be as 'independent' as possible. Such independence would encourage integration into community and family life and, as a consequence, play a critical part in an individuals 'physical and psychological integrity'. The need for independence and its potential impact upon an individual's 'integrity', and therefore '*private.. life*', is readily apparent from the issues arising in *ex parte* Barry.

Secondly, the Court confirmed that, while primarily intended to protect the individual against arbitrary interference by public authorities, Article 8(1) may also impose '*positive obligations inherent in effective respect for private or family life*'.[18] In the context of *ex parte*

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16 *R v. Gloucestershire County Council,* ex parte *Barry* [1997] 2 ALL ER 1; [1997] 2 WLR 459 (HL).

17 Judgement of 24 February 1998 (153/1996/772/973).

18 Moreover, the Court confirmed that such obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations between individuals. See also in this respect, *X and Y v. the Netherlands*, 26 March 1985, Series A no. 91, p. 11, para 23. The latter concerned the rape of a mentally handicapped person and accordingly related to her physical and psychological integrity. The offence had occurred

Barry, one may assume that because the applicant had satisfied the eligibility criteria for disability support services, the obligation at issue would be the continued provision of those services; a State obligation, therefore, that is positive in nature.

Thirdly, in striking a fair balance between the general interest and the interests of the individual, the Court stated that such obligations would only exist where a *direct* and *immediate* link is established between the measures sought, and the applicant's private and/or family life. On the facts of *Botta*, however, it was held that the actual right sought by the applicant:

> '…concerned *interpersonal relations of such broad and indeterminate scope* that there could be no conceivable *direct [and immediate] link* between the measures which the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life[19] (Emphasis added).'

The *direct* and *immediate* link requirement would, therefore, appear to limit the application of Article 8 (1) both in terms of the 'sphere of human relations' at issue and the extent to which the act or omission in question 'directly affects' the private/family life of the applicant. It is submitted however that, in the context of *Botta*, an overly narrow interpretation was placed upon this requirement. Such an interpretation is particularly difficult to accept in light of the definition of disability provided by the Council of Europe itself in paragraph 3 of Recommendation 1185. This definition clearly acknowledges the link between obstacles, such as those in *Botta*, preventing people with disabilities becoming:

> '...integrated and taking part in family life and the community on the same footing as everyone else[,]...'

and therefore creating the disability itself, and society's duty to remove those obstacles by

> '...[adapting] its standards to the specific needs of disabled people in order to ensure that they can lead independent lives.' [20]

Moreover, it is arguable that had the applicant in *Botta* been denied access to the beach on the basis of gender or race - grounds classified as 'internationally suspect' - it is unlikely that the Court of

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while the applicant was being cared for in the private sector.

19 Op cit., para 35. *X and Y*, ibid, provides a contrast to the reasoning in *Botta*. It was held in *X and Y* that the government of Netherlands, due to the shortcomings of the Dutch Criminal Code, had not afforded the applicant with practical and effective protection against the offence in question (p. 14, para 30) and, as a result, a direct and immediate link had been established between the measure sought by the applicant and her private and/or family life.

20 A requirement that is also reflected in Recommendation No. R (92)6 on *a coherent policy for people with disabilities* (discussed above). Moreover Recommendation No. R (92)6 clearly provides that a failure by society to adapt its standards in this respect, would constitute a 'violation of human dignity'.

Human Rights would have placed such a restrictive interpretation upon this requirement. This would suggest, therefore, that either people with disabilities have been accorded a second class right to equality under the Convention, or the Court was simply not aware of the social nature of disability.[21]

Be that as it may, irrespective of the interpretation placed upon the direct and immediate link requirement, we suggest that the facts of *ex parte* Barry clearly satisfy such a link; i.e. between the measures sought by Mr Barry (the continuation of care and home help) and the right to respect for his private/family life and his home (the option of independent living).[22]

A further argument on the facts of *ex parte* Barry could be based upon Article 1 of the First Protocol to the ECHR which states that:

> 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions...'

This article has been interpreted to include within its meaning the provision of a 'welfare benefit' as a 'pecuniary right' once the eligibility criteria for such benefits (which must also be in accordance with the ECHR) have been satisfied.[23] In the context of *ex parte* Barry, it is arguable that as Mr Barry had previously satisfied the eligibility criteria for disability support services under s2 CSDPA he should, as a result, be entitled to the provision of such services as a 'pecuniary right', i.e. a right within the protective remit of Article 1 of the First Protocol.

One should note, however, that in defending an action under the ECHR or its Protocols a State may have recourse to its margin of appreciation; a concept that is capable of placing a qualification upon the rights contained therein. On the facts of *ex parte* Barry, therefore, a government could attempt to justify the decision as being in the interests of:

'the economic well-being of the country (Article 8(2))

and/or

in accordance with [*inter alia*] the general interest... (Article 1(2) First Protocol)...'

As the decision to discontinue the provision of disability support services in *ex parte* Barry was essentially based on economic reasoning made in a climate of limited resources and arguably, therefore, in accordance with both the 'economic well-being of the country' and the 'general interest' of the nation, the above qualifications may preclude a favourable outcome for Mr Barry under the Convention. Be that as it may, the margin of appreciation attributed to a State must always be tempered by 'the circumstances, the subject matter [of the

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21 For a distinction between the 'social' and 'medical' model of disability, see *infra* at f.n. 28.

