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Article

## Reasonable Accommodation as a Gateway to the Equal Enjoyment of Human Rights: From New York to Strasbourg

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### Abstract

The UN Convention on the Rights of Persons with Disabilities (CRPD) explicitly embeds the concept of reasonable accommodation within the principle of non-discrimination. Article 2 of the CRPD unambiguously recognizes that reasonable accommodation is vital in enabling persons with disabilities to enjoy and exercise their rights on an equal basis with others. This article argues that in the ten years since its entry into force, the CRPD has stimulated a process of cross-fertilization. In particular, it contends that the CRPD has played a crucial role in the advancement of disability equality, and in the recognition of reasonable accommodation as a gateway to the equal enjoyment of all human rights within the European human rights system. By adopting a legal perspective and a traditional doctrinal approach, this article focuses on relevant European Court of Human Rights (ECtHR) case law. It shows the gradual adoption by the ECtHR of the concept of reasonable accommodation as an essential element to remove specific barriers or disadvantages to which a particular disabled individual would otherwise be subject. The primary emphasis of this short article is on the ECtHR case law and on the extent to which it has translated the CRPD and the work of the CRPD Committee into the European human rights system.

### Keywords

disability; discrimination; equality; human rights; legislation; reasonable accommodation

### Issue

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### 1. Introduction

The legal concept of “reasonable accommodation” (or its synonym “reasonable adjustment”)<sup>1</sup> first appeared in the United States. It was introduced in the US Equal Employment Opportunity Act of 1972, which amended the Civil Rights Act 1964 (Jolls, 2001; Willborn, 2016) and, shortly thereafter, in Canadian law (Banks, 2016). Originally, it defined specific solutions that the employer was obliged to adopt in order to accommodate specific needs related to religious practices. In 1973, the US Rehabilitation Act extended the concept of reasonable accommodation to the disability context. As noted by Waddington (2011, p. 187):

The obligation to make a reasonable accommodation on the grounds of disability is based on the recognition that, on occasions, the interaction between an individual’s impairment and the physical or social environment can result in the inability to perform a particular function, job or activity in the conventional manner.

Lawson (2012, p. 846) highlights that the duty to provide reasonable accommodations entails a duty to remove barriers created by physical structures, traditional methods of communication and standard policies or practices where these would place a person with a disability at a disadvantage when compared with a non-disabled per-

<sup>1</sup> The terms “reasonable accommodation” and “reasonable adjustment” are generally considered interchangeable. The term adjustment is used in some national laws, such as e.g. the UK Equality Act 2010.

son. Along the lines traced by the Rehabilitation Act, the Americans with Disabilities Act (ADA) of 1990 has introduced a provision requiring employers to adopt specific adjustments that remove the environmental and social barriers faced by persons with disabilities<sup>2</sup> in the workplace (Rosen, 1991). It includes a broad prohibition of discrimination on the grounds of disability and qualifies as a discriminatory behavior the denial of reasonable accommodation. In 2000, the concept of reasonable accommodation was incorporated within European Union (EU) legislation. Article 5 of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation establishes the duty of the employer to provide disabled workers with reasonable accommodation. With the 2006 UN Convention on the Rights of Persons with Disabilities (CRPD), which entered into force in May 2008, reasonable accommodation has become an integral part of the international human rights framework. The CRPD unequivocally links the duty to accommodate to the principle of equality (Broderick, 2015a, p. 107), recognizing the role of reasonable accommodation as a gateway to the equal enjoyment of all human rights, being they civil, political or socio-economic rights (Lawson, 2008a, pp. 65–66).

The CRPD as a whole has experienced an unprecedented level of success, and, at the time of writing, it has been ratified by 175 States across the globe as well as by the EU. It has become the main legal benchmark against which the appropriateness of domestic disability laws and policies should be measured and the protection and promotion of the rights of persons with disabilities should be assessed. In Europe, the CRPD has had a significant influence on the legal discourse surrounding disability equality. The Court of Justice of the EU as well as national courts have referred to the CRPD as the key international document for the protection and promotion of the rights of persons with disabilities in their decisions. They have increasingly attempted to interpret domestic law in a manner consistent to the CRPD (Ferri, 2014; Waddington & Lawson, 2018). The CRPD itself requires States Parties to ensure full compliance with the Convention within their domestic legal order, an obligation that even extends to their national courts. However, and more broadly, the CRPD has stimulated a process of cross-fertilization and has played a crucial role in the advancement of disability equality beyond State Parties (Ferri, 2017). It has contributed to the advancement of the protection of the rights of persons with disabilities within the European human rights system of the Council of Europe, which mainly revolves around the European Convention of Human Rights (ECHR). The European Court of Human Rights (“ECtHR” or “Strasbourg Court”) has referred to the CRPD in almost all of the most recent case law on disability. Lawson (2012, p. 847) suggests that “the relevance of the CRPD in questions of in-

terpretation of the ECHR in matters relating to disability” has been fully acknowledged by the ECtHR. Favalli (2018) goes even further and argues that the ECtHR has recognized the core provisions of the CRPD as general principles of international law that must be complied with when applying and implementing the ECHR.

