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## WORKING PAPER

# Gender and Disability in EU Law: An Intersectional Approach to Informing Kosovo's Legal Framework

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May 2022

*This publication was produced with the financial support of the European Union. Its contents are the sole responsibility of the authors and do not necessarily reflect the views of the European Union.*



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## I. Introduction

European Union (EU) Law on the topic of disability is in full evolution. However, an inclusive and intersectional approach to gender and disability is still missing. The population in the EU is aging,<sup>1</sup> and disability is a reality for more than 100 million citizens in the EU,<sup>2</sup> affecting them in their everyday lives. Around 800 million people with disabilities worldwide are of working age,<sup>3</sup> and many of them face significant obstacles to equal opportunities in the world of work, ranging from attitudinal and physical to informational barriers. Consequently, the right of people with disabilities to work and employment is frequently denied. Persons with disabilities, particularly women with disabilities, experience higher rates of unemployment, economic inactivity, and a lack of social protection in comparison to their peers with no disabilities.<sup>4</sup>

**An intersectional approach to gender and disability, is still missing.**

Additionally, during the pandemic, women with disabilities have had greater exposure and risk of violence.<sup>5</sup> According to UN Women,<sup>6</sup> women with disabilities have faced several additional challenges during COVID-19: “They confront challenges including lack of legal capacity, access to sexual and reproductive health services. In addition, there is limited data available on the impact of COVID-19 on women with disabilities.” Moreover, children with disabilities have faced added challenges in accessing education amid COVID-19 restrictions on movement, transport interruptions, and school closures; this has affected their mothers disproportionately, as women have tended to serve as primary caregivers, given traditional gender roles. As a result, women reportedly have had to quit their jobs or, in some instances, have been fired because they had to prioritise caring for their children with disabilities during the pandemic.<sup>7</sup>

Considering the aforementioned issues, the EU has drifted from soft law instruments and charters to stronger legal obligations in the form of two Directives and the control of the European Court of Justice. Nevertheless, and as mentioned above, a comprehensive Directive covering all aspects of social life such as housing, health, and education, and inclusive of an intersectional approach to gender and disability, is still missing.

This paper provides a chronological overview of existing legal and political instruments, their strengths and weaknesses. It seeks to inform civil society advocacy for claiming more political measures and positive actions regarding inclusion and anti-discrimination, particularly for women with disabilities.

## II. Intersectionality

According to the Oxford English dictionary, intersectionality is “the interconnected nature of social categorizations such as race, class, and gender, regarded as creating overlapping and interdependent systems of discrimination or disadvantage.” “Intersectional discrimination” describes a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and produce specific types of discrimination.

First coined by Professor Kimberlé Crenshaw back in 1989, intersectionality was added to the Oxford Dictionary in 2015 with its importance increasingly being recognised in the world of women’s

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<sup>1</sup> [Ageing Europe - looking at the lives of older people in the EU - Eurostat 2019 report | AGE Platform \(age-platform.eu\)](#)

<sup>2</sup> [How many persons with disabilities live in the EU? – European Disability Forum \(edf-feph.org\)](#)

<sup>3</sup> [Return-to-work, disabilities and occupational health in the age of COVID-19 - PubMed \(nih.gov\)](#)

<sup>4</sup> [Disability and work \(ilo.org\)](#)

<sup>5</sup> [Policy-brief-Women-with-disabilities-in-a-pandemic-COVID-19-en.pdf \(unwomen.org\)](#)

<sup>6</sup> [Ibid.](#)

<sup>7</sup> KWN interviews, 2020-2021.

rights. Without an intersectional lens, efforts to tackle inequalities and injustice towards women are likely to end up perpetuating systems of inequalities. Feminist writer Zoe Samudzi explains that “intersectionality is such a vital framework for understanding systems of power, because ‘woman’ is not a catchall category that alone defines all our relationships to power”. A black woman may experience misogyny and racism, but she will experience misogyny differently from a white woman and racism differently from a black man. The work towards women’s rights must be

**Any feminism that purely represents the experiences of white, middle class, able-bodied, heterosexual, etc. women will fail to achieve equality for all.**

intersectional; any feminism that purely represents the experiences of white, middle class, able-bodied, heterosexual, etc. women will fail to achieve equality for all.

In recent years, the intersectionality of disability and gender has been discussed first by researchers and practitioners, and then by courts. Nevertheless, it is not yet included as such in the EU legal framework.

## Legal Framework

Under EU law, the only mention of multiple discrimination at present can be found in recitals to the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC) stating merely that “women are often the victims of multiple discrimination”.

Thus, under EU law, while discrimination may indeed be based on several protected grounds, the Court of Justice of the EU (CJEU) considered that there could be no new category of discrimination consisting of the combination of more than one of those grounds. This means that intersectionality is not (yet) part of the legal framework of the EU. The European Parliament and the Council request that the European Commission and Member States seek to “address intersectionality of gender with other forms of discrimination” in the EU Gender Action Plan (GAP) III,<sup>8</sup> though this is only a Staff Working Document for the European Commission and thus not legally binding to Member States or countries interested in joining the EU. Nevertheless, it encourages attention to intersectionality, particularly in the external actions of the EU, including in political dialogue and financial support.

Moreover, in international law, intersectionality is officially recognised by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>9</sup> Committee as a pertinent concept for understanding the scope of State Parties’ obligation to eliminate discrimination. The Committee stated that: “States parties must legally recognise and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned.”<sup>10</sup>

## III. “Soft Law” Instruments

Unlike “hard” law, soft law is not legally binding. The term soft law is used to denote agreements, principles and declarations that are not legally binding. They are often found in the international sphere. This section outlines the relevant soft law instruments related to persons with disabilities.