22 Note that in addition to *X and Y*, op cit., a direct and immediate link has been found to exist in *Airey v. Ireland*, 9 October 1979, Series A no. 32; *Lopez Ostra v. Spain* (mutatis mutandis, 9 December 1994, Series A no. 303-C) and *Guerra and Others v. Italy*, 19 February 1998 (mutatis mutandis, Reports of Judgements & Decisions 1998). Common to each of these cases, is the intimacy between the act/omission in question and the private or family life of the applicant; an intimacy that arguably existed in *Botta*.

23 See *Gaygusuz v. Austria*, 16 September 1996 (39/1995/545/631).

right in question] and its background'.[24] In respect of *ex parte* Barry therefore, it is interesting to note the priority given to disability support services by the Committee of Ministers of the Council of Europe in Recommendation No. R (92) 6 *on a coherent policy for people with disabilities*. This recommendation states at paragraph 4 under the heading 'General Policy':

> '...it is important to ensure that sufficient financial resources are available in order to overcome the disadvantages affecting people with disabilities.'

Moreover, at paragraph 1.3 under the heading 'Social, Economic and Legal Protection', the Recommendation continues:

> 'Socio-economic protection must be ensured by financial benefits and social services. This protection must be based on a precise assessment of the needs and situation of people with disabilities.'

In light of the importance attached by this Recommendation to the provision of disability benefits and services,[25] and the argument that disability support services - such as that in dispute in *ex parte* Barry - can and should be provided as of right,[26] a strong counter-argument could be made against a defence based upon the above qualifications to the rights in the Convention. Moreover it should also be noted that, as a concept, the State's 'margin of appreciation' is likely to be given a strict interpretation in the context of those grounds of discrimination that have been accorded the classification as being 'internationally suspect', a classification that should arguably include disability (see Part I).

As to the right of non-discrimination in Article 14 ECHR and its possible application to the facts of *ex parte* Barry, difficulty exists in attempting to use this provision in conjunction with the above Articles as it requires inequality of treatment to be established between individuals or groups of individuals placed in comparable situations.[27] Given that the 'services' listed under s2 of the CSDPA are only available to disabled people, the identification of any 'less favourable treatment' in comparison with a non-disabled person is clearly problematic.

Article 14 may, however, prohibit discrimination existing between the various subsets

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24 See *Inze v. Austria* 28 October 1987, Volume 126, Series A, at para 41. Note also that consideration of the individual interest at issue or the 'nature of the activities involved' will affect the scope of the margin of appreciation, see in this respect, *Dudgeon v. The U.K*, 22 October 1981, Volume 45, Series A, European Court of Human Rights, at para 52.

25 Further support in this respect can be found in the preamble to Rule 4 of the UN Standard Rules on the Equalisation of Opportunities for People with Disabilities (see Part I) which provides: 'States should ensure the *development and supply of support services* including assistive devices for persons with disabilities, *to assist them to increase their level of independence in their daily living and to exercise their rights* (Emphasis added).'

26 See in this respect, R Whittle, 'The Question of Resources and the Application of Disability Rights', 6 *Health Care Analysis*, 1998, 3, 227.

27 See , *Sunday Times v. UK* Series A, Vol. 30.

of disabilities and the weight accorded to them in the provision of disability benefits and support services. Nonetheless, as mentioned above, the case law under the ECHR indicates that the non-discrimination provision found in Article 14 of the Convention will only prohibit distinctions that are not based upon 'reasonable' and 'objective' criteria (the 'justification defence'). Consequently, while the assessment criteria for the provision of such benefits and services are based upon the 'medical model' of disability[28] and arguably, therefore, grounded upon an 'essentialist' ideology that devalues the lives of people with disabilities,[29] it is unlikely that the Court of Human Rights would find it in breach of the Convention given the present format of Article 14.[30]

Beyond the facts presented in *ex parte* Barry and the articles discussed above, it is clear that while each of the remaining articles under the Convention and its Protocols relate to both able-bodied and disabled people,[31] the following provisions are likely to have particular relevance to people with disabilities:

> 'No one shall be subject to...*degrading treatment*... (Article 3 -Emphasis added).'

It has been held that discrimination based on race may itself amount to 'degrading treatment'.[32] Potentially, therefore this application of Article 3 may also extend to include disability based discrimination.

'Everyone has the right to *liberty* and *security* of the person (Article 5 - Emphasis

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28 The 'medical' model of disability focuses on the physical or sensory impairments of the individual and the definition of disability is largely based on that contained in the WHO, International Classification of Impairments, Disabilities and Handicaps, Geneva: WHO, 1980. In contrast, the 'social' model views the existence of disability as stemming from significant barriers in the social and built environment; see M Oliver, (ed.) '*Social Work: Disabled People and Disabling Environments, Jessica Kingsley*', London, 1991. One should note, however, that the classification provided by the WHO is currently under revision and early drafts demonstrate a clear recognition of the 'social model' of disability.

29 See in this respect, J Branson and D Miller, 'Beyond Integration Policy - The Deconstruction of Disability. In L Barton (ed.) 'Integration: Myth or Reality'?, Falmer, London, 1989.

30 This point needs to be tackled at both a social and political level. Reliance should not be placed, at least within the United Kingdom and New Zealand, upon existing domestic legal structures to address this issue in a satisfactory way. See in this respect, R Whittle, 'The Question of Resources and the Application of Disability Rights', *supra*.