Against this background, this article contends that the ECtHR decisions in which the influence of the CRPD is most relevant and obvious concern the role of reasonable accommodation in ensuring equal rights for persons with disabilities. By adopting a legal perspective and a traditional doctrinal approach, this succinct article deliberately focuses on the ECtHR case law. It endeavors to discuss the extent to which it has effectively translated the CRPD and the work of the CRPD Committee into the European human rights system. In doing so, it tallies with previous research which argues that the CRPD has shed a light on the significance of reasonable accommodation as a primary tool to achieve disability equality across different jurisdictions (Brown & Lord, 2011; Ferri, 2017; Mégret & Msipa, 2014). After this Introduction, the remainder of this article is divided into five sections. Building on the broad array of literature on the topic (Broderick, 2015a, 2015b; Brown & Lord, 2011; Cera, 2017; Lawson, 2007, 2008a, 2008b, 2009, 2012, 2017), Section 2 discusses in a general fashion the role of reasonable accommodation in the CRPD, in light of the CRPD Committee’s jurisprudence and general comments. Section 3 goes on to examine in a general fashion how the concept of reasonable accommodation has been incorporated into the ECHR framework by the Strasbourg court. Sections 2 and 3 provide important context for the rest of the discussion that is conducted in Section 4. The latter aims to highlight the gradual adoption by the ECtHR of the concept of reasonable accommodation. Section 5 concludes with brief remarks on the role of reasonable accommodation in ensuring disability equality.

## 2. Reasonable Accommodation in the CRPD

### 2.1. Reasonable Accommodation and Equality in the CRPD: Setting the Scene

The CRPD is underpinned by the social model of disability and embraces the view that “disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others” (UN, 2016, Preamble, lett. e). Dignity, individual autonomy, equality, accessibility and inclusion within society and the acceptance of disability as part of human diversity are some of the key principles around which the CRPD revolves and that permeate the entirety of the text. The Convention, by recasting disability as a social construction (Stein & Lord, 2009, p. 33), focuses

<sup>2</sup> The terms “persons with disabilities” and “disabled people” are used interchangeably throughout this article, consistently with the idea that disability stems from the interaction between the individual impairment and social structures and systems, and in line with a social-contextual understanding of disability.

on the removal of barriers and provision of accommodations to ensure the equal enjoyment of rights by persons with disabilities, and their full participation in society. Ngwenya (2013, p. 478) affirms that the emphasis placed by the CRPD on accommodating human diversity, providing individualized support, is “the Convention’s greatest transformative modality”.

The concept of reasonable accommodation is a core of feature of the CRPD, and is unequivocally incorporated into the non-discrimination and equality principles. Article 5(2) of the CRPD requires States Parties to prohibit discrimination on the basis of disability. The latter is defined in Article 2 of the CRPD as:

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. (UN, 2016)

Article 5(3) of the CRPD explicitly requires States Parties to take all appropriate steps to ensure that reasonable accommodation is provided. Reasonable accommodation is clearly defined in Article 2 of the CRPD as

The necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. (UN, 2016)

Since the Convention does place reasonable accommodation within the realm of non-discrimination and equality, according to the CRPD Committee, States Parties must immediately ensure that reasonable accommodation is provided, since the duty to accommodate is not subject to progressive realization (CRPD Committee, 2017a, para. 46).

## 2.2. Reasonable Accommodation as an “Incidental Right” and as a Gateway to the Equal Enjoyment of Human Rights

Aside from Articles 2 and 5 of the CRPD, reasonable accommodation is mentioned explicitly in other provisions of the Convention, for example in Article 24 on the right to education and in Article 27 on the right to work. Moreover, Article 14(2) of the CRPD explicitly recognizes that reasonable accommodations must be provided to persons with disabilities held in detention. However, as noted by Broderick (2015a, p. 155), “by virtue of the cross-cutting nature of Articles 2 and 5 of the CRPD”

persons with disabilities are “holders of a fundamental right to be accommodated in a variety context and by a wide array of entities”.

