

Beyond the Pragmatic Definition? The Right to Non-discrimination of Persons with Disabilities in the Context of Coercive Interventions

SÁNDOR GURBAI

Abstract

According to a longstanding definition of non-discrimination, differential treatment does not constitute discrimination if the purpose or effect of the differential treatment is to achieve a legitimate aim and if the differential treatment can be objectively and reasonably justified. This characterization reflects what Wouter Vandenhoele has described as the “widely-used pragmatic definition of discrimination.” In mental health policy, one important application of this definition pertains to the disputed question of whether coercive psychiatric interventions constitute discrimination on the basis of disability. In this paper, I consider whether the well-established pragmatic definition of discrimination remains valid in light of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). I review evidence from the convention, from the general comment on equality and non-discrimination published by the Committee on the Rights of Persons with Disabilities, and from the committee’s adjudication of individual allegations of discrimination. I conclude that the CRPD and its treaty body send mixed signals in relation to the pragmatic definition: The convention itself is silent as regards the pragmatic definition, and while the committee has in some instances invoked it, it also seems to be pointing toward a new approach that goes beyond the pragmatic definition. I survey three possible alternatives to the pragmatic definition, tracing each to suggestions in the jurisprudence of the Committee on the Rights of Persons with Disabilities, and illustrating how each can be applied in determining whether coercive psychiatry is discriminatory.

SÁNDOR GURBAI, JD, PhD, is a researcher affiliated with the Essex Autonomy Project, School of Philosophy and Art History, University of Essex, UK; Visiting Fellow at the Human Rights Centre, School of Law, University of Essex, UK; Assistant Professor at the Institute for Disability and Social Participation, Faculty of Special Needs Education, ELTE Eötvös Loránd University, Hungary; and Impact Manager at Validity Foundation – Mental Disability Advocacy Centre, Hungary.

Please address correspondence to the author. Email: sg17096@essex.ac.uk.

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Introduction

In 2017, Dainius Pūras, the United Nations (UN) Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, gave voice to the imperative to tackle discrimination that persons with psychosocial disabilities are facing in the mental health system:

*Discrimination, de jure and de facto, continues to influence mental health services, depriving users of a variety of rights, including the rights to refuse treatment, to legal capacity and to privacy, and other civil and political rights. The role of psychiatry and other mental health professions is particularly important and measures are needed to ensure that their professional practices do not perpetuate stigma and discrimination.*¹

Its response to this report, the UN Human Rights Council called on states “to abandon all practices that fail to respect the rights, will and preferences of all persons, on an equal basis, and that lead to power imbalances, stigma and discrimination in mental health settings.”²

But what exactly is meant by *discrimination*? Can people be treated *differently* in an unfavorable way? If so, can *unfavorable* treatment be justified in some circumstances? Can a *protected characteristic* ever be the basis for such treatment? If not all differential treatment constitutes discrimination, then we need a method for determining whether a particular policy or practice is *justifiable*—even if its application has an unfavorable impact on persons with one or more protected characteristics. To best of my knowledge, there is no agreed definition of “unfavorable treatment.” For the purpose of the present analysis, I shall assume that “unfavorable treatment” includes any differential treatment that impairs or denies the recognition or exercise of any human rights.

Let us put these questions into the context of coercive psychiatric interventions. *Under what circumstances can people be treated against their will on the basis of their actual or perceived impairment?* This is a question to which many lawyers may think they know the answer: If a less favorable treatment

on the basis of a protected ground has a *legitimate aim* and is *objectively and reasonably justified*, it cannot be viewed as discrimination. Similarly, many psychiatrists may also think they know the answer: Deprivation of liberty in a mental health care facility and coercive mental health treatment can be justified when *certain criteria* (which are either explicitly or implicitly linked to the notions of legitimate aim, objectivity, and reasonability) *are satisfied*. These criteria include that coercive measures shall be *last-resort* options and that these measures shall aim to protect the health or life of the patient and/or others.

These familiar positions are based on a longstanding principle of non-discrimination: the principle that differential treatment does not constitute discrimination if the purpose or effect of the differential treatment is to achieve a legitimate aim and if the differential treatment can be objectively and reasonably justified. Under this familiar approach, even laws and policies that would otherwise be tantamount to direct discrimination on the basis of disability can in principle be deemed compliant with human rights standards—so long as the disadvantageous differential treatment can be justified. But does this approach remain valid in light of 21st-century developments in international human rights law?