31 See, for example *X and Y v. the Netherlands*, discussed *op cit*, and *Obermeier* case, 28 June 1990 (6/1989/166/222). In the latter, it was held that the Disabled Persons Board and Provincial Governor of Austria did not constitute independent tribunals for the purposes of Article 6(1). The lack of an effective review of these bodies, therefore, constituted a violation of the right of access to a court under Article 6(1).

32 *East African Asians v. UK* (1994) 78-A D & R 5, at para 207.

added)'[33]

'Men and women of marriageable age have the right to *marry* and to *found a family*, according to the national laws governing the exercise of this right (Article 12 - Emphasis added).'

'No person shall be denied the *right to education* (Article 2, First Protocol - Emphasis added)'

'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of *free-movement* and *freedom to choose his residence* (Article 2(1), Fourth Protocol - Emphasis added).'

Once incorporated into domestic law, either by national statute (in a dualist legal system) or by virtue of ratification by the State (in a monist legal system), the ECHR will provide *self-executing* rights to individuals within the territory of a State Party. Disabled individuals within those Contracting States will therefore be able to enforce their rights under the ECHR before national courts and tribunals and, in this respect, may refer to relevant national decisions interpreting the Convention, the judgements by the Court of Human Rights, and relevant Convention sources such as the Recommendations and Resolutions discussed earlier in this paper.

2.1.2. The European Social Charters [34]

Although *binding* upon State signatories, the European Social Charter 1961 (ESC 1961) does not provide a facility for individual complaints. The incorporation of a mere supervisory mechanism (discussed in Part I) while valuable, will not, on its own, render the treaty *accessible* to the individual. Moreover, given that all but one of the rights enshrined within the ESC 1961 are 'non-justiciable' in nature, it is clear that they will not produce *self-executing* rights, i.e. rights enforceable before national courts.[35] It should be noted, however, that disability Non Governmental Organisations (NGOs) in Contracting States that have signed the 1995 Additional Protocol to the ESC 1961 (providing for a system of collective complaints) are now able to submit complaints regarding breaches under the ESC 1961 directly to the Committee of Independent Experts (the body presiding over the Charter).[36]

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33 The application of the rights protected under the ECHR, in particular Article 5, to people with mental illness is examined in O Thorold, 'The Implications of the European Convention on Human Rights for the United Kingdom Mental Health Legislation', 6 *European Human Rights Law Review* 1996, 619.

34 For a brief discussion on the actual and potential impact of both the European Social Charter 1961 and the European Social Charter 1996 (Revised), see A Heringa, 'Editorial', 4 *Maastricht Journal of European and Comparative Law*, 1997, 2, 107.

35 Arguably the right to strike under Article 6(4) of the ESC 1961 has *self-executing* effect.

36 For an examination of the additional protocol to the ESC 1961, see R Brillat, 'A New Protocol

While the Revised European Social Charter 1996 (ESC(R) 1996)[37] incorporates new and more progressive provisions, many of which can be analysed both in terms of 'civil and political' and 'social and economic' rights, it does not provide a facility for individual complaints and will not, therefore, be any more *accessible* than the ESC 1961. Consequently, the Social Charters will place little more than a political or moral obligation upon governments of Contracting States that operate a dualist legal system and have not, at present, enacted a national statute to incorporate either the ESC 1961 or the ESC(R) 1996. In this context, therefore, similarities may be drawn with the *non-binding* instruments examined in Part I. Although it should be noted that certain provisions of the ESC(R) 1996 are arguably capable of providing *self-executing* rights to nationals within those Contracting States operating a monist legal system; rights that may therefore be pleaded directly before national courts or tribunals.[38]

Encouragement as to the potential future role of the Social Charters in the sphere of human rights may be gained from various sources that together indicate an increase in both the profile and possible application of the rights protected within these Charters. Thus, within the remit of the Council of Europe, the Court of Human Rights has referred to the ESC 1961 - during its deliberations - in developing the indivisible link between the 'civil and political rights' protected by the ECHR and the 'social and economic rights' protected by the ESC 1961 (rights recently been expanded in the ESC(R) 1996).[39] In relation to the European Community, the increasing importance of the ESC 1961 and the growing awareness of a need for a 'social Europe'[40] is both re-enforced in the new fourth paragraph of the Preamble to the Maastricht Treaty, and manifest in the introduction of a new Chapter IV on Social Policy in Section II of the Amsterdam Treaty. Together, therefore, with the justiciable nature of many of the new provisions within the ESC(R) 1996 and the global recognition of the indivisible, interdependent, and interrelated nature of both 'social and economic' and 'civil and political'

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to the European Social Charter Providing for Collective Complaints', 1 *European Human Rights Law Review*, 1996, 52. At present, the United Kingdom has neither signed nor ratified it.

37 The ESC(R) 1996 entered into force on the 1st July 1999. It required at least three ratifications before it could take effect. To date it has received four ratifications (France, Romania, Slovenia, and Sweden) and nineteen signatures (including the United Kingdom). These State signatories are now Contracting States to the ESC(R) 1996.