It is often acknowledged that the Convention does not create new rights. Rather, it “rewrites” human rights within a disability context. In doing so it does include “amplified formulations of human rights” (Kayess & French, 2008, p. 28), and creates “incidental rights” (Harpur, 2012, p. 2) which ensure those same rights can be fully enjoyed by persons with disabilities. Reasonable accommodation is one of them. Insofar as it represents a right enforceable in itself, applicable to all persons with disabilities, who, by virtue of Article 1(2) of the CRPD, 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. (UN, 2016)

Since its early decisions, the CRPD Committee has emphasized that the right to be provided with reasonable accommodation functions as a gateway to the exercise of all other rights.<sup>3</sup> The case of *H.M. v Sweden* (CRPD Committee, 2012) is quite exemplary in this respect. Mrs. H.M., who was suffering from a chronic disease which had led to her being unable to walk or stand, was refused planning permission to build an indoor swimming pool next to her house for her to carry out hydrotherapy which would alleviate the symptoms of her condition. The refusal of planning permission by the local authorities was due to the fact that the local urban plan did not allow new constructions in the area concerned. The Swedish administrative authority, followed by the courts, upheld the initial decision and contended that derogations from the urban plan were not permissible. Having exhausted all domestic remedies, Mrs. H.M. lodged a complaint with the CRPD Committee. The latter, in its decision, focused on the interpretation of the concepts of non-discrimination and reasonable accommodation. In particular, the CRPD Committee acknowledged that the Mrs. H.M.’s health was of paramount concern. It also held that access to a hydrotherapy pool in her home was essential, as it constituted the only effective means of protecting the right to health of the applicant. Then, the Committee recognized that a derogation from the local urban plan, to allow the construction of a hydrotherapy pool, would constitute a reasonable accommodation. In essence, it held that States Parties to the CRPD are under the obligation to consider the particular circumstances and needs of persons with disabilities and to accommodate these needs when applying domestic legislation.

The CRPD Committee has also articulated the unequivocal linkages between reasonable accommodation and the fundamental principle of human dignity. In par-

<sup>3</sup> As Lawson (2009) contends, by cutting across the full spectrum of rights—civil, political, economic, social and cultural—provided for in the CRPD, reasonable accommodation plays a “peculiar bridging role”.

ticular, in *X v Argentina* (CRPD Committee, 2014a) and in the “Guidelines on Article 14 of the CRPD” (CRPD Committee, 2015), the Committee explicitly referred to reasonable accommodation in places of detention as an essential gateway for the equal protection of the dignity of persons with disabilities. In a similar vein, in its most recent General Comment No. 5 on independent living, the Committee has highlighted the role of reasonable accommodation in enhancing autonomy and independence of people with disabilities (CRPD Committee, 2017a).

Reasonable accommodation could be construed as an “incidental right”, using the term suggested by Harpur (2012, p. 2), in that it is essential to ensure that other existing rights are realized. It matches a corresponding duty to accommodate which is placed on a broad range of stakeholders, as well as a general obligation on State Parties to ensure the provision of reasonable accommodation. As pointed out by Brown and Lord (2011, p. 279), the duty to provide reasonable accommodation in the CRPD extends to “the State, employers, education providers, health care providers, testing and qualification bodies, providers of goods and services and private clubs”. In essence, Article 5(3) of the CRPD requires States Parties to ensure that all these actors “reasonably adjust policies, practices and premises that impede the inclusion and participation of persons with disabilities” (UN, 2016). Additionally, Lawson (2008b, p. 32) suggests that Article 5(3), read in conjunction with Article 8 of the CRPD on awareness-raising, requires States Parties to encourage reflection and promote dialogue on the duty to accommodate, and on all the types of measures that can be taken.

Lawson (2012, p. 848) suggests that the individual-oriented nature of the reasonable accommodation obligation:

Requires duty-bearers to resist making assumptions as to what might be most appropriate for a particular individual and demands that instead they engage in a dialogue with such a person about how the relevant disadvantages might most effectively be tackled.

With specific regard to the employment context, it has been observed that a “failure to consult and involve the disabled person in question would also appear to sit uncomfortably with the CRPD’s general principle of respect for inherent dignity” (Ferri & Lawson, 2016, p. 49).

Even though the Convention gives a definition of reasonable accommodation in Article 2, it does not provide specific guidance on what the incidental right to be provided with an accommodation entails. Unsurprisingly, the Convention is silent on what, in practice, constitutes a reasonable accommodation and on the procedural aspects of the adoption of an accommodation. Examples of accommodations have been put forward by the CRPD Committee in its general comments relating to women with disabilities (CRPD Committee, 2016a) and with regards to the educational context (CRPD Com-

mittee, 2016b). Other examples can be found in studies or documents released by other UN bodies or agencies, such as the Office of the United Nations High Commissioner for Human Rights (OHCHR, 2010) and by the World Health Organization (WHO & World Bank, 2011). The International Labour Organization in 2016 (ILO, 2016) has also compiled a list of best practices in relation to reasonable accommodations in the employment context. The CRPD Committee has however elaborated on the concept of reasonable accommodation and its meaning. It clarified that the word “reasonable” concerns the relevance and the effectiveness of the specific accommodation in removing the individual situation of disadvantage that the person with a disability is facing, and relates to the role of the accommodation in countering discrimination. This approach is confirmed by the CRPD Committee’s decision in *Jungelin v Sweden* (CRPD Committee, 2014c) and in *Michael Lockrey v Australia* (CRPD Committee, 2016c).