### III. I. European Conventions

Three conventions shall be discussed: European Social Charter, Community Charter of the Fundamental Social Rights of Workers, and the Charter of Fundamental Rights of the European Union.

<sup>8</sup> [Gender Action Plan III](#) – a priority of EU external action (europa.eu), (last checked on 19.01.2022).

<sup>9</sup> [CEDAW](#), New York, 18 December 1979 (last checked on 19.01.2022).

<sup>10</sup> UN, CEDAW (2010), General Recommendation 28 on the Core Obligations of States Parties under Art. 2, CEDAW/C/GC/28, 16 December 2010.

## A. The European Social Charter of 1961, produced by the Council of Europe

The 1961 European Social Charter was very much understood to be a classic inter-state Treaty, which had implications for States from the point of view of imposing obligations under public international law, but not necessarily creating rights for individuals within those States. There was no procedure for individuals to make complaints of breach of its provisions by a Member State. A protocol was added to the Social Charter in 1995 allowing for the possibility of collective complaints being made by international and national organisations of employers and of trade unions to the Social Charter's Committee of Independent Experts. In May 1996 the Council of Europe produced a revised European Social Charter (ESC), updating and altering some of the substantive provisions of the original 1961 Social Charter.

Article 1 (2) of the ESC requires that national legislation prohibits any discrimination in employment, inter alia on grounds of sex, race, ethnic origin, religion, **disability**, age, sexual orientation and political opinion, including on grounds of conscientious objection or non-objection. Discrimination is prohibited regarding recruitment or employment conditions in general (in particular, remuneration, training, promotion, transfer, and dismissal or other detrimental action). There must be adequate legal safeguards against discrimination regarding part-time work. In particular, there must be rules to prevent non-declared work through overtime, and equal pay, in all its aspects, between part-time and full-time employees.

## B. The Community Charter of the Fundamental Social Rights of Workers.

The Community Charter of the Fundamental Social Rights of Workers, adopted on 9 December 1989 by a declaration of all Member States, with the exception of the United Kingdom (UK), established the major principles on which the **European labour law model** is based and shaped the development of the European social model in the following decade. The fundamental social rights declared in the Community Charter are further developed in the Charter of Fundamental Rights of the European Union that became legally binding with the ratification of the Treaty of Lisbon on 1 December 2009.

The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of **discrimination**, including the need to take appropriate action for the social and economic integration of the elderly and **people with disabilities**.

The legal status of the Community Charter is that of a mere **political declaration**, as stated in its preamble, since, due to the opposition of the UK government, the Charter could not be integrated into the EC Treaty in 1989. The UK eventually acceded to the Charter, following the election of a new government in May 1997. Amongst other objectives, the Charter pursued the aim of "protection of the young, the elderly and the person with disabilities in the workplace".

## C. The Charter of Fundamental Rights from 2012

The Charter of Fundamental Rights of the European Union brings together the most important personal freedoms and rights enjoyed by citizens of the EU into one **legally binding document**.<sup>11</sup> The Charter was declared in 2000 and came into force in December 2009 along with the Treaty of Lisbon. The Charter of Fundamental Rights of the EU has the same legal status as the other EU treaties.

The Charter applies to EU institutions and to Member States when they act **within the scope of EU law**. It does not give a citizen of the EU an individual right to a claim. It can be invoked indirectly against decisions based on EU law or its transpositions before national courts and the Court of Justice of the EU. The Charter states in Article 21 on non-discrimination on the grounds of (...) disability:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, **disability**, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

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<sup>11</sup> [Charter of Fundamental Rights of the European Union](#) (last checked on 19.01.2022).

Article 26 on Integration of persons with disabilities continues:

The Union recognizes 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.

The wording “respects the right” does not create a legal obligation to create benefits or measures. It allows and encourages Member States to take measures to ensure independence, social and occupational integration, and participation. It can therefore be used as an argument since it is a value of respect. It does not entitle the individual to benefits or measures though.

## IV. EU “Hard Law”

The EU can regulate through “soft law” and through legally binding instruments such as treaties, regulations, and Directives, the so-called “hard law”. This section describes the “hard law” relevant to persons with disabilities.

### IV.1 Treaty of the European Union

According to Article 2 of the Treaty of the European Union (TEU), the non-discrimination principle is one of the fundamental values of the Union. Article 10 of the Treaty on the Functioning of the European Union (TFEU) requires the EU to combat discrimination based on sex, racial or ethnic origin, religion or belief, **disability**, age, or sexual orientation, when defining and implementing its policies and activities.

### IV.2 EU Directives

EU Directives are legally binding instruments. They fix a date for transposition and must be transposed in every Member State by the end of that period; in case they are not transposed, they may be directly applicable in national law.

The European Commission and the Court of Justice of European Union (CJEU) are in charge of evaluating and controlling the respect of the Directive. The CJEU interprets the Directive by “preliminary rulings”; this occurs when a national court asks the CJEU for help to interpret the Directive in order to apply national law in the light of the Directive.