In order to answer these questions, I proceed as follows: I begin by analyzing the standard for legal defenses against allegations of discrimination in UN human rights treaties and in the interpretative instruments of their treaty bodies. I then focus on whether the text of the UN Convention on the Rights of Persons with Disabilities (CRPD) calls for rejection or acceptance of the well-established justification defense standard. In the following sections, I analyze the general comment on equality and non-discrimination published by the Committee on the Rights of Persons with Disabilities (CRPD Committee) and the committee’s case law in order to identify whether the traditionally used justification defense remains valid in light of the committee’s jurisprudence. Finally, I propose candidates for alternatives to the broadly used justification defense in allegations of discrimination.

Before turning to the matter at hand, it is worth reminding ourselves of the broader significance of the issues explored here. This legal analysis can have enormous consequences not only for the interpretation of fundamental international human rights standards but ultimately for determining what forms of unfavorable treatment persons with disabilities can lawfully be subject to, and what defenses are available to states when they are accused of discriminatory treatment.

The longstanding schema for defense

According to a longstanding schema for defense against allegations of discrimination, differential treatment in a comparable situation does not constitute discrimination if the purpose or effect of the differential treatment is to achieve a legitimate aim and if the differential treatment can be justified objectively and reasonably. In a synoptic 2005 review of non-discrimination as interpreted by the UN human rights treaty bodies, Wouter Vandenhole described this as the “widely-used *pragmatic definition of discrimination*.”³

This pragmatic definition of discrimination does not come from the treaties themselves; rather, it was worked out by treaty bodies, particularly by the UN Human Rights Committee (HRC). This body—which is tasked with overseeing states’ compliance with the International Covenant on Civil and Political Rights—emphasizes in its General Comment No. 18 that

*[n]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.*⁴

The HRC has often relied on this formula in its case law and has constructed its jurisprudence on this approach to justification.⁵ The UN Committee on the Elimination of Racial Discrimination (CERD) and the UN Committee on Economic, Social and Cultural Rights (CESCR) have made similar statements, endorsing the pragmatic definition.⁶ Furthermore, each of these three treaty bodies has

made explicit in their statements that the pragmatic definition of discrimination should apply in cases of both direct and indirect discrimination.⁷

The CESCR’s General Comment No. 20 elaborates on the pragmatic definition of discrimination, clarifying that when it comes to the “objective and reasonable” justification defense,

*[t]his will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.*⁸

Under this approach, therefore, differential treatment satisfies the “objective and reasonable” standard as long as three criteria are met: (1) the disputed policy or practice has a legitimate aim or effect; (2) the aim is compatible with international human rights and serves the purpose of promoting general welfare in a democratic society; and (3) the disputed policy represents a proportional means to achieve the intended aim.

Some hints in dissents

Up to this point, we have seen that the pragmatic definition of discrimination, together with the associated schemas for justifying differential treatment, have been explicitly endorsed by UN treaty bodies monitoring the implementation of the three oldest UN treaties. But what are the opinions of the treaty bodies that oversee the more recent UN conventions?

Surveying the various UN human rights treaty bodies in 2005, Vandenhole noted the following:

- The UN Committee on the Rights of the Child does not seem to have embraced the pragmatic definition.⁹
- The UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) has not yet used the pragmatic defi-

dition, and “[i]t is not clear whether the CEDAW Committee accepts the widely-used pragmatic definition of discrimination.”¹⁰

Fifteen years later, the positions of these two treaty bodies remain unclear, but some relevant traces can be found, particularly in dissenting opinions of the CEDAW Committee. Although these cases are not related to coercive interventions or to persons with psychosocial disabilities, their impact on the pragmatic definition of discrimination is significant.

In 2007, the CEDAW Committee had to decide in the case of *Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain*.¹¹ In this case, the applicant alleged that the state party had discriminated against her based on sex by denying her right, as the first-born child, to succeed her late father to the title of Count of Bulnes. The committee’s decision stated that the application was inadmissible *ratione temporis*. There was a concurring opinion that also found the application inadmissible because it was incompatible with the provisions of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) insofar as the title of nobility in question did not have any legal effect. However, according to one member of the CEDAW Committee, Mary Shanthi Dairiam, the application was admissible. In her dissenting opinion, she argued:

*First of all I acknowledge that the right to titles of nobility is not a fundamental human right and may not be of much material consequence to the author. However, the legislation and practice of States parties must in no way and in no context provide for a differential treatment of women and men in a manner that establishes the superiority of men over women and concomitantly, the inferiority of women as compared to men. This is what the law of 4 May 1948 and 11 October 1820 does.*¹²