38 See, for example, the non-discrimination provision in Article E (discussed below).

39 See for example, *Lopez-Ostra*, judgement of 9 December 1994, Series A, vol. 303-C and *Sigurdur A. Sigurjonsson*, judgement of 30 June 1993, Series A, vol. 264. It should be noted that these references were made despite the inability of a complainant to invoke the provisions of the ESC 1961 in application proceedings under the ECHR. For an interesting discussion concerning the protection of social and economic rights through treaties on civil and political rights, see M Scheinin, 'Economic and Social Rights as Legal Rights' in A Eide, C Krause and A Rosas (ed.) '*Economic, Social and Cultural Rights: A Textbook*', Martinus Nijhoff, Dordrecht, 1994, 44-62.

40 See in this respect, B Bercusson et al, 'A Manifesto for Social Europe', 3 *European Law Journal*, 1997, 2, 189.

rights,[41] these sources indicate that the Social Charters are likely to play a valuable role in protecting the rights and interests of disadvantaged social groups - such as disabled people - in future years.

One apparent limitation of the European Social Charters, however, is the failure of the non-discrimination provisions in both the ESC 1961 and the ESC(R) 1996 to expressly include disability within their protective remit.[42] Thus, the preamble to the ESC 1961 provides:

> 'the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin.'

Moreover, despite being more extensive, the expatiation of the grounds of discrimination contained in Article E of the ESC(R) 1996 also fails to specifically include disability within its coverage, thus:

> 'The enjoyment of the rights *set forth in this Charter* shall be secured without discrimination *on any ground such as* race, colour, sex, language, religion, political or other opinion, national extraction or social origin, *health*, association with a national minority, birth *or other status*. (Emphasis added).'

It is likely, however, that this limitation - like that of the non-discrimination provisions in the other treaties identified above and in Part I - is more apparent than real. Given that Article E of the ESC(R) 1996 is largely a codification of the understanding that the Committee of Independent Experts has placed upon the non-discrimination principle in the preamble to the ESC 1961, the following points can be made in respect of both Social Charters and their operation.

The first point is that neither of the non-discrimination provisions in the Social Charters can be described as autonomous due to the inclusion of the words 'set forth in this Charter' in Article E of the ESC(R) 1996. Equal, therefore, to the position under Article 14 of the ECHR and Article 2 (2) of the ICESCR, the non-discrimination provisions in the Social Charters will only prohibit discrimination in respect of one or more of the other rights protected within their respective remit of application.

The second point concerns the Annex under Article E of the ESC(R) 1996 which provides:

> 'A differential treatment based on an objective and reasonable justification shall not be deemed discriminatory.'

Coupled with the words 'on any grounds such as' within Article E of the ESC(R) 1996, its Annex would therefore suggest that the non-discrimination provisions within the Social

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41 See, The Vienna Declaration and Programme of Action 1993.

42 A similar limitation has previously been identified in respect of Article 26 of the ICCPR and Article 2 (2) of the ICESCR (examined in Part I) and Article 14 ECHR (see above).

Charters prohibit any distinction on any ground unless 'an objective and reasonable justification' can be made by the State concerned. Equal to the interpretation placed upon Article 26 ICCPR and Article 14 ECHR, the non-discrimination provisions in the Social Charters would therefore appear to be 'open-ended' and, as a consequence, prohibit disability-based discrimination unless an objective and reasonable justification can be established by the defendant State. This 'justification defence' would arguably allow for the introduction of 'affirmative action measures' for groups - such as disabled people - that have historically suffered from *de facto* forms of discrimination.[43]

It should be noted however that, *prima facie*, the non-discrimination provisions within the Social Charters do not place a positive obligation on Contracting States to introduce legislation to ensure that the rights protected by the Social Charters are not violated. This is in contrast, therefore, to the relevant provisions under both the ICCPR and the ICESCR (discussed in Part I) and the interpretation that may be placed upon Article 14 ECHR by the Court of Human Rights (see above).

The third point is that - like Article 14 ECHR and Article 26 of the ICCPR - it is unclear, at present, whether the right to non-discrimination within the Social Charters will prohibit 'indirect' forms of discrimination and whether or not this right would encompass the concept of 'reasonable accommodation'. A similar statement, therefore, to that made by the Committee on Economic, Social and Cultural Rights under the ICESCR (see Part I) would provide much needed clarification in this respect.

While the absence of an express inclusion of disability in the non-discrimination provisions under the ICCPR, the ICESCR (see Part I), the ECHR and the ESC 1961, arguably reflects the age of these documents, difficulty exists in extending this justification to the ESC(R) 1996. In the event that the Committee of Independent Experts adopt a different approach to that of both the Human Rights Committee under the ICCPR and the Court of Human Rights under the ECHR - in not interpreting the non-discrimination provisions under the Social Charters as being 'open-ended' - reliance would have to be placed upon the non-exhaustive nature of the words 'or other status' in Article E of the ESC(R) 1996'. These words would therefore leave open the possible inclusion of 'disability' within the protective remit of the non-discrimination provisions of both Social Charters. Further encouragement in this respect may be gained from the commitments contained within the *non-binding* instruments pertaining to disability that have emanated from the Council of Europe (see above).

Alternatively, one should note that the specific reference to the word 'health' in the ESC(R) 1996 can clearly have relevance to people with disabilities[44] albeit limited, *prima facie*, in its application to matters relating to the 'medical' model of disability. Moreover, a more purposive interpretation of the term 'health' might evolve through decisions by the Committee of Independent Experts in light of the definition of disability contained within

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43 It should be noted that affirmative action measures may also be allowed under the ICESCR's non-discrimination provision (Article 2(2)) when read in light of the General Comment on disability issued by the Committee on Economic, Social and Cultural Rights (see Part I).