#### A. Directive 2000/78 EC: Discrimination Framework Directive

The adoption of the Directive 2000/78 Discrimination Framework Directive from 17 November 2000 establishing a general framework for equal treatment in employment and occupation created a milestone in the EU as it set up the legal framework for protection against discrimination with regard to five grounds (age, disability, sexual orientation, religion, or belief) in the field **of employment and occupation**. Before 2000, no legally binding instrument covering disability (and other grounds) existed in this field. This Directive completed the Directive on the prohibition of discrimination with regard to origin and “race” (2000/43) and the Directive with regard to prohibition against gender/sex discrimination 2006, resuming in the so-called “Recast Directive”<sup>12</sup>.

**Importantly**, the scope of protection has so far not been widened to other fields such as access to goods and services, education, or health. A Directive on non-discrimination with regard to “goods

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<sup>12</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation ([recast](#)), (last checked on 19.01.2022).

and services” (a “horizontal Directive”), such as the 2004/113<sup>13</sup> with regard to sex discrimination was planned in the last decade but never adopted.

The accessibility act, the second important Directive regarding “disability” was adopted in 2019. However, it does not mention the term “discrimination”.

Article 2 of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation states:

The employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take *appropriate measures* in line with the principles contained in Article 5 in order to *eliminate disadvantages* entailed by such provision, criterion or practice.<sup>14</sup>

This means that there is an

- Obligation for the Member State to create legal obligation for employers to eliminate existing disadvantages in rules or practices;
- Obligation for Member States to detect disadvantages for example by making risks analysis, audits, polls, creating data with respect to disability; and
- The employer is obliged eliminate existing disadvantages in his/her business.

The Directive 2000/78 states further in the introduction (20):

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

Article 5 of the Directive 2000/78 foresees reasonable accommodation for persons with disabilities

(i)n order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, **reasonable accommodation** shall be provided. This means that employers shall take **appropriate measures**, where needed in a particular case, to enable a person with a disability to have **access to, participate in, or advance in employment**, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Other key elements of the Directive are:

- the obligation for Member States to create a legal framework prohibiting direct and indirect discrimination, and harassment linked to disability;
- the obligation to create reasonable accommodation (Article 5) for persons with disabilities;
- the obligation for employers to take appropriate measures in order to eliminate disadvantages entailed by such provision, criterion or practice;
- the obligation to Member States to provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive;
- a shift of the burden of proof with regard to discrimination and disability; and
- the possibility (but not obligation) to set up positive action.

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<sup>13</sup> Council Directive [2004/113/EC](#) of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (last checked on 19.01.2022).

<sup>14</sup> Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (last checked on 19.01.2022).



## B. Recommendation on employment

In line with positive actions, there is also **86/379/EEC Council Recommendation of 24 July 1986 on the employment of people with disabilities in the Community**.<sup>15</sup> A recommendation does not have binding force for Member States but gives concrete examples for the integration of persons with disabilities in employment. This recommendation can be useful in order to claim revisions of laws, “regulations and administrative provisions to ensure that they are not contrary to the principle of fair opportunity for people with disabilities”.

## C. The European Accessibility Act / Directive 2019/882

Directive 2019/882 aims to improve trade between members of the EU for accessible products and services by removing country specific rules.<sup>16</sup> Businesses benefit from having a common set of rules within the EU, which should facilitate easier cross-border trade. It should also allow a greater market for companies providing accessible products and services. Persons with disabilities and elderly people will benefit from having more accessible products and services in the market.

The laws, regulations and administrative provisions necessary to comply with this Directive have to be adopted and published by the Member States by 28 June 2022. Three years later, in 2025, the requirements of the European accessibility act must already have been implemented.

The requirements and obligations of this Directive do not apply to microenterprises providing services within the scope of this Directive, whereby “microenterprise” means an enterprise which employs fewer than 10 persons and which has an annual turnover not exceeding €2 million or an annual balance sheet total not exceeding €2 million.

The Directive binds manufacturers and providers to the following types of services and products to adhere to accessible design:

- E-Commerce services and related platforms
- Computers and operating systems, Smartphones and devices that are predominantly used for electronic communication
- Banking services, Service terminals and Automated Teller Machines (ATM)
- Emergency Numbers
- Access to audiovisual media, but not audiovisual media itself - this is subject of an own EU Directive (EU Directive 2018/1808).
- Services and products of the transportation sector related to air, bus, rail, and waterborne passenger transport
- E-Books

## D. The European Web Accessibility Directive 2016/2102

Directive 2016/2102 aims to improve the accessibility of websites and mobile applications of public sector bodies.<sup>17</sup> Article 4 states that Member States shall ensure that public sector bodies “take the necessary measures to make their websites and mobile applications” more accessible by making them “perceivable, operable, understandable, and robust”.

## IV.3. Examples of Case Law of the European Court of Justice with regard to Disability

In this sub-section, three different cases of the European Court of Justice (CJEU) related to persons with disabilities will be described, which could have an impact on persons with disabilities in

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<sup>15</sup> Council Recommendation of 24 July 1986 [on the employment of disabled people](#) in the Community (last checked on 19.01.2022).

<sup>16</sup> Directive (EU) [2019/882](#) of the European Parliament and of the council of 17 April 2019 on the accessibility requirements for products and services (last checked on 19.01.2022).

<sup>17</sup> Directive (EU) [2016/2102](#) of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies (last checked on 19.01.2022).



Kosovo. The focus will be laid on Case C-303/06 *Coleman v Attridge Law* (2008) ECR I5603 and Case C-13/05 *Chacón Navas v Eurest Colectividades SA* (2006) ECR I-6467(Grand Chamber).