### 2.3. Reasonable accommodation v Accessibility

Although this analysis does not include a reflection on the concept of accessibility and on how (and whether) it has been translated in the ECtHR case law, it seems useful to briefly trace the boundaries of “reasonable accommodation” by comparing and contrasting it with accessibility in light of the CRPD Committee’s General Comment No. 2 (CRPD Committee, 2014b).

Without delving into the theoretical question on whether accessibility is a principle, a right, or a facilitator of rights, the main difference between accessibility and reasonable accommodation is that accessibility obligations laid down in the CRPD are group related, while, as discussed above, reasonable accommodation has an individualised nature. Consequently, accessibility obligations are anticipatory in nature. The CRPD Committee affirms that the “duty to provide accessibility is an *ex ante* duty” and that States Parties therefore have “the duty to provide accessibility before receiving an individual request to enter or use a place or service” (CRPD Committee, 2014b, para. 25). The CRPD Committee has also emphasized that its most fundamental characteristic is its individualized nature. The CRPD Committee’s “General Comment no. 2 on accessibility” (CRPD Committee, 2014b) and subsequent comments (CRPD Committee, 2016a, 2016b) explain that, by virtue of this individualized nature, the duty to provide reasonable accommodation arises *ex nunc*, i.e., only at the moment at which a person with a disability has need for a particular solution in a given situation. It might be argued that the duty to accommodate arises when the duty-bearer knows or ought to know (using the ordinary diligence) about the disability and of the specific needs of the person with a disability. However, the CRPD Committee has mentioned that the duty arises from the moment a person with a disability requires the accommodation in a given situation (CRPD Committee, 2016a, 2016b). Hence, there is



still some ambiguity surrounding the temporal scope of the right and the corresponding duty to accommodate.

Another key difference is that reasonable accommodation obligations are subject to the limit of “undue” or “disproportionate” burden, as will be discussed in subsection 2.4. By contrast:

The obligation to implement accessibility is unconditional, i.e. the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities. (CRPD Committee, 2014b, para. 25)

#### 2.4. The “Disproportionate or Undue Burden” Limit

The right to be provided with a reasonable accommodation is not absolute (Waddington & Broderick, 2017, p. 12) and is subject to the “disproportionate or undue burden” limit. This means that the denial of reasonable accommodation does not constitute a discrimination when the accommodation entails a disproportionate burden on the duty bearer.

Regrettably, there is no explicit guidance in the CRPD as to what may constitute a disproportionate burden. In *Jungelin v Sweden* (CRPD Committee, 2014c) and in *Gemma Beasley v Australia* (CRPD Committee, 2016d), the CRPD Committee held that States Parties to the Convention enjoy a margin of discretion when formulating and assessing the reasonableness and proportionality of accommodation measures. *Jungelin v Sweden* is particularly relevant in this respect. The complaint made to the CRPD Committee was raised by Ms. Jungelin, a person with a visual impairment. Despite the fact that she met the required qualification for the job she had applied to, she was not hired because her potential employer’s intranet system was not accessible and could not be adjusted to accommodate her sight impairment. Ms. Jungelin claimed that this amounted to a denial of reasonable accommodation, and consequently a discrimination on the grounds of disability. However, her complaints were rejected by the Swedish courts. Endorsing the defense of the employer, the domestic tribunals took the view that the cost of adjusting the computer system would have imposed a disproportionate burden on the employer. The CRPD Committee, with some dissenting opinions, concluded that the Swedish courts had carried out a thorough and well-balanced assessment of the factual circumstances at hand. The decision to deem the accommodation requested as constituting an unreasonable burden was therefore justified and the CRPD Committee held that there was no violation of Article 5 of the CRPD on equality and non-discrimination. This decision suggests that the financial cost of a requested accommodation is a relevant factor in determining whether and to what extent the duty-bearer can duly claim to be ex-

empt from the duty to accommodate.<sup>4</sup> This approach is confirmed by the “General Comment No. 4 on Article 24: Right to education” which explicitly affirms that “the availability of resources and financial implications is recognized when assessing disproportionate burden” (CRPD Committee, 2016b, para. 27).