44 It is the opinion of Wolfgang Peukert (Head of Case-Law and Research Unit, European Commission of Human Rights, Council of Europe, Strasbourg) 'that disability could undoubtedly be subsumed under [the terms] health or other status' (letter to author, 03.02.98).

paragraph 3 of Recommendation 1185 (1992); a definition that is reflective of the 'social' model of disability. Such an interpretation has already been provided elsewhere in the context of the term 'health' under Article 12 ICESCR[45] and the new Article 137 of the European Community treaties.[46] This interpretation extends beyond matters relating to its medical component and could equally apply to Article E of the ESC (R) 1996. However, if the non-discrimination provisions within the Social Charters are not considered to be 'open-ended' it is likely that, until such clarification exists in relation to the term 'health', the phrase 'or other status' will provide a more appropriate provision for disabled citizens of State signatories to the Social Charters.

While the remaining provisions under both the ESC 1961 and the ESC (R) 1996 cover both able-bodied and disabled people within their specific remit of application,[47] the following articles are of particular relevance to the rights and freedoms of people with disabilities:

ESC 1961 [48]

The right to vocational guidance (Article 9)
The right to vocational training (Article 10)
The right to social and medical assistance (Article 13)
The right to benefit from social welfare services (Article 14)
The right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement (Article 15)
The right of the family to social, legal and economic protection (Article 16)

ESC(R) 1996

Disabled persons have the right to independence, social integration and participation in the life of the Community (Article 15 - *amended*)[49]

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45 See, R Whittle, 'The Question of Resources and the Application of Disability Rights', *supra* f.n. 26 at 228.

46 See, R Whittle, 'Disability Discrimination and the Amsterdam Treaty', 23 *European Law Review*, 1998, 1, 50, at p. 55 (published prior to the re-numbering of the Treaty articles). Moreover it is arguable that, in light of the Amsterdam Treaty, the European Commission can now adopt a more progressive approach to Community legislation concerning 'health' matters. Such an approach may be justified through reliance on other terms in the Treaty such as 'quality of life' (Article 2) and 'social exclusion' (Articles 136 and 137); terms that would certainly encompass issues relating to disability benefits and support services (for example) when used in conjunction with the term 'health'.

47 With the exception of Article 15 under both Social Charters which specifically limits its application to people with disabilities.

48 It should be noted that each of the following provisions of the ESC 1961 have been accepted by the government of the United Kingdom.

49 Fully in line with the equality of opportunity approach to disability rights, Article 15 is clearly the most

All workers have the right to dignity at work (Article 26 - *new*)
Everyone has the right to protection against poverty and social exclusion (Article 30 - *new*)
Everyone has the right to housing (Article 31 - *new*)

2.2. Instruments emanating from the European Union

To date there are fifteen countries that have signed the European Community Treaty[50] and together constitute the membership of the European Union. By attributing their sovereign rights in certain fields of policy to the Community Institutions, each Member State has acknowledged and validated the existence of a *binding* and autonomous legal system that transcends State boundaries and is unique at an international level. In contrast to the other systems of international law discussed above and in Part I, European Community law possesses a comprehensive and pervasive monitoring and enforcement mechanism that is both *accessible* to the individual, and supported by effective powers of sanction. In this regard, the European Union is therefore superior to the other international organisations identified throughout Part I and II of this article.

At the highest level, this monitoring and enforcement mechanism enables the acts and/or omissions of a Community Institution to be reviewed directly before the European Court of Justice. This process of judicial review may be initiated either at the suit of individuals, groups of individuals, Member States, or other Community Institutions (Articles 230 and 232). In light of the recent amending Treaty of Amsterdam, this ability to review the acts of the Community Institutions has particular relevance to people with disabilities. In this respect (as suggested elsewhere) disabled nationals of a Member State may in the future be able to challenge those Community measures (based upon Article 95 of the Treaty) that have implications for, but fail to adequately consider, the needs of disabled people within their design.[51]

At another level, a facility exists whereby both the European Commission and the Member States may eventually take a State Party that is failing to meet its obligations under Community law before the Court of Justice (Articles 226 and 227 respectively). The Court of Justice may then direct the Contracting State to comply with its obligations and may impose a large cumulative fine as a penalty for its failure to do so (Article 228).

The need to initiate the above monitoring and enforcement mechanisms will typically arise when the Community Institutions act within their delegated fields of competence and thereby create or extend existing obligations upon either themselves, Member States, or

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significant provision within the ESC(R) 1996 from a disability perspective. It should be noted, however, that, like a number of other articles within the Social Charters, Contracting States have the option as to whether or not they wish to be bound by the obligations that Article 15 would impose upon them.

50 Treaty of Rome 1957 as amended by the Single European Act 1986, the Treaty on European Union 1992, and the Amsterdam Treaty 1997. The Amsterdam Treaty came into force on the 1st of May 1999. Please note that the treaty articles referred to in this section of the paper are based upon the new numbering system introduced by the Treaty of Amsterdam.