Dairiam used the phrase “differential treatment,” which is a neutral term in itself. By describing the avoidable situation as “establishing the superiority of men over women and concomitantly, the inferiority of women as compared to men,” she clearly addressed *less favorable treatment on the*

basis of gender. She talked about “States parties” and not only about Spain, by which she indicated that her statement was meant to be addressed to all states parties. Finally, by using the formulations of “no way” and “no context,” she signaled that her statement was meant to be applicable under all circumstances. In other words, *if we accept that less favorable treatment on the basis of gender constitutes discrimination under all circumstances, then less favorable treatment on the basis of gender automatically amounts to gender-based discrimination*. In this regard, Dairiam’s dissent is an indicator that at least one member of the CEDAW Committee harbors reservations about the adequacy of the pragmatic definition.

While Dairiam’s dissent may suggest a rejection of the pragmatic definition, another committee member’s dissent reflects a continued commitment to it. In 2009, the CEDAW Committee dealt with the case of *G. D. and S. F. v. France*.¹³ In this case, two unmarried women without children claimed to be victims of human rights violations under CEDAW because they had been legally barred from changing their family names. They submitted that French legislation governing family names contravened the principle of equality between parents and constituted a violation of article 16(1)(g) of the convention. The CEDAW Committee found the application inadmissible because the applicants lacked the quality of victim, since article 16(1)(g) refers to “husband and wife” and the applicants were not married. Six members of the CEDAW Committee submitted a dissenting opinion on the issue of admissibility. With their statement, however, they acknowledged that less favorable treatment on the ground of sex could be justified:

*It is a clear obligation of all States parties to the Convention to uphold the principle of equality between women and men in their legislation and to ensure practical realization of this principle (article 2) and to abolish and change stereotypes on roles of women and men (article 5). This means that very weighty reasons would have to be put forward before a difference of treatment on the sole ground of sex could be regarded as compatible with the Convention.*¹⁴

From the circumstances of the case, it is clear that the concept of *difference of treatment* is meant to be *less favorable treatment*, which means that one-third of the members of the CEDAW Committee acknowledged the possibility in principle of a justification defense when it comes to gender-based less favorable treatment. In other words, *six dissenting members of the CEDAW Committee showed a commitment to the pragmatic definition of discrimination, while the majority remained silent on it, deciding the issue on different grounds.*

In sum, in the 15 years following Vandenhole's synoptic survey, it has remained unclear whether the Committee on the Rights of the Child and the CEDAW Committee are committed to the pragmatic definition of discrimination and its associated schemas for justifying differential treatment.

UN Convention on the Rights of Persons with Disabilities

The CRPD's definition of discrimination is similar to the definitions given in the International Convention on the Elimination of All Forms of Racial Discrimination and in CEDAW.¹⁵ According to article 2 of the CRPD:

"Discrimination on the basis 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. It includes all forms of discrimination, including denial of reasonable accommodation.

This article is of limited value in determining whether the convention adheres to the pragmatic definition. It explicitly tells us that discrimination is present if the following conditions are met: (1) the person concerned has an impairment or disability; (2) there is a less favorable treatment compared to others; (3) there is a link between the impairment and the less favorable treatment (either intentional or unintentional); and (4) the purpose or effect of the less favorable treatment is impairing or nullifying the recognition, enjoyment, or exercise of any

of the human rights and fundamental freedoms.

However, the article is silent on the following aspects: (1) whether less favorable treatment on the basis of disability may have a *legitimate purpose or effect* and (2) whether there is any room for *objective and reasonable justification*.

At first sight, then, the CRPD, like the other UN human rights treaties, *neither explicitly rejects the pragmatic definition of discrimination nor explicitly relies on it.*

How should this silence be decoded? When the task is to interpret a treaty, lawyers turn to the Vienna Convention on the Law of Treaties (VCLT).¹⁶ Can the VCLT help us determine whether the CRPD is endorsing the pragmatic definition? I suggest focusing on three provisions of the VCLT.