The CRPD Committee has not elaborated further on specific criteria to carry out the proportionality test, however its jurisprudence and general comments would suggest that, by its very nature, reasonable accommodation entails balancing the needs and interests of both the person with a disability and the duty-bearer.

### 3. Equality and Reasonable Accommodation in the ECHR: “The Feast of Stone” and the Strasbourg Judges

Within the European context, the Council of Europe, which plays a primary role in the protection of human rights, has not yet adopted any specific binding instrument on the rights of persons with disabilities. The latter are however protected by the European Social Charter (ESC) and the ECHR and through various policy initiatives (Favalli, 2018; Ferri, 2017; Seatzu, 2014). The ESC, in its revised formulation, includes an article on the right of persons with disabilities to independence, social integration and participation in the life of the community. Notably, this provision (i.e., Article 15 of the revised ESC) refers to positive measures which provide persons with disabilities with education and vocational training, and explicitly mentions that States Parties must promote measures intended “to adjust [the] working conditions to the needs of the disabled”. While reasonable accommodation is not explicitly mentioned, it does seem to be encompassed within the generic reference to measures that facilitate the exercise of the freedom of movement, the right to use goods and cultural content, and the right to housing. As noted elsewhere (Ferri, 2017), the European Committee on Social Rights has, in a few occasions, highlighted the existence of the duty to accommodate as an integral element of disability equality.

By contrast to the ESC, the ECHR does not contain any express reference to disability,<sup>5</sup> disability rights or reasonable accommodation. However, Article 14 of the ECHR does prohibit discrimination “on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”, and, for the first time in *Glor v Switzerland* (ECtHR, 2009), the Strasbourg court established that this provision also encompasses the prohibition of discrimination on the basis of disability. The case revolved around the application of the Swiss legislation on the military-service tax, the payment of which is required for those who decide not to carry out military service. Swiss law provided a twin-track system, exempting from the payment of the

<sup>4</sup> This approach is in line with that adopted at the EU level with regards to the implementation of Article 5 of Directive 2000/78.

<sup>5</sup> Neither disability nor persons with disabilities are mentioned in the text of the ECHR. There is only a reference to Intellectual disability in Article 5(e) ECHR on the lawful detention of “persons of unsound mind”.

tax all those having a “major” disability (i.e., 40% physical or mental disability), but requiring the payment to all the others declared unfit to military service by virtue of a “minor” disability. The applicant, Mr. Glor, who suffered from diabetes was declared unsuited for military service. Since his condition did not meet the threshold of 40% physical or mental disability required by Swiss law, he was required to pay the military-service exemption tax, for not carrying his military service. Mr. Glor argued that the disability threshold provided by Swiss law (40% physical or mental disability) was discriminatory and violated Article 14 of the ECHR. The Strasbourg Court considered that the Swiss authorities failed to strike a balance between the protection of the interests of the community and respect for the rights of Mr. Glor as a person with a disability. The ECtHR recognized that the list of grounds of discrimination of Article 14 is not exhaustive and that discrimination based on disability is included under the “other status” grounds. It held that the distinction made by the Swiss authorities between persons who were unfit for service and not liable to the tax in question and persons who were unsuited but still obliged to pay it was not justified and constituted discrimination. Favalli (2018) highlights that, in *Glor v Switzerland*, the ECtHR has also adopted a broad conceptualization of what constitutes a disability in line with the CRPD. This author suggests that such a broad conceptualization has been upheld in subsequent decisions in which the Court has extended the application of the non-discrimination protection under Article 14 of the ECHR to persons affected by HIV, as a form of disability. In *Kiyutin v Russia* (ECtHR, 2011) the Strasbourg judges considered that the refusal of a residence permit to Mr. Kiyutin because he was HIV-positive constituted a discrimination prohibited by Article 14. The ECtHR went on to affirm that a distinction made on the grounds of an individual’s health status, including conditions such as an HIV infection, should be covered—either as a disability or a form thereof—by the term “other status” listed in Article 14 of the ECHR. The same approach has been taken in *I.B. v. Greece* (ECtHR, 2013), which concerned HIV-based discrimination in the employment context. Timmer (2013) affirms that the latter case is also particularly notable in that it embraces the social model of disability, and the role of social barriers and stigma in creating discrimination and preventing equal treatment.