#### A. “Colman Case 2008”: Direct Discrimination of a Worker with Association to Her Child with Disabilities

**Main facts:** In this case, a mother claimed that she was treated unfavourably at work because her son had a disability. Her son’s disability led her to be late to work on occasion and to request leave to be scheduled according to her son’s needs. The complainant’s requests were refused, and she was threatened with dismissal, as well as receiving abusive comments relating to her child’s condition.

**Legal reasoning:** The CJEU considered her colleagues in similar posts and with children as comparators, finding that they were granted flexibility when requested. It also accepted that this amounted to discrimination and harassment on the grounds of the disability of her child.

For the first time, the CJEU recognised the concept of “discrimination by association” of Miss Coleman in association to the child with disabilities. The CJEU has therefore given a broad interpretation of the scope of the “protected ground”. It can include “discrimination by association”, where the victim of the discrimination is not themselves the person with the protected characteristic. It can also involve the particular ground being interpreted in an abstract manner. This makes it imperative that practitioners embark on detailed analysis of the reasoning behind the less favourable treatment, looking for evidence that the protected ground is causative of such treatment, whether directly or indirectly.

This concept has since been applied in Member States such as France and Poland. Therefore, it has served as a landmark case on discrimination and disability by association to a child.

This has significant gender implications, given that women often are caretakers of children with disabilities and thus may be more likely to be in a position to suffer discrimination by association. The case therefore holds relevance to Kosovo as it strengthens the legal protection against discrimination and harassment and recognises the vulnerability of women and men with responsibilities for persons with disabilities (children, relatives, or parents) in the workplace and other sectors of life.

The “Colman Case 2008” holds relevance to Kosovo as it strengthens the legal protection against discrimination and harassment and recognises the vulnerability of women and men with responsibilities for persons with disabilities (children, relatives, or parents) in the workplace and other sectors of life.

#### B. Chacón Navas Case (2006) and Ring v Dansk almennyttigt Boligselskab (2013) on the Definition of Disability

**Main facts:** An employee who had taken sick leave for eight months was dismissed. The CJEU does not indicate the nature of the illness. The employer acknowledged that the dismissal was “unlawful” under Spanish law and offered her compensation. However, the employee argued that the dismissal was “void” on account of unequal treatment and discrimination, which would mean she could claim to be reinstated in her post. The Spanish court said that, according to Spanish case law, this type of dismissal is unlawful rather than void, because in Spanish law sickness is not expressly referred to as a prohibited ground of discrimination. This would mean she could not claim reinstatement. However, the Spanish court pointed out the link between sickness and disability. It asked the CJEU whether “sickness” is included in the Directive, either as “disability” or as a separate ground.

**Legal reasoning of the CJEU:** In the Chacón Navas case, the CJEU interpreted the concept of disability under Directive 2000/78/EC similar to a medical model of disability. However, the EU became

party to the Convention on the Rights of Persons with Disabilities (CRPD), which is now a reference point for interpreting EU law relating to discrimination on the grounds of disability. The CJEU stated that “Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with that Convention.”

Consequently, the CJEU refers to the definition of disability as provided in the CRPD, which reflects the *social model of disability*. According to Article 1 of the CRPD: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” According to Article 2 (3) of the CRPD, discrimination on the grounds of disability means “any distinction, exclusion or restriction on the basis of disability, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

Notably, in the decision (*Ring v Dansk almennyttigt Boligselskab*<sup>18</sup>) in 2013, the CJEU modified the definition of disability to take greater account of the social model of disability. This model recognises the barriers caused by the environment and people’s attitudes to disability. The court also said the aim of the reasonable adjustment duty was to remove barriers that hinder “full and effective participation” by people with disabilities. The court emphasised the importance of the UN disability convention (CRPD) and used it when interpreting the Directive.

### C. *Enver Şahin v Turkey* (2018): Human Rights Court Decision, Confirming Obligation to Make Reasonable Adjustments

**Main facts:** In 2005, a first-year mechanics student at the technical faculty of a Turkish university had an accident. This accident left the student’s lower limbs paralysed. The student suspended his studies until he recovered. The student later requested the faculty to adapt the university premises so he could resume his studies in the 2007-2008 academic year. The faculty said the work could not be carried out, at least in the short term. The authorities offered the student an assistant. However, the student (and later claimant) said this illustrated their ignorance of his personal situation and the implications of that situation. The claimant said it would be degrading for him to be placed in a situation of dependence on a third person because of his disability. For example, the constant presence and assistance of a third person would invade his privacy. Also being carried upstairs by another individual comprised a definite risk of his falling. The situation improved in 2010 when the faculty was closed and replaced by a new faculty of technology in buildings which (reportedly) were disability accessible. However, the claimant argued there was unlawful discrimination contrary to Article 14 for the three academic years up to 2010.

The legal reasoning of the European Court of Human Rights (ECtHR), which is not an EU institution, stated that in applying Article 2 of Protocol No. 1 (education), the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including the UN CRPD (paragraph 53 of the judgment). The court summarised some of its previous judgments on the meaning of “discrimination under” Article 14 (paragraph 54). The ECtHR further stated that in applying Article 14, it must have regard to the changing conditions of international and European law and respond to any emerging consensus as to the standards to be achieved. The ECtHR noted the importance of the fundamental principles of universality and non-discrimination in the exercise of the right to education and emphasised that international instruments “have recognized inclusive education as the most appropriate means of guaranteeing [those] fundamental principles, as such education is geared to promoting equal opportunities for all, including persons with disabilities” (*Çam v Turkey* § 64, and the references therein). Inclusive education “indubitably forms part of the States’ international responsibility” (paragraph 55).