51 See, R Whittle, 'Disability Discrimination and the Amsterdam Treaty', *supra*. In light of the ever increasing profile of human rights within the Community, it would now seem appropriate for the Court of Justice to interpret the case law requirements for an individual to have sufficient legal standing to challenge the Community Institutions by judicial review in a less restrictive manner.

natural or legal persons. Such action by the Community Institutions can provide a supreme source of law capable of furnishing 'justiciable' rights to individuals before their national courts.

However, the ability to enforce Community law against a natural or legal person (as opposed to a State) directly before national courts is restricted to those measures complying with the requirements to be *self-executing* (see Part I). Moreover EC Directives (one form of binding measure) that meet with those requirements can only be enforced, due to their particular nature, against the State or emanations thereof. Nevertheless, both Directives and other forms of Community law that cannot 'directly' be enforced before national courts against either private parties and/or the State, may still provide the individual with enforceable rights through an indirect channel. Under the *Von Colson principle*, national courts are obliged to construe national law in line with Community law as far as possible without an undue straining of the words in a domestic statute.[52] Reliance would therefore be placed upon the new interpretation of the national statute and, consequently, Community law would be enforced through the 'backdoor'.[53] In the context of disability discrimination (for example) national statutes such as the United Kingdom's Disability Discrimination Act 1995, the Irish Employment Equality Act 1998 and Equal Status Bill (revised), and the relevant draft legislation in Sweden and the Netherlands,[54] have a clear potential application in this regard.

In practice, the majority of complaints regarding alleged breaches of Community law are today adequately dealt with by national courts. Moreover, in the event that national courts are unclear as to the principles or scope of Community law, the preliminary reference procedure under Article 234 allows guidance and clarification in this respect to be sought from Court of Justice. This facility therefore provides the individual with an indirect access to the Court of Justice when other direct avenues (such as Articles 230 and 232, above) are not available.

This *accessibility*, therefore, of the monitoring and enforcement mechanism (a mechanism ultimately enforceable through the Court of Justice) contributes to a legal structure that has greater potential than the other forms of transnational law discussed thus far to impose changes in the laws of recalcitrant States and to bring about an improvement in the rights and freedoms of disabled citizens within the European Union.[55]

However, while substantial, this potential is limited at present because the general right to equality under Community law has not yet been extended to include a prohibition of discrimination *based on disability*. Although the Court of Justice has developed human

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52 Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR. 1891.

53 One should note that a natural or legal person may also claim damages from the State for its failure either to implement a Community measure, or to implement it correctly; see in this respect Cases C-6 and 9/90 *Francovich and Bonifaci v. Italy* [1991] ECR. I-5357.

54 See in this respect, Sweden's proposed Bill against discrimination in working life on grounds of disability, and the proposed Bill in the Netherlands on the prohibition of making an unjustifiable distinction on the grounds of handicap or chronic disease.

55 A potential that is particularly important in light of the future enlargement of the Union.

rights protection within its jurisprudence on the 'general principles' of Community law, such protection has not yet encompassed the right to equality of opportunity for this population group. Nonetheless, despite this current limitation, the prohibition of discrimination under the existing general right to equality includes both 'direct' and 'indirect' forms of discrimination [56] and would also allow 'affirmative action measures' under certain circumstances.[57] A suitable foundation therefore exists within the jurisprudence of the Court of Justice to enable an aggressive judicial policy aimed at combating discrimination based on disability.

First, however, such a policy must be within the scope of the Community treaties and it is in this context that the amending Treaty of Amsterdam is most significant. The ability of the Community Institutions to introduce secondary or delegated legislation on the basis of the primary Treaty provisions is another important distinction between Community law and the international instruments and organisations discussed above and in Part I. In effect, the adoption of secondary legislation or the development of the general principle of equality in the context of non-discrimination for people with disabilities would impose a legal regime in this area of human rights that is superior to national law; a regime that must then be reflected within the domestic legal systems of the Member States.

This legislative ability is aptly illustrated by the Article 13 of the Treaty, which provides a clear legislative basis for the introduction of secondary legislation to combat, *inter alia*, disability based discrimination, thus:

> *'Without prejudice to the other provisions of this Treaty* and *within the limits of the powers conferred by it upon the Community*, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, *may take appropriate action to combat discrimination* based on sex, racial or ethnic origin, religion or belief, *disability*, age, or sexual orientation (Emphasis added).'

While the limitations and potential benefits surrounding Article 13 (both legislative and jurisprudential) have been discussed elsewhere,[58] encouragement may be gained from

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56 See Case 170/84 *Bilka-Kaufhaus Gmbh v. Weber von Harz* [1986] ECR 1607. It is suggested that any further developments at a Community level - legislative or jurisprudential - in protecting the right to non-discrimination for people with disabilities should incorporate the test employed in Case C-237/94 *John O'Flynn v. Adjudication Officer* [1996] ECR I-2617 to identify indirect forms of discrimination; a test more appropriate in combating discrimination on grounds such as disability.

57 Case 13/63 *Italy v. Commission* [1963] ECR 31. Although the uncertainty surrounding the further development of affirmative action measures at a Community level in the context of human rights is demonstrated by the recent jurisprudence of the Court of Justice (CF. Case-C409/95 *Hellmut Marshall v. Land Nordrhein-Westfalen* with Case C-450/93 *E. Kalanke v. Freie Hansestadt Bremen* ECR I-3051) and the inclusion of a new fourth paragraph in Article 141 (concerning gender discrimination) by the Amsterdam Treaty. This paragraph merely allows for the introduction of such measures by Member States under limited circumstances.