According to the VCLT's general rule of interpretation, "[a] treaty shall be interpreted ... *in the light of its object and purpose.*"¹⁷ The stated purpose of the CRPD is to promote, protect, and ensure the *full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.*¹⁸ What, if anything, does this tell us about the position of the CRPD as regards the pragmatic definition? Alas, two different answers can be offered here. On the one hand, it might be held that the convention's aim permits balancing the right to non-discrimination against other rights. Real-life situations, such as coercive interventions, are complex and generally involve conflicts of rights (for example, in the case of involuntary placement, the right to liberty of a person with disabilities versus the right to health of others or the person's own right to life or health).¹⁹ In these situations, the usual solution is to engage in a balancing exercise of rights, which means that disability-based limitations of rights may be justified in order to achieve the protection of other rights. This approach would be tantamount to acceptance of the pragmatic definition of discrimination. On the other hand, it might be held that the aim of the CRPD precludes the pragmatic definition and its associated schemas for justifying differential treatment. Under this construction, the objective of ensuring the *full enjoyment of all human rights by all persons with disabilities* is simply incompatible with poli-

cies that restrict rights and freedoms on the basis of disability. Where circumstances arise in which the balancing of conflicting rights is required, this must never be done in a way that is tantamount to unfavorable treatment on the basis of disability.

As for the VCLT, “[a] treaty shall be interpreted ... in accordance with the ordinary meaning to be given to the terms of the treaty *in their context*.”²⁰ The principle of equality and non-discrimination is built in deliberately and systematically throughout the substantive articles of the CRPD through the formula of “on an equal basis with others.” Thus, it must be recognized that the CRPD emphasizes the contextual connection between non-discrimination and the substantive rights. But this by itself does not show that the CRPD diverges from the pragmatic definition of discrimination.

According to the VCLT, “[r]ecourse may be had to supplementary means of interpretation, including the *preparatory work of the treaty*.”²¹ In relation to this provision of the VCLT, one might argue that there is no justification clause in the CRPD when it comes to direct and indirect discrimination. If the negotiators of the convention had wanted to include a justification provision in the definition of “discrimination on the basis of disability,” they could have included one. If we accept this argument, then the absence of such a justification clause might be taken as an indication that the CRPD rejects the pragmatic definition of discrimination. However, the International Convention on the Elimination of All Forms of Racial Discrimination does not contain any justification clause either, but the interpretation of the CERD is in favor of the pragmatic definition of discrimination.

Application of the VCLT rules therefore does not provide a decisive indication as to whether the CRPD should be interpreted as conforming to the pragmatic definition or departing from it.

CRPD Committee’s general comment on equality and non-discrimination

In 2017, the CRPD Committee produced an outline of its draft general comment on equality and non-discrimination and invited public comment

on the document.²² The outline did not mention justification defenses in relation to either direct or indirect forms of discrimination. One of the respondents to the call for comments was a former member of the HRC, Gerald L. Neuman. He encouraged the committee to address the issue of how differential treatment can be justified:

*It would be useful for the Committee to clarify that the prohibition of discrimination on the basis of disability does not mean that differential treatment on the basis of disability is always a violation of the Convention per se, without any consideration of the explanation that is put forward to justify the differential treatment. Referring to disability as a “prohibited ground” does not mean that it is a ground that can never provide the basis of a lawful difference in treatment, but rather that differential treatment requires a high level of justification. The distinction between differential treatment (irrespective of justification) and “discrimination” (in the absence of sufficient justification) is fundamental in international human rights law, and should also inform the Committee’s interpretation of the Convention.*²³

Urging the committee to avoid a “rigid definition of discrimination,” Neuman argued that “[a] refusal to consider whether differential treatment may be justified as reasonable, objective and proportional would not serve the goal of human rights.”²⁴ For Neuman, a definition of discrimination is unduly “rigid” insofar as it fails to acknowledge that some disability-based differential treatment can be justified as reasonable, objective, and proportional.

Following the consultation process on its outline, the CRPD Committee defined direct discrimination in its draft general comment but did not mention explicitly any possibility for justification.²⁵ However, indirect discrimination was defined by explicitly allowing for objective justification of the differential treatment by a legitimate aim. The committee added that “the means achieving that aim shall be appropriate and necessary.”²⁶ At least at the time of the *drafting* of the general comment, the committee seemed to embrace the pragmatic definition of discrimination (and its associated schemas for the justification of differential treatment) while restricting its application to alle-

gations of indirect discrimination. But this hybrid position was not ultimately the one adopted by the committee.