As it will be further discussed in Section 4, the explicit recognition that any discrimination based on disability is prohibited under the ECHR goes hand in hand with the acknowledgement of the right of persons with disabilities to be provided with reasonable accommodation. First, in *Glor*, the Court incidentally observed that the Swiss authorities had not taken sufficient account of Mr. Glor’s individual circumstances, imposed on Mr. Glor the payment of the military-service tax and did not propose to him any alternative services compatible with his disability. Although the ECHR has not explicitly recognized a right to obtain reasonable accommodations, the judg-

ment can be interpreted as an implicit recognition that some form of obligation to provide reasonable accommodation is included in the principle of non-discrimination laid down in Article 14 of the ECHR (Broderick, 2015b). The ECtHR adopted a more explicit approach in *Çam v Turkey* (ECtHR, 2016a). This case concerned the refusal to enroll the applicant, a girl with a visual impairment, as a student at the Turkish National Music Academy. Even though Ms. Çam had demonstrated adequate ability in playing the Turkish lute (*bağlama*), she was refused admission because the music courses were not accessible to blind people. The applicant alleged that she had been discriminated against on account of her blindness and complained of a violation of Article 14 of the ECHR read in conjunction with Article 2 Protocol 1 on the right to education. In its decision, the ECtHR held that discrimination on the grounds of disability under Article 14 ECHR encompasses the denial of reasonable accommodations as defined by Article 2 of the CRPD. The Strasbourg judges stated that, by refusing to register the applicant without accommodating her needs, the Turkish authorities had prevented her, without any objective justification, from exercising her right to education.

A month after *Çam v Turkey*, in *Guberina v Croatia* (ECtHR, 2016b), the ECtHR elaborated further on the concept of reasonable accommodation. The case arose from the complaint of the father of a severely disabled child and concerned a tax exemption on the purchase of a home. Mr. Guberina lived in a flat located on the third floor of an inaccessible building in Zagreb. Since his child had found it increasingly difficult to live in the flat, the applicant and his family decided to move to a different and more accessible accommodation and purchase a new flat. Mr. Guberina requested a tax exemption on the purchase of the new property. According to Croatian legislation, this exemption was in fact available to buyers who moved in order to solve their “housing needs”, when their previous property did not possess “basic infrastructures” (i.e., did not satisfy basic hygiene and technical requirements). The applicant argued that accessibility was a feature of “basic infrastructure”, and his previous flat did not satisfy his family’s housing needs. By contracts the Croatian authorities decided that the applicant’s old flat possessed all basic infrastructures features and dismissed his request, without taking into consideration his son’s particular circumstances. After having exhausted all domestic remedies, Mr. Guberina alleged the violation of Articles 8 and 14 of the ECHR in conjunction with Protocol 1 on the right to property. The ECtHR reaffirmed the need to give an extensive interpretation to the concept of non-discrimination on the basis of disability, including discrimination by association. In addition, and most notably for the purpose of this analysis, the Court recalled the concept of reasonable accommodation as defined in Article 2 of the CRPD and held that the Croatian authorities failed to consider the specific needs of the applicant’s disabled son. The ECtHR considered that that the manner in which the Croatian legislation had been

applied in practice had failed to accommodate the specific needs of the applicant, in breach of the CRPD.

#### 4. Synergies between the CRPD and the ECHR

##### 4.1. Reasonable Accommodation and Equality

The seeds of the acknowledgment of reasonable accommodation as a tool to ensure disability equality are long standing in the European human rights system. They pre-date *Glor v Switzerland* and can be found in cases dating back to the late 1990s and early 2000s (De Schutter, 2005), such as *Botta v Italy* (ECtHR, 1998) and *Price v United Kingdom* (ECtHR, 2001).<sup>6</sup> However, only in *Glor v Switzerland*, and more palpably in *Çam v Turkey* and *Guberina v Croatia*, has the ECtHR interpreted the concept of discrimination on the grounds of disability as encompassing the denial of reasonable accommodation. It is not a coincidence that the importance of reasonable accommodation in the context of the application of Article 14 of the ECHR has emerged after the entry into force of the CRPD, and that, in each of these cases, the ECtHR refers several times and explicitly to the definition of reasonable accommodation laid down in Article 2 of the CRPD. In *Çam* the Court read Article 14 of the ECHR in the light of the CRPD and held that persons with disabilities are entitled to reasonable accommodation, which is essential:

To ensure ‘the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’ (Article 2 of the Convention on the Rights of Persons with Disabilities...). Such reasonable accommodation helps to correct factual inequalities which are unjustified and therefore amount to discrimination. (ECtHR, 2016a, para. 65)

The Strasbourg court embraced a concept of substantive equality that fully encompasses the duty to take account of the needs of people with disabilities and to accommodate those needs accordingly. In *Glor v Switzerland*, *Çam v Turkey* and *Guberina v Croatia*, it places a great emphasis on the necessity to consider the specific and individual circumstances of persons with disabilities and to accommodate these when applying domestic legislation. In this respect, the reasoning of the ECtHR in *Guberina v Croatia* presents interesting similarities to the CRPD’s Committee decision in *H.M. v Sweden*. In *H.M.*, Swedish authorities failed to consider the specific health situation of the applicant when denying the planning

permission, and, in *Guberina*, Croatian authorities did not recognize:

The factual specificity of the applicant’s situation with regard to the question of basic infrastructure and technical accommodation requirements to meet the special housing needs of his family. The domestic authorities adopted an overly restrictive position on the applicant’s particular case, by failing to take into account the specific needs of the applicant and his family when applying the condition relating to “basic infrastructure requirements” to their particular case, as opposed to other cases where elements such as the surface area of a flat, or access to electricity, water and other public utilities, might have suggested adequate and sufficient basic infrastructure requirements. (ECtHR, 2016b, para. 86)

In both cases, national authorities should have gone beyond a strict interpretation of national law and acted in a manner consistent with the CRPD.

##### 4.2. Reasonable Accommodation as an “Incidental Right” and as a Gateway to the Equal Enjoyment of Human Rights

The Strasbourg judges have clearly embraced a view of reasonable accommodation as entailing the removal of the specific disadvantage faced by the person with a disability in order to ensure substantive equality. While *Glor v Switzerland* is merely suggestive of a right of persons with disabilities to be provided with reasonable accommodation (Broderick, 2015b, p. 15; Brown & Lord, 2011, p. 291), *Çam v Turkey* and *Guberina v Croatia* are indeed more explicit. It can be inferred from these cases that persons with disabilities have a right to reasonable accommodation, which is enforceable as an individual stand-alone right within the framework of non-discrimination and equality, even though it is contingent on the enforcement of another substantive right (e.g., in *Çam*, the right to education).

The elaboration by the ECtHR of the right to be provided with a reasonable accommodation is still in its infancy. However, both the CRPD Committee and the ECtHR conceptualize reasonable accommodation as “quintessentially individualized”.<sup>7</sup> This is well exemplified by the ECtHR’s statement in *Glor* that recognizes “special forms of civilian service *tailored* (emphasis added) to the needs of people in the applicant’s situation are perfectly envisageable” (ECtHR, 2009, para. 95). This approach is

<sup>6</sup> In the latter case, as suggested by Lord & Brown (2011) and by Lawson (2012), the ECtHR acknowledged that reasonable accommodation is an essential element to protect human dignity and prevent inhuman treatment, even though it did not place it in the realm of the equality norm. Ms Price, who had a serious kidney condition, was sentenced to three nights in custody. During her stay in prison she was kept in inadequate cell, and she had serious difficulties in using toilets facilities which substantially aggravated her physical condition. The ECtHR stated that the conditions in which Ms Price was held amounted to degrading treatment, and addressed the failure to accommodate the needs of MS Price as woman with disability in a prison setting. A similar approach has been taken in subsequent cases, such as *Jasinskis v. Latvia* (ECtHR, 2010) and *Grimailovs v. Latvia* (ECtHR, 2013b), which also cite the CRPD. In all these cases, reasonable accommodation is considered an element inherent to the application of Article 3 of the ECHR which prohibits torture and inhuman and degrading treatment or punishment. This approach is similar to the one adopted by the CRPD Committee in *X v Argentina* and sits well with the interpretation given to Article 14(2) CRPD.

<sup>7</sup> This expression is used by Gerard Quinn (Quinn, 2007).



confirmed by the recent case of *Kacper Nowakowski v Poland* (ECtHR, 2017), in which the Court considered (to a very limited extent and somewhat implicitly) the role of reasonable accommodation and referred to the specific needs of persons with disabilities. The case concerned the rights of a Deaf father to contact his son, who also had a hearing impairment. Mr. Nowakowski, the applicant, complained that the dismissal of his request to extend contact with his son had been solely on the ground of his disability and had been discriminatory. He alleged the violation of Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) of the ECHR. The ECtHR decision focused on Article 8, rather than on Article 14. When deciding the case, the ECtHR examined the reasons that led national courts to dismiss Mr. Nowakowski's request. The Strasbourg court highlighted that Polish courts involved the child's mother in the contact arrangements, since she was able to communicate both orally and in sign language. However, this solution ignored the existing animosity between the parents and the frequent complaints by the applicant that the mother had attempted to obstruct contact and to marginalise his role. The Court, considering the specific factual situation, held that the applicant and his child would have required more time than would be the case in a normal situation. It stated that the dismissal of Mr. Nowakowski's application for extension of contact meant that the applicant kept his right to two hours of contact per week in the presence of the child's mother. The ECtHR went on to affirm that:

The domestic courts should have envisaged additional measures, more adapted to the *specific* circumstances of the case....(emphasis added) Having regard to the specifics of the applicant's situation and the nature of his disability, the authorities were required to implement *particular* measures that took due account of the applicant's situation. The Court refers here to the second sentence of Article 23 § 2 of the CRPD, which provides that State Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities. (ECtHR, 2017, para. 93)

However, similar to the CRPD's Committee, the Strasbourg court has so far refrained from giving specific guidance on what might constitute a reasonable accommodation. In *Çam*, the Strasbourg court affirmed:

The Court is not unaware that every child has his or her specific educational needs, and this applies particularly to children with disabilities. In the educational sphere, the Court acknowledges that reasonable accommodation may take a variety of forms, whether physical or non-physical, educational or organisational, in terms of the architectural accessibility of school buildings, teacher training, curricular adaptation or appropriate facilities. That being the case,

the Court emphasises that it is not its task to define the resources to be implemented in order to meet the educational needs of children with disabilities. The national authorities, by reason of their direct and continuous contact with the vital forces of their countries, are in principle better placed than an international court to evaluate local needs and conditions in this respect. (ECtHR, 2016a, para. 66)

Similarly, in *Kacper Nowakowski v Poland* the ECtHR held that it was up to the national court to identify suitable accommodations:

The domestic courts' duty, in cases like the present one, is to address the issue of what steps can be taken to remove existing barriers and to facilitate contact between the child and the non-custodial parent. However, in the instant case they failed to consider any means that would have assisted the applicant in overcoming the barriers arising from his disability. (ECtHR, 2017, para. 95)

Both the CRPD Committee and the ECtHR leave States Parties (and national authorities) with a wide margin of appreciation in determining what kind of accommodations might be reasonable (i.e., effective in the particular situation). Some additional indication of what might constitute a reasonable accommodation within the scope of the European human rights system could have been provided in *Bayrakci v Turkey* (ECtHR, 2016c). The case concerned a disabled employee who alleged the lack of suitable toilet facilities installed at his workplace. The Court, however, declared the applicant's complaint inadmissible for failure to exhaust domestic remedies. In *I.B. v Greece*, the Court also missed an opportunity to elaborate on reasonable accommodation. As noted by Timmer (2013), the Strasbourg Court, in line with domestic courts, emphasized that the applicant's health status had not diminished his work capacity, but carefully avoided considering whether reasonable accommodations might be necessary for persons with HIV-related illness to carry out their work.

Finally, the ECtHR has not yet been directly confronted with procedural aspects, and has, thus far, been unable to elaborate on the "disproportionate or undue burden" limit. The CRPD Committee still offers limited guidance in this respect, but, arguably, the forthcoming General Comment No. 6 on the right of persons with disabilities to equality and non-discrimination has the potential to stimulate cross-fertilization between the ECHR and the CRPD. The CRPD's Committee has identified implementation gaps with regard to Article 5 of the CRPD and intends to clarify, among others the concept of substantive equality and the limits, processes and duties relating to the provision of reasonable accommodation (CRPD Committee, 2017b). It is expected that additional synergies might occur between the CRPD Committee's work and the ECtHR case law.

## 5. Conclusion

In 2011, Brown and Lord argued that the CRPD and its complaint mechanism should rouse and stimulate “the somewhat sluggish development” of the concept of reasonable accommodation in the ECtHR and other regional systems (Brown & Lord, 2011, p. 273). Seven years after the release of their paper, it seems that indeed the CRPD and the jurisprudence of the CRPD Committee have prompted an evolution in the understanding of the concept of equality and non-discrimination in the European human rights system. As this short article has attempted to show, the Strasbourg court case law gradually adopted the concept of reasonable accommodation as set out in the CRPD. As well explained by Waddington and Broderick (2017, p. 12), reasonable accommodation “is an individualised response to the particular needs of an individual with disabilities to ensure equal opportunities” (emphasis added), and the ECtHR has clearly and unequivocally embraced this view. The Strasbourg judges, by referring to the CRPD, have recognized that reasonable accommodation is an essential element in removing specific barriers or disadvantages to which a particular disabled individual would otherwise be subject. Campos Velho notes that in the CRPD the role of reasonable accommodation is conceptually linked to the prevention and elimination of segregation, humiliation and stigma (Campos Velho Martel, 2011, p. 103). This approach seems to have been at least partially adopted by the ECtHR, especially in *Çam* and *Guberina*.

There is still a long way to go before the cross-cutting application of reasonable accommodation can be assured in practice. There are also several procedural aspects to be unveiled and explored, especially when it comes to the adoption and choice of a specific accommodation and to the disproportionate burden limit. However, the ECtHR and the CRPD Committee will most certainly have the possibility to elaborate further on these aspects, stimulating new synergies and convergences.

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## Conflict of Interests

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