58 R Whittle, 'Disability Discrimination and the Amsterdam Treaty', *supra*. For a discussion concerning the practical application of Article 13 to people with disabilities in the context of

obiter dicta in a recent decision by the Court of Justice. In *Lisa Jacqueline Grant v. South-West Trains Ltd*,[59] the Court, while holding that the treaty - at the time the case was heard - did not encompass protection against discrimination based on sexual orientation, purposely left open the possibility of a full equality jurisprudence developing after the Amsterdam Treaty had come into effect. Given that the Treaty of Amsterdam has recently come into operation, it is clear that sexual orientation, and therefore disability and the other grounds of discrimination listed within Article 13, are now within the scope of the Treaty.

One should note, however, that if the general principle of equality in the context of human rights is limited to Article 13's remit of application, then, due to that Article's particular wording, the general principle cannot be described as being 'open-ended' in nature. This is in contrast, therefore, to the ICCPR (see Part I), the ECHR, and the Social Charters. Moreover, as the grounds of discrimination listed within Article 13 do not conclude with the words 'or other status' it would also appear that the Community's general principle of equality, in the context of human rights, cannot be described as being non-exhaustive in nature. In contrast, therefore, with the other principle *binding* instruments considered in both Part I and II of this article.[60]

In developing the general principle of equality or formulating a legislative measure to combat disability based discrimination, it would be open to the Court of Justice and the Community Institutions to make reference to the other international instruments that have a bearing on the rights and freedoms of disabled people. Thus, the new Article 6 of the Treaty on European Union (TEU) directs the Court of Justice to refer to both the ECHR and the constitutional traditions of the Member States in determining what may or may not constitute a 'fundamental right'.[61] In addition, both the new fourth paragraph in the Preamble to the Maastricht Treaty and Article 136 encouragingly confirm the Member States' commitment to fundamental social rights as set out in the ESC 1961 and in the Community Charter of the Fundamental Social Rights of Workers 1989 ('The Community Charter').[62]

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the recent legislative commitment by the European Commission in respect of non-discrimination, see, R Whittle, (1999) *Disability Rights and the Amsterdam Treaty: the way forward*. Annual General Assembly of the European Disability Forum, Brussels, E.D.F.

59 Case C-249/96 (1998) at para 47-48.

60 Although it should be noted that certain grounds of discrimination listed within Article 13, such as 'belief' for example, may well be given a purposive interpretation to include matters such as 'political opinion'. The grounds of discrimination listed within Article 13 may, therefore, be more extensive than they would first appear.

61 One should note that an amendment to Article L (now Article 46 of the TEU) by the Amsterdam Treaty expressly provides jurisdiction to the Court of Justice to review compliance of the acts of the institutions with Article 6 in so far as it has jurisdiction under the Community Treaties and the revised Title VI of the Treaty on European Union. Article 46 TEU, as far as the first pillar is concerned, simply codifies the existing case law position recently confirmed in Case C-299/95, *Kremzow v. Austria* [1997] E.C.R. I-2629 The Court's jurisdiction in this respect has particular relevance to a judicial review action based on Articles 230 and 232, discussed in R Whittle, 'Disability Discrimination and the Amsterdam Treaty', *supra*.

62 Note also that both the ECHR and the European Social Charter 1961 are referred to in the preamble to the Single European Act 1986.

In terms of the Community Charter it is worth noting that, although *non-binding* in nature, the majority of Member States have agreed to it and it therefore constitutes a clear declaration by those States in the context of workers rights. Moreover, by establishing certain fundamental principles in the social arena for workers, the Community Charter has empowered the European Commission to take appropriate measures in order to both implement the rights that it enumerates and to prepare annual reports on its application in the Member States. Furthermore, in providing the basis for the Agreement on Social Policy, its main provisions[63] were effectively incorporated into Community law via the Treaty's new social provisions, as amended at Amsterdam.[64] These provisions arguably provide the most promising basis for the introduction of secondary legislation protecting the rights and freedoms of people with disabilities, albeit limited in their application to matters ostensibly relating to the concept of 'worker' or the 'working environment'.[65]

The Community Charter, therefore, is likely to play an important part in the furtherance of social policy and law within the Community and this, in turn, will have a significant bearing on the rights and interests of disabled citizens of the European Union. Of particular relevance in this respect, Article 26 of the Community Charter provides:

> 'Whatever the nature of disablement, disabled persons are entitled *to concrete measures to improve their social and occupational integration, especially vocational training, ergonomics, accessibility, transport and housing* (Emphasis added).'

The Treaty references to the ECHR, the ESC 1961, and the Community Charter, clearly underline the existing case law concerning the Treaty and the application of those international instruments to human rights. One may therefore extrapolate the inferences that we have made in relation to those instruments in the context of disability, and place such inferences within a European Community dimension. However, it remains unclear as to the extent that the Community Institutions can employ the instruments of *global international law* (GIL) - discussed in Part I - in developing Community jurisprudence or legislative action in the field of equality of opportunity.[66] There appears no reason in principle for restricting the Community Institutions, when seeking guidance in this respect, to refer only to those documents emanating from the Council of Europe. At the very least, it is arguable that the phrase 'constitutional traditions of Member States' contained in the new Article 6 of the TEU would also include those elements under GIL that may be considered as 'customary international law'. In this regard, and in terms of disability rights, encouragement can be

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63 See, B Bercusson, 'The European Community's Charter of Fundamental Social Rights of Workers', 53 *Modern Law Review*, 1990, 624.