The final version of General Comment No. 6 is entirely silent on justification when it comes to both direct and indirect discrimination.²⁷ The CRPD Committee removed the explicit mention of justification even from the definition of indirect discrimination. There is no public record of the committee's reasons for this elision. What is a matter of public record are the public comments that the committee received, both on its outline and on its draft of General Comment No. 6. Neuman, together with the Equal Rights Trust and the Danish Ministry for Children and Social Affairs, expressed support for inclusion of the pragmatic definition of discrimination.²⁸ However, the Center for the Human Rights of Users and Survivors of Psychiatry (CHRUSP) and Inclusion International, two global networks of persons with psychosocial and intellectual disabilities, opposed it.²⁹ CHRUSP asked the committee to amend the draft paragraph defining direct discrimination:

*In the examples of disability-based violence, please include forced psychiatric interventions. It would be helpful also to include ... forced hospitalization ... as examples of direct discrimination.*³⁰

It may be that the comments of persons with disabilities and their organizations were more influential on the committee than submissions from other sources.

We should note, however, that the footnotes in the definitions of both direct and indirect discrimination take us to paragraph 10 of the CESCR's General Comment No. 20.³¹ According to this paragraph, "Both direct and indirect forms of differential treatment *can* amount to discrimination under article 2, paragraph 2, of the Covenant."³²

The word "can" suggests that in the view of the CESCR, differential treatment does not amount *automatically* to discrimination. The CESCR suggests that "[d]ifferential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective."³³

It is not entirely clear whether the CRPD Committee wanted to refer in both direct and indirect discrimination cases to the entire content of paragraph 10 of General Comment No. 20 or just specific aspects of it (such as "detrimental acts or omissions," "neutrality at face value," and "disproportionate impact") that are not related to the justification defense.

In sum, particularly when read in light of its drafting history, the CRPD Committee's general comment on equality and non-discrimination sends mixed messages in relation to the validity of the pragmatic definition in the context of the CRPD.

Jurisprudence of the CRPD Committee

The ultimate test of any definition of discrimination must concern its application to concrete cases. In order to provide the fullest possible accounting, this section expands the scope of my analysis to include all discrimination cases considered by the committee—and not just those addressing the specific topic of involuntary mental health interventions. As of October 2019, the CRPD Committee had dealt with 15 individual applications in which either direct or indirect discrimination was addressed.³⁴ Out of these 15 cases, there were 14 adoptions of views (decisions on the merits) and one inadmissibility decision.

Direct discrimination was addressed by the committee in three cases. In none of these cases did the committee invoke the pragmatic definition of discrimination:

- *V.F.C. v. Spain* (2019)³⁵
- *Y v. United Republic of Tanzania* (2018)³⁶
- *X v. United Republic of Tanzania* (2017)³⁷

Direct discrimination was raised by the parties alone in two cases:

- *Marie-Louise Jüngelin v. Sweden* (2014)³⁸
- *Bujdosó et al. v. Hungary* (2013)³⁹

Indirect discrimination was addressed by the committee in eight cases (seven adoptions of views and

one inadmissibility decision). Out of the seven adoptions of views, three cases used the pragmatic definition of discrimination and four cases did not.

- Adoptions of views where the pragmatic definition was used:
 - *Iuliia Domina and Max Bendtsen v. Denmark* (2018)⁴⁰
 - *Marlon James Noble v. Australia* (2016)⁴¹
 - *H.M. v. Sweden* (2012)⁴²
- Adoptions of views where the pragmatic definition was not used:
 - *J.H. v. Australia* (2018)⁴³
 - *Gemma Beasley v. Australia* (2016)⁴⁴
 - *Michael Lockrey v. Australia* (2016)⁴⁵
 - *Liliane Gröninger et al. v. Germany* (2014)⁴⁶
- Inadmissibility decision:
 - *S.C. v. Brazil* (2014)⁴⁷

Indirect discrimination was raised by the parties alone in three cases:

- *Bacher v. Austria* (2018)⁴⁸
- *Bujdosó et al. v. Hungary* (2013)
- *Nyusti and Takács v. Hungary* (2013)⁴⁹

In surveying these cases, we can distinguish three different stances taken by the CRPD Committee toward the pragmatic definition of discrimination.

Adoption of the pragmatic definition

The committee relied on the pragmatic definition of discrimination in three cases about allegations of indirect discrimination: *H.M. v. Sweden*, *Marlon James Noble v. Australia*, and *Iuliia Domina and Max Bendtsen v. Denmark*.

In *H.M. v. Sweden*, the applicant had a “chronic connective tissue disorder” due to which she could neither leave her house nor safely be transported to the hospital. The only meaningful rehabilitation was hydrotherapy in an indoor pool. The local housing

committee rejected the applicant’s application for permission to construct such a pool at her home, holding that it contravened land-use restrictions under the Swedish Planning and Building Act.