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<sup>18</sup> In Joined [Cases](#) C-335/11 and C-337/11, REQUESTS for a preliminary ruling under Article 267 TFEU from the Søg Handelsret (Denmark), made by decisions of 29 June 2011, received at the Court on 1 July 2011, in the proceedings HK Danmark, acting on behalf of Jette Ring (last checked on 19.01.2022).

## V. The European Disability Strategy 2021-2030

The European Commission adopted in March 2021 the Strategy for the rights of persons with disabilities 2021-2030.<sup>19</sup> This Strategy builds on the results of the previous European Disability Strategy 2010-2020, which paved the way to a barrier-free Europe and to empower persons with disabilities so they can enjoy their rights and participate fully in society and economy. Despite the progress made in the past decade, persons with disabilities still face considerable barriers and have a higher risk of poverty and social exclusion, it states.

The objectives of this Strategy are to “progress towards ensuring that all persons with disabilities in Europe, regardless of their sex, racial or ethnic origin, religion or belief, age or sexual orientation”:

- enjoy their human rights,
- have equal opportunities, equal access to participate in society and economy,
- are able to decide where, how and with whom they live,
- move freely in the EU regardless of their support needs,
- and no longer experience discrimination.

This new Strategy “takes account of the diversity of disability comprising long-term physical, mental, intellectual, or sensory impairments (in line with Article 1 of the United Nations Convention on the Rights of Persons with Disabilities), which are often invisible”.

The Strategy addresses the risks of multiple disadvantages faced by women, children, older persons, refugees with disabilities, and those with socioeconomic difficulties. By doing so it promotes an intersectional perspective in line with the United Nations 2030 Agenda for Sustainable Development and Sustainable Development Goals (SDGs). As stated within the Strategy:

The new strategy therefore contains an ambitious set of actions and flagship initiatives in various domains and has numerous priorities, such as

- accessibility: being able to move and reside freely but also to participate in the democratic process
- having a decent quality of life and to live independently as it focuses notably on the de-institutionalisation process, social protection and non-discrimination at work
- equal participation as it aims to effectively protect persons with disabilities from any form of discrimination and violence, to ensure equal opportunities in and access to justice, education, culture, sport and tourism, but also equal access to all health services
- the role of the EU to lead by example
- the EU’s intention to deliver on that strategy
- promoting the rights of persons with disabilities globally

The European Commission will support Member States in shaping their national strategies and action plans to further implement the UN CRPD and EU legislation in the field. The European Commission calls on Member States to contribute to this new and reinforced Strategy as the framework for EU actions and for the implementation of the United Nations Convention on the Rights of Persons with Disabilities.<sup>20</sup>

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<sup>19</sup> [Strategy for the Rights of Persons with Disabilities](#) 2021-2030 (last checked on 19.01.2022).

<sup>20</sup> Ibid.

Kosovo is not yet an EU Member State. However, it is a partner country which falls under the EU GAP III by the European Parliament and the Council. GAP III provides a policy framework for the EU and one of the three guiding principles is “addressing intersectionality of gender with other forms of discrimination”.<sup>21</sup> GAP III states that “(t)he rights of women with disabilities should be at the core of the future strategy on the rights of persons with disabilities for the coming years (2021-2030).”

**Kosovo falls under the EU GAP III by the European Parliament and the Council, which has the guiding principle of “addressing intersectionality of gender with other forms of discrimination”.**

## **VI. International Law Instrument: the UN Convention on the Rights of Persons with Disabilities (CRPD)**

The very innovative and modern UN Convention on the Rights of Persons with Disabilities (CRPD) is the first international, legally binding instrument setting minimum standards for rights of people with disabilities,<sup>22</sup> and the first human rights convention to which the EU has become a party.

According to Article 216 (2) of the TFEU, international agreements concluded by the EU are binding to the Union and the Member States and are an integral part of Union law. As the EU is party to the CRPD, when applying EU law, EU institutions and Member States must comply with the Convention. In addition, individual Member States have acceded to the CRPD, which imposes obligations upon them directly. The CRPD thus has become a reference point for interpreting both EU and ECtHR law relating to discrimination on the basis of disability.

In 2013 the aforementioned case of *Ring v Dansk almennyttigt Boligselskab*, the CJEU applied the definition in accordance with the concept of “disability” used in the UN CRPD. The CJEU stated that “Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with the Convention.

The UN CRPD gives a very broad and environment-related definition of disability, whereas the other legal instruments mostly abstain from defining the term disability or have a more medical approach. The UN CRPD recognises that disability is “an evolving concept and that disability results from the

**Disability is the effect of the interaction between an individual’s impairment and the barriers society creates, and not simply a medical condition, according to the CRPD.**

interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”. It is very important to stress that this definition places the person in the centre and describes his/her limitation as a result from “interaction between persons with impairments and attitudinal and environmental barriers”. It gives therefore a very dynamic and evolutionary definition; one has not a disability for lifetime, but only with regard to existing barriers. It

therefore marks a paradigm shift from an understanding of disability as a medical condition to one that sees disability as the effect of the interaction between an individual’s impairment and the barriers society creates.

<sup>21</sup> Joint Communication to the European Parliament and the Council EU [Gender Action Plan](#) (GAP) III – an ambitious agenda for gender equality and women’s empowerment in EU external action (last checked on 03.06.2022).

<sup>22</sup> United Nations [Convention on the Rights of Persons with Disabilities](#) (last checked on 19.01.2022).