64 See in this respect, Articles 136-45 of the Treaty.

65 See, R Whittle, 'Disability Discrimination and the Amsterdam Treaty', *supra*.

66 Reference was made to the ICCPR by the Court of Justice in *Lisa Jacqueline Grant v. South-West Trains Ltd,* op cit., at para's 43-47.

gained from the recent *non-binding* instruments emanating from both the European Commission and the Council of the European Union[67] endorsing the application of UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (discussed in Part I of this article).

Conclusions

This two part article has aimed to demonstrate that while there is, at present, no single human rights instrument constituting a *binding*, *accessible*, and *self-executing* measure in the context of disability rights, there does exist a complex, though workable, transnational legal framework through which such an instrument may evolve. A progressive measure in this regard would, we suggest, encompass both civil and political, and social and economic rights that are *self-executing* in nature. Such an instrument would be further enhanced if accompanied by appropriate affirmative action measures.

The process involved in developing such an instrument will require, *inter alia*, a comprehensive understanding and recognition of the existing potential of transnational law in both the protection and further advancement of disability rights. This two part article has sought to contribute to that understanding. In this respect, the concluding remarks made in relation to the relevant instruments of global international law (GIL) in Part I are equally applicable to those of European international Law (EIL) considered here in Part II. We emphasise again, therefore, the importance of national and international NGOs vigorously pursuing the supervisory, and where appropriate, the enforcement mechanisms of such instruments, and we also stress the practical utility of those provisions (within *binding* international measures) that are *self-executing* in nature.

As a system of law, it would appear that European Community law holds greater promise for disabled citizens of Europe than the instruments that have emanated from the Council of Europe to date (see above) and those considered under GIL in Part I. It clearly provides the most appropriate international system for both the promotion and the policing of a comprehensive legislative package in this respect within the European region; a package that has the greatest potential to be translated into national law and policy.[68] The recent amendments to the treaties of the European Community by the Amsterdam Treaty provide a clear and encouraging step in this direction.

In the context of non-discrimination, it is submitted that a focus should be placed

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67 See in this respect the Commission's Communication *on Equality of opportunity for people with disabilities - a new European Community disability strategy* (1996) Com 406 final and Council Resolution *on equality of opportunity for people with disabilities*, 1996, (97/C 12/01), OJ C 12 Vol 40 13 January 1997.

68 The significance of this potential is particularly apparent when one considers that if Community action in the area of disability rights took a progressive stance towards the concept of 'reasonable accommodation' (for example), it would effectively overturn the recent decision by the Irish Supreme Court which prevented the adoption of Ireland's 'Employment Equality' and 'Equal Status' Bills proposed during 1997. See in this respect, *In the matter Article 26 of the Constitution of Ireland and in the Matter of the Employment Equality Bill*, Judgement of the Supreme Court, 1997. Given that both Bills had attracted cross party support favouring their adoption, it is unlikely that the Irish Government would react in a negative manner towards a legislative proposal from the European Commission in this regard.

upon the economic dimension of the Community and the importance that it attaches to regulating the common market. It is this importance that has provided the catalyst for the development of those factors that distinguish European Community law from the other systems of international law considered throughout Part I and II of this article. Given that equality of opportunity and non-discrimination underpin, rather than undermine market rationality, we suggest that it is this dimension that should be harnessed by disability NGOs in Europe. In this respect, it is clear that the existence of discrimination limits both competition and the growth of economic markets and that these markets will, in the absence of regulation, continue to discriminate.[69] Moreover, added 'Community value' in the context of the labour market, tax revenues, welfare costs and consumer activity would also accrue from the implementation of effective measures combating discrimination. European disability NGOs should therefore focus on these benefits when lobbying at both a national and international level for Community intervention to combat disability based discrimination.

That is not to ignore, however, the individual potential of those GIL and EIL instruments that have emanated from organisations external to the European Community. As demonstrated throughout Part I and II of this article, these instruments may conceivably play a significant role in the further advancement of the rights and freedoms of disabled people. We stress, therefore, that any further development at Community level (legislative or jurisprudential) in combating disability discrimination should not proceed without a full appreciation of all relevant GIL and EIL instruments protecting human rights. Clearly the campaigning vitality and intelligent advocacy of international disability organisations and NGO pressure groups will undoubtedly play a vital role in this regard. Disability NGOs have already served to enhance the visibility of international law and to underline its potential as a force to regulate and further develop human rights in this area. One positive outcome of their continued advocacy and lobbying across both GIL and EIL contexts may well be the recognition, in the near future, of disability discrimination being classified as 'internationally suspect'; a classification that would then be in line with the other well recognised grounds of discrimination such as race and gender.

In light of the developing global recognition of the need to combat disability based discrimination in recent years, it is likely that transnational law, and European Community law in particular, will form a key element in pushing forward the positive frontiers of equality in the years to come. The time is now ripe for disability NGOs to exploit that potential.

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69 See in this respect, C Sunstein, 'Why Markets Don't Stop Discrimination', 8 *Soc. Phil. and Pol.*, 1991, 22.