In the case of *Iuliia Domina and Max Bendtsen v. Denmark*, the applicants were Iuliia Domina, a national of Ukraine, and Max Bendtsen, a national of Denmark. The applicants were a married couple. Mr. Bendtsen had brain damage following a car accident in 2009 and consequently received social benefits, as he could not support himself through employment. In May 2013, the applicants applied for family reunification and a residence permit for Ms. Domina in Denmark based on their marriage, which they had celebrated in April 2013. Their application was rejected based on the Danish Alien Act, according to which a residence permit based on family reunification could not be granted if the applicant’s spouse had received social benefits within a period of three years prior to the application.

In both *H.M. v. Sweden* and *Iuliia Domina and Max Bendtsen v. Denmark*, the Committee observed that “a law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration.”⁵⁰ When it comes to the justification defense, the committee argued in both cases that

*[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different.*⁵¹

In *Marlon James Noble v. Australia*, the applicant was an Aboriginal man with intellectual and psychosocial disabilities. In 2001, when he was 19 years old, he was charged with child sex abuse and was arrested. The court found that the applicant was unfit to plead and subjected him to a custody order. Because the applicant did not have the opportunity to plead not guilty, the court made no finding of guilt. The applicant was deprived of his liberty for more than 10 years, “converting his disability into the core cause of his detention.”⁵² In this case, the

committee mentioned only the reasonableness part of the justification defense.

*The issue before the Committee is therefore to assess whether the differential treatment provided under the Act is reasonable or whether it results in discriminatory treatment of persons with disabilities.*⁵³

Thus, the CRPD Committee has explicitly adopted the pragmatic definition in indirect discrimination cases, even though the final version of General Comment No. 6 elides any explicit acknowledgment of the defenses that it affords.

Silence on the pragmatic definition

The treaty body did not address the pragmatic definition of discrimination in four cases where it dealt with the issue of indirect discrimination. For example, the cases of *Michael Lockrey v. Australia*, *Gemma Beasley v. Australia*, and *J.H. v. Australia* concerned deaf persons. While Mr. Lockrey used steno-captioning, Ms. Beasley and J.H. used Australian Sign Language (Auslan) to communicate. All three applicants were summoned to perform jury service, and while Mr. Lockrey requested steno-captioning, Ms. Beasley and J.H. requested that Auslan interpretation be provided. They were all told that under the legislation in force, Auslan service and real-time steno-captioning would not be provided, considering that the introduction of a non-jury person in the deliberations room would be incompatible with the confidentiality of jury deliberations.

In these cases, the committee did not use the pragmatic definition of discrimination even as it recalled its jurisprudence on indirect discrimination.

*In that regard, the Committee recalls that discrimination can result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate, but that disproportionately affects persons with disabilities.*⁵⁴

In *Liliane Gröninger et al. v. Germany*, the applicant argued that her son was discriminated against in his inclusion in the labor market. She claimed that Germany's integration subsidy to assist persons

with disabilities in participating in the labor market was applicable only to "persons with disabilities whose full working capacity may be restored within 36 months." Furthermore, the subsidy could be claimed only by employers, who had to go through a complicated application process whose duration and outcome were uncertain. The scheme had the effect of deterring employers from employing persons with disabilities, including the applicant's son.

In this case of allegation of indirect discrimination, the CRPD Committee indicated that there is a place for the justification defense by using the word "may," but it did not mention the content of the pragmatic definition of discrimination.

*The already mentioned administrative complexities put applicants in a disadvantageous position and may in turn result in indirect discrimination.*⁵⁵

Beyond the pragmatic definition?

The committee did not use the pragmatic definition of discrimination in the three cases in which it addressed explicitly the concept of direct discrimination. In the case of *V.F.C. v. Spain*, the applicant was forced to retire from his local police officer post because he was declared "permanently and totally disabled." Although the state party explicitly invoked the pragmatic definition in defense of the differential treatment, the committee saw no need to comment on that defense and found that "the facts of the present case disclose one of the forms of discrimination prohibited by the Convention, whether it is viewed as direct discrimination or as a denial of reasonable accommodation."⁵⁶

In the cases of *X v. United Republic of Tanzania* and *Y v. United Republic of Tanzania*, which concerned allegations of direct discrimination, the state party did not submit any observation on the merits and thus did not offer any justification. Both cases concerned applications by persons with albinism, who were attacked and who lost limbs and fingers as a result. In these cases, the CRPD Committee found direct discrimination *without entering into the consideration of whether there was any legitimate aim* for the less favorable treatment based on disability.⁵⁷