States that are parties to the Convention are obliged to bring their legal frameworks in line with the CRPD's core concepts of self-determination, equality, non-discrimination, participation, inclusion, and accessibility. In the EU, 22 Member States have ratified the Optional Protocol to the CRPD.<sup>23</sup> This protocol gives the Committee on the rights of persons with disabilities (CRPD Committee) competence to examine "individual complaints of alleged violations of the convention by States that are parties" to the protocol.<sup>24</sup>

The EU itself became a member of the CRPD in 2007, and the Convention on the rights of persons with disabilities entered into force on 23 December 2010. In 2018, the EU Fundamental Rights Agency (FRA) addressed a state of change in the EU with regard to the UN CRPD, as shown in the infographic.

FRA delivers some key facts regarding the CRPD.<sup>25</sup> The UN CRPD has several key elements with regard to international human rights:

- Even though it does not create new rights, it reaffirms and codifies the existing human rights of persons with disabilities;
- It is the first UN human rights treaty that provides for a comprehensive national-level implementation monitoring framework and recognizes human rights as universal and inalienable;
- It provides a legal basis for including a disability perspective in all international cooperation initiatives.

The UN CRPD is underpinned by eight fundamental principles spelled out in UN CRPD Article 3 and interwoven throughout the letter and the spirit of the Convention:

1. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons
2. Non-discrimination



Source: FRA

<sup>23</sup> Chapter IV, Human Rights, 15. [A Optional Protocol](#) to the Convention on the Rights of Persons with Disabilities, New York, 13 December 2006 (last checked on 19.01.2022).

<sup>24</sup> CRPD [Committee](#) on the Rights of Persons with Disabilities (last checked on 19.01.2022).

<sup>25</sup> [FRA](#), "Implementing the United Nations Convention on the Rights of Persons with Disabilities (CRPD) An overview of legal reforms in EU Member States" (last checked on 19.01.2022).



3. Full and effective participation and inclusion in society
4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
5. Equality of opportunity
6. Accessibility
7. Equality between men and women
8. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Kosovo has not yet included the CRPD in the list of eight (8) directly applicable International Agreements enlisted under Article 22 of the Constitution of the Republic of Kosovo.

## **VII. The Legal Framework in Kosovo regarding Rights for Persons with Disabilities from a Gender Perspective**

In Kosovo, the legal framework and strategic documents with regard to employment of persons with disabilities have been aligned with international documents, such as the cited UN CRPD from 2006 and the EU Charter on Fundamental Rights from 2000, and EU directives, even though the official ratification of the UN CRPD has been postponed until Kosovo is granted full membership in the UN. This section analyses Kosovo's legal framework regarding the rights of persons with disabilities from a gender perspective.

### **VII.1. Kosovo's Legal Framework**

Kosovo's legal framework specific to disability includes:

1. The Law on Disability Pensions No° 2003/23,<sup>26</sup> which assures social protection and receipt of social benefits for persons with disabilities; this includes pensions for people who are unable to work on grounds of disability and benefits to cover their transportation costs.
2. The Law on Material Support for Families of Children with permanent disabilities No° 03/L-22,<sup>27</sup> which brings material and financial support to families with children with disabilities.
3. The Law on Vocational Ability, Rehabilitation and Employment of Persons with Disabilities, No° 03/L-019 and Law No° 05/L-078 setting legal grounds of the implementation of public policy directed at the promotion of employment of persons with disabilities. This law includes in Article 5 the prohibition of discrimination in work with regard to disability and eleven other criteria, such as, for example sex, origin, or age. Article 12 of this law obliges employers with more than 50 employees to hire one person with disabilities in every 50 employees. Employers who do not comply with this obligation are obliged to pay monthly contributions of 1% of the minimal wage to the Kosovo budget.
4. The Law No. 04/L-092 For Blind Persons,<sup>28</sup> which regulates the legal status of blind persons in the Republic of Kosovo.
5. The Law on Amending and Supplementing the Law on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Sexual Violence Victims of the War, Civilian Victims, and their Families, which determines the status and rights of victims of sexual violence perpetrated during the war.

<sup>26</sup> Law No. [2003/23](#) on disability pensions in Kosovo (last checked on 19.01.2022).

<sup>27</sup> Law No. [03/L-022](#) on material support for families of children with permanent disability (last checked on 19.01.2022).

<sup>28</sup> Law No. [04/L-092](#) for blind persons (last checked on 19.01.2022).

## VII.2. Non-specific Law without Focus on Disability

This subsection describes laws not specifically focused on disability in Kosovo that have relevance for persons with disabilities.

First, the Law on the Protection against Discrimination of 2015 offers a general framework against discrimination in different areas of life (employment, housing, education, etc.) for a multitude of criteria.<sup>29</sup> Article 1 mentions disability among the criteria. Interestingly, the Law mentions the criteria “gender”, “gender identity”, and “sex”. By doing so, the law goes beyond the EU directives and many other national laws. Also, it recognises in Article 1.7 the concepts of discrimination by association, based on case law of the ECEU with regard to disability. “Discrimination based on association” is defined as “discrimination on the grounds set out in Article 1 of this Law, targeting people who do not belong to a particular group but are third parties that are associated with those groups”. Also, it prohibits multiple discrimination in Article 1.10 and defines it as follows: “Multiple discrimination occurs when discrimination is based on any combination of the grounds covered by this law. Multiple discrimination and multiple grounds shall be construed accordingly”.

With regard to disability, the Law mentions as a form of unequal treatment in Article 1.8:

Failure of a reasonable adaptation/accommodation for persons with disabilities - in accordance with their specific needs, is deemed discrimination on the grounds set out in Article 1 of this Law, unless when is an undue burden on the person who is obliged to provide and this is not in contradiction with the legislation in force, by considering due to this purpose such factors as the use of available public resources, participation in social and public life and ensuring access to the workplace and suitable working conditions;

Thus, in several ways, Kosovo law goes beyond EU directives in the protections it offers persons with disabilities. The challenge lays in the practical application of the existing legal framework in Kosovo. In order to make the law become a strong instrument to bring human rights forward, case law, sanctions, and the concrete interpretation and application of the law are necessary. This requires trained advocates, a mobilised civil society, and persons who are willing and encouraged to enforce the law.

The Law on Health and Safety at Work applies to the public sector, private sector, public-private partnerships, and state administration and obliges employers to follow the principle of equal treatment for all employees when taking health and safety measures.<sup>30</sup> It also obliges employers to inform employees regarding measures taken for protecting health and safety at work for children, youth, pregnant women, breast-feeding women and persons with disabilities.

The Criminal Code of Kosovo outlines criminal acts related to labour rights, including: violating rights in labour relations (e.g., the protection of women, children, and people with disabilities), denying or restricting the right of persons to employment under equal conditions, violating the right to strike and violating and/or misusing social insurance rights.<sup>31</sup> In addition and with a broader scope of victims, the Criminal Procedure Code<sup>32</sup> has partially transposed the Victims’ Rights Directive, which aims to “ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings”.<sup>33</sup> The Directive seeks to “promote the principle of non-discrimination, the principle of equality between women and men, the rights of the child, the elderly and persons with disabilities, and the right to a fair trial”.

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<sup>29</sup> Law No. [05/I-021](#) on the protection from discrimination (last checked on 19.01.2022).

<sup>30</sup> Law No. [04/I-161](#) on safety and health at work (last checked on 19.01.2022).

<sup>31</sup> Code [No. 06/I-074](#) Criminal Code of the Republic of Kosovo (last checked on 19.01.2022).

<sup>32</sup> [Criminal Procedure Code](#).

<sup>33</sup> Directive [2012/29/EU](#) of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (last checked on 03.06.2022).



### VII.3. Analysis of Kosovo Laws regarding Disability

Nevertheless, regarding the **specific legislation with regard to disability**, several shortcomings can be identified in Kosovo, as discussed in this subsection.

#### A. Weak Definition of Disability and Attention to Intersectionality

Article 3 of the Labour Law (LL) defines disability as a result of “physical, sensory or mental impairment which inhibit him/her to participate in everyday activities”. This limitation to three forms of disability, without further defining others, is insufficient. Depending on the interpretation, psychological disabilities, such as autism or down syndrome, might not be covered.<sup>34</sup> A wider definition that places the person in the centre of the definition with regard to his/her environment, as per the UN CRPD, would be preferable, such as:

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

Also, the analysed specific national laws do not give any special attention to the intersectionality between gender and disability, even though Article 6 of the UN CRPD mentions the following obligations:

1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this **regard shall take measures to ensure the full and equal enjoyment** by them of all human rights and fundamental freedoms.
2. States Parties shall take **all appropriate measures** to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

The existing **specific laws** do not foresee any affirmative actions with regard to women and girls with disabilities.

#### B. Insufficient Definition of Discrimination and Unclear Enforceability

The definition of “discrimination” in the current Labour Law (LL) does not include a clear definition of the legal concepts of “direct” and “indirect” discrimination, which would align the law with the provisions of the Law on Protection from Discrimination. However, Article 5 on Prohibition of all Forms of Discrimination, does state that “Direct or indirect discrimination of persons with disabilities is prohibited during employment, promotion and capacity building, if that job may be performed adequately by a person with disabilities.”

The LL does not mention the concept of intersectionality or multiple discrimination between criteria such as sex, gender, and origin, and disability. Also, it does not detail the obligation for employers to establish reasonable accommodation regarding specific needs. Even though the wording of Article 5, paragraph 4 is very broad (“equal and effective support is guaranteed for persons with disabilities towards all kinds of discrimination in all situations”), it is unclear who gives support and how the person can make effective use of the law. The current LL does not reflect the affirmative measures on employee’s obligations, deriving from the Law No. 03/L-019 on vocational ability, rehabilitation, and employment of people with disabilities, to employ persons with disabilities, adopted in 2009, although

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<sup>34</sup> Sheeren, J., “Disabled Community Takes a Stand in Kosovo” in [Balkan Insight](#) on 10.01.2018 (last checked on 19.01.2022).

the LL was adopted later, in 2010. The present drafting of new LL presents an opportunity for improvement and better legal alignment among these, currently not harmonised laws.

### C. Control Mechanism for National and International Obligations

A monitoring mechanism for the application of the law and the treatment of concrete demands and files of persons with disabilities facing discrimination in the working place is assigned to the Office of Good Governance (OGG) in the Office of the Prime Minister and the OP. In practice, the OP's recommendations are hardly ever taken into account from institutions. Further, the capacities of OGG are limited to fulfil its tasks. The collaboration between these two institutions with the Prosecution, courts, and police is not strong enough, especially related to persons with disabilities. In practice, one can observe a lack of implementation of affirmative measures, as well as of the aforementioned laws.