Furthermore, in *Bujdosó et al. v. Hungary*, the

committee found that the assessment of individuals' capacity on the basis of disability constituted discrimination. It did not consider any justification regarding this assessment, which automatically amounted to discrimination, most probably direct discrimination. In this case, all six applicants had intellectual disabilities and were placed under guardianship, which had the effect of automatically removing their names from the electoral register pursuant to a provision of the Constitution that was in force at the time. Therefore, the applicants could not vote in either the parliamentary or municipal elections held in 2010. The committee held that since capacity assessment amounted to discrimination, it did not make any sense to assess whether there was any legitimate aim to be achieved or whether the assessment was a proportional means to achieve the objective of the state party.⁵⁸

Before concluding this survey of the committee's jurisprudence, it is worth considering the subset of cases that have been decided since the committee's adoption of its general comment on equality and non-discrimination on March 9, 2018. In these more recent cases, the committee has only once used the pragmatic definition, and this was in a case that turned on *indirect* discrimination (*Iuliia Domina and Max Bendtsen v. Denmark*). In three other cases, the committee made no use of the pragmatic definition in its jurisprudence. These three cases involved two direct discrimination cases (*Y v. United Republic of Tanzania* and *V.F.C. v. Spain*) and one indirect discrimination case (*J.H. v. Australia*).

Alternatives to the pragmatic definition

In light of the foregoing, we need to consider the possibility that in non-discrimination law, the CRPD and the CRPD Committee are pointing toward a new approach, which is different from the pragmatic definition of discrimination. To summarize:

- The CRPD uses an inclusive language, and its definition of "discrimination on the basis of disability" is formulated very broadly. My analysis shows

that the CRPD could be interpreted as rejecting the pragmatic definition of discrimination.

- Despite explicit pressure to acknowledge the pragmatic definition in its general comment on equality and non-discrimination, the committee moved in the opposite direction, eliding passages in which the pragmatic definition was endorsed and in the end acknowledging no legal framework for defenses in relation to either direct or indirect discrimination.
- The CRPD Committee did not mention or rely on the pragmatic definition of discrimination in those three cases in which it addressed allegations of *direct discrimination*, and it did not invoke the pragmatic definition in four cases out of seven in which it addressed allegations of *indirect discrimination*.

Before concluding, we need to consider what alternatives to the pragmatic definition might be available. The following proposals can be taken either as stand-alone candidates or as a package of options.

Alternative 1: No justification in direct discrimination cases

This alternative calls for zero tolerance for any reliance on disability status as the basis for treatment that limits a person's rights or freedoms. This approach would require a new definition of direct discrimination that replaces the pragmatic definition. I propose the following candidate for an alternative definition: Direct discrimination on the basis of disability means any unfavorable treatment on the basis of disability that, because of this disability, impairs or nullifies the recognition, enjoyment, or exercise of any human right or fundamental freedom. Such treatment would admit of no justification defense. Consequently, any unfavorable treatment on this basis would automatically amount to disability-based direct discrimination.

For example, if a person is subjected to unfavorable treatment by being involuntarily admitted to a psychiatric hospital and treated coercively on the grounds of an actual or perceived impairment,

this would automatically be considered as disability-based discrimination, and no justification defense would be permitted.

Neuman has described this alternative as “a rigid definition of discrimination.” However, if we accept that it is a sign of the inclusive approach of the CRPD and the CRPD Committee, then it would be more appropriate to describe this alternative in a positive way. My suggestion is “the progressive definition of discrimination.”

Alternative 2: Justification of reasonable accommodation, support, and accessibility measures in indirect discrimination cases

Under this alternative, if there is an allegation of indirect discrimination, the state party is invited to show that the less favorable treatment of the person with disabilities happened despite the fact that all reasonable accommodations, support, and accessibility measures were provided.

If the state party shows that the less favorable treatment had a legitimate aim and the applicant with disabilities cannot exercise their rights in question even if all reasonable accommodations, support, and accessibility measures were provided for them, then there would be no discrimination. However, if the less favorable treatment did not have a legitimate aim, or even if there was a legitimate aim but the state party did not provide the applicant with disabilities with all reasonable accommodations, support, and accessibility measures in order for the person be able to exercise their rights, it would amount to indirect discrimination.