### D. Legal Quota in Employment Insufficient and Ineffective

Experts underline that the legal quota for the participation of persons with disabilities in workplaces is widely unknown among employers and not respected; financial fines seem too low to incite employers to take proactive measures to recruit persons with disabilities.<sup>35</sup> There are no monitoring mechanisms to issue fines for private or public sector employers that fail to implement the Law No. 03/L-019 on vocational ability, rehabilitation, and employment of people with disabilities. Following the most recent amendments made to this Law, the Labour Inspectorate is officially responsible for monitoring its implementation related to the employment of persons with disabilities. However, no data exists as to whether the Labour Inspectorate has ever treated such cases. Statistics on employment rates, including of persons with disabilities (and disaggregated by gender), are not communicated, which also makes monitoring challenging. Sanctions, as elaborated, are not high enough to create commitment and motivate employers to take action.

**“What is worrying is that the public sector, the state itself, is violating the Law on Vocational Ability, Rehabilitation and Employment of people with disabilities by not employing them as per the quota required.”**

**– Representative, Committee of Blind Women of Kosovo**

Further, Employment Agencies reportedly rarely ever recommend or intermediate the employment of persons with disabilities.<sup>36</sup> There are no tailored capacity development programs, adapted to the capabilities and skills of persons with disabilities, which would make possible their preparation for the labour market. Poor quality data and statistics related to persons with disabilities, their needs, skills, and requirements further undermine evidence-based policymaking that could otherwise include more suitably tailored affirmative measures supporting their labour force participation.

### E. Lack of Implementation

Special laws, regulations, and campaigns related to the existing laws or monitoring mechanisms are missing in Kosovo. As the Regional Cooperation Council expressed in its paper, the social system in Kosovo is based on charities and social benefits coupled with a severe lack of more inclusive public policies and active labour market programmes.<sup>37</sup>

<sup>35</sup> UNDP, *Report on Labour Market Inclusion of persons with disabilities in Kosovo*, September 2019, p. 23.

<sup>36</sup> KWN discussions with CSOs supporting persons with disabilities, 2022.

<sup>37</sup> Regional Cooperation Council, *Peer review on the Employment of Persons with Disabilities in the Western Balkans*, Policy Paper, 2018.

#### VII.4. Analysis regarding the Anti-Discrimination Law

The law on the Protection from Discrimination, adopted in 2015 is a “modern” anti-discrimination law which goes further in elaboration than many national laws in the EU regarding the grounds of discrimination (e.g., gender, gender identity, and social origin), the multiple forms of discrimination (multiple and association), and the obligation to establish reasonable accommodation in employment. It incorporates EU case law and legal doctrine.

Interestingly, “severe discrimination” is recognised as a very harmful form of discrimination. It is defined as:

discriminatory behavior that is motivated **by more than one ground** or which is committed more than once, or which has lasted for a long period of time or had harmful consequences especially for the victim, is considered severe form of discrimination.

It therefore applies to discrimination on more than one ground and recognises the specific harm of “intersectionality”.

Article 7 of the law authorises and details “affirmative actions” and also incorporates binding case law as “guidelines”.

### VIII. Recommendations

In general, besides the theory of this comprehensive legal instrument, practical application seems to be missing in Kosovo since persons with disabilities and especially women with disabilities are underrepresented in the labour market, access to housing, or education. It is especially recommended:

- Increase inter-institutional cooperation to monitor and punish violations of rights of persons with disabilities, contributing to judicial practice and precedents to be used by corresponding monitoring authorities.
- Increase the capacities of OGG to lead better inter-institutional coordination related to the implementation of the Human Rights Legislation Package, and to produce concrete reports on the situation of persons with disabilities, as per the obligations deriving from the Strategy for Human Rights 2021-2025, under the lead of OGG;
- Increase the capacities of the OP towards accepting more claims, providing more detailed recommendations for institutions related to the treatment of persons with disabilities, monitoring cases of discrimination, as well as monitoring the work of institutions responsible to issue fines, through close consultations with and utilising the expertise of CSOs, particularly women’s rights CSOs, for a more gender sensitive and inclusive approach;
- Monitor laws, both primary and secondary, to provide a more gender-sensitive perspective during the drafting process or to require amending of laws to correspond to the needs of diverse women and men with disabilities;
- Raise awareness, including through media, of referral mechanisms for cases of discrimination of persons with disabilities and multiple discrimination, such as based on gender and disability;
- Establish affirmative action plans with regard to persons with disabilities, and women specifically, since they are far from being included in the regular labour market and education;
- Establish additional communication against negative stereotypes with regard to disability and gender in the field of employment;
- Provide training on existing legal tools and anti-discrimination law for legal professionals and CSOs, including specifically with regard to multiple discrimination based on gender and disability;
- Establish a department on the inclusion of persons with disabilities and gender at national and local government levels to enforce the law. This department should cooperate with CSOs to identify

and address the specific needs and concrete obstacles persons with disabilities face in Kosovo with regard to all fields of their public and private life;

- Allocate a sufficient budget for enforcement of laws, sensibilization measures, communication, and training for different target groups, including employers, teachers, and CSOs working with persons with disabilities;
- Teach strategic litigation in university law faculties, towards transforming the law into a concrete instrument for the inclusion of persons with disabilities in all fields of public and private life;
- Offer legal aid services especially for persons with disabilities and women with disabilities in employment agencies; information and legal support should be proposed to sensitise them and enhance their access to rights; and
- Persons with disabilities must be involved at every stage in legislative processes and the practical application of laws. Their considerations and needs must be at the centre of actions to be taken.