This approach is based on those four cases of the CRPD Committee in which it addressed the issue of indirect discrimination without invoking the pragmatic definition. In these cases, the committee pointed out that the applicants were denied reasonable accommodations and supports.⁵⁹ Furthermore, this alternative seems to be in line with those examples provided under the definition of “indirect discrimination” in the CRPD Committee’s general comment on equality and non-discrimination.⁶⁰

With regard to the mental health framework, if a person is involuntarily placed in a psychiatric hospital and treated coercively on a ground that is

neutral at face value, but the person can show that these interventions affected them because of their disability, then the less favorable treatment can be justified by proving that the less favorable treatment had a legitimate aim and the person with disabilities was provided with all reasonable accommodations, support, and accessibility measures in order for them be able to exercise their rights.

Alternative 3: No justification in new absolute right cases.

This alternative calls for zero tolerance for specific differential-plus-disadvantageous treatment of persons with disabilities and suggests that (1) *specific absolute rights* can be closely connected to persons with disabilities, and (2) *limitations on these disability-related absolute rights* can never be justified.

The “absolute right” approach is used by the CRPD Committee, for example, when it comes to involuntary mental health interventions. Although my paper does not address the topic of absolute rights, this alternative is indeed present in the interpretative measures of the committee.⁶¹ For example, in its *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities*, the committee claims that there is an absolute ban on deprivation of liberty on the basis of impairments, and thus there is an *absolute right for persons with disabilities not to be deprived of liberty on the basis of disability*.⁶² In connection to the absolute prohibition of torture and cruel, inhuman, or degrading treatment or punishment (article 15 of the CRPD), the committee denies the possibility of involuntary treatment on the basis of disability.⁶³

Conclusion

I started my analysis by pointing to an imperative to eliminate discrimination against persons with psychosocial disabilities. I noted that according a longstanding pragmatic definition of non-discrimination, differential treatment does not constitute discrimination if the purpose or effect of the differential treatment is to achieve a legitimate aim and if the differential treatment can be objectively and reasonably justified. Then I undertook to investigate

whether this approach remains valid considering recent developments in international human rights law, especially in light of the UN Convention on the Rights of Persons with Disabilities.

My findings include the following:

- Using the VCLT to interpret the CRPD offers ambiguous results on whether the pragmatic definition of discrimination remains valid under the convention.
- The drafting process of the CRPD Committee's general comment on equality and non-discrimination shows a deliberate resistance to acknowledging the "objective and reasonable" justification defense.
- The evidence that the CRPD Committee rejects the pragmatic definition is inexplicit but considerable in direct discrimination cases and in a number of indirect discrimination cases. The evidence that the committee endorses the pragmatic definition is direct and explicit in a number of indirect discrimination cases.
- In the discrimination cases adjudicated by the CRPD Committee since its adoption of General Comment No. 6, we find a trend away from reliance on the pragmatic definition in direct discrimination cases, and hesitation to rely on the pragmatic definition in indirect discrimination cases.

Taken together, these results demonstrate that with regard to the definition of non-discrimination and associated practices for justifying differential treatment, the time has come to consider alternatives to the pragmatic definition of discrimination.

The evidence that I have surveyed in this research is not itself sufficient to answer the first-order question of human rights law—namely, whether any provision of coercive psychiatric care can avoid disability-based discrimination. But in order to address that first-order question in a legally rigorous manner, it is imperative to address the issues that have been surveyed in the foregoing: whether the "pragmatic definition" of discrimination remains valid in light of developments in 21st-century

international human rights standards, and what alternative approaches might be available to replace it.

I surveyed three such alternatives above, tracing each to suggestions in the jurisprudence of the CRPD Committee and illustrating how each can be applied in determining whether coercive psychiatry is discriminatory. Under Alternative 1, coercive psychiatric interventions constitute discrimination on the basis of disability if these interventions are directly based on the disability or impairment of the person concerned. Under Alternative 2, there is scope in principle for defenses against the charge that coercive psychiatric interventions constitute indirect discrimination. Under Alternative 3, such interventions are discriminatory in nature and can never be justified.

It is not yet entirely clear in which direction the CRPD Committee's interpretation of the principle and the right to equality and non-discrimination will evolve. The committee may decide to continue using the pragmatic definition but can also replace the "objective and reasonable" justification defense with alternatives presented in this analysis or with other schemata.

I hope that this exploration of existing and potential schemata for defenses can strengthen the human rights of persons with disabilities.

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