

June 2004.

Report from The Kingdom of Denmark.

On Danish Disability Discrimination Law

In the Field of Employment.

By Holger Kallehauge

High Court Judge.

President of PTU

(The Danish association of Polio-
and other accident Victims).

Table of Contents:

1. Introduction:.....	page 3 - 4.
2. The Legal Tradition	page 4.
A. The Danish Constitution.....	page 4 - 8.
B. Legislation	page 8 - 9.
1) Employment Law	page 8-10.
2) Social law.....	page 10.
3) Incorporation of Human Rights	page 10-11.
4) Government Reports	page 11-13.
Council Directive 2000/78/EC of Nov. 27th 2000.	
5) Miscellaneous.....	page 13.
3. The Legal Framework.....	page 13 - 15.
The Principle of Equality.	
4. The Notion of Equality under current Law.....	page 15-16.
Definition of Discrimination.	page 16 -17.
5. Definition of Disability	page 17.
6. The Notion of Positive Action under current Law.....	page 17 -19.
7. The Treatment of Medical Examination under current Law ...	page. 19.
8. Vicarious Liability of the Employer.....	page 19 - 21.
9. Remedies, Enforcement and Sanctions.....	page 21 - 22.
10. Conclusion	page 22.

1. Introduction.

Denmark is a constitutional monarchy and a democratic welfare state.

The monarch, Queen Margrethe the Second, is head of State without any political power or influence. The monarch has only ceremonial and representative duties. The welfare state was founded and developed by the Socialdemocratic Party during the period 1930 - 1970 with support from various other political parties often with support from a broad majority of Parliament.

The Danish realm consists of three parts, Denmark, Greenland and the Faeroe Islands. The two latter territories have Parliaments and governments of their own and are in many areas self governing. When passing a law Parliament must therefore at the same time determine if a new act of Parliament shall be applied in all the three parts of the country or only in one or two parts of the realm.

The law-making powers which Greenland and the Faeroe Islands possess are limited both in scope and in the geographical area that they cover. The following remarks do not cover special rules and regulations for Greenland or the Faeroe Islands.

As a welfare society Denmark has tradition for social services at a comparatively high level, good pensions schemes for elderly people and for the disabled and other social benefits for persons who cannot earn their own living. Social legislation in Denmark has not primarily been based on empowering people but on taking care of those who have not been able to fend for themselves. This tradition has been predominant for more than a hundred years and is still a vivid Danish tradition. Almost all political parties in Parliament are in favour of a welfare policy and very few if any Danish politician wants to dissociate himself from such a policy, except when it comes to financing of its costs. That does not mean that Danish politicians do not disagree about how welfare policy shall be designed and to which segments of the population it shall be applied, but there is a broad agreement about not abolishing the welfare society.

One cannot however invest so much of the total tax revenue on welfare policy as in Denmark without giving lower priority to other political issues and possible alternative solutions. Welfare policy is social policy and in social policy individuals are seen as clients and not so much as independent citizens. When you perceive human beings as clients you are focussing more on what they cannot do than on their resources. In Denmark persons with disabilities have until quite recently been categorized as social clients and disability policy perceived merely as a social problem. This is of course a serious mistake, but a mistake which it takes time to correct. Some disability organizations - among them the one of which I am a president - started about 1980 to change this attitude both among experts and in the general public. To day most people admit that the social problems which persons with disabilities have to face are only one of the many aspects of a life with a disability.

In welfare policy and social legislation disability rights are not a predominant legal figure nor are rules about non-discrimination or human rights.

In countries where welfare policy have been more or less identified with socialism and where a more conservative and capitalistic approach to politics have been the leading ideology the individual is always perceived as a citizen. The relationship between a state and its citizens is not only that of an enlightened government ruling its subjects, but also a need for protection which the citizens want against usurpation from the government. The state is not a benefactor but a necessary governmental instrument controlled by representatives elected by the people. In legislation emanating from a Parliament with a liberal or conservative attitude the chance of finding rules about civil rights and non-discrimination is much higher than in welfare state legislation

The Danish legislation shall as above mentioned be seen on a welfare state background.

2.The legal tradition.

The Danish legal system is based on a Nordic tradition dating back to written mediaval codes from the year 1200 covering each of the Three Danish regions, Jutland, Sealand and Skaane.

Danish law is not a common law system but a national legal system highly influenced by a European or continental legal tradition. Danske Lov (The Danish law book) was given by the Danish King Christian the V on the 15th of April in 1683. This lawbook of which elements are still in force was both a compilation of older lawtexts and a codification of case law. The two main sources in later Danish legal development has been the romanistic school in Germany during the 19th century and a strong legal cooperation between the Scandinavian countries during the 20th Century leading to common Scandinavian laws in many areas like family law, consumer law and law of contracts. This Nordic law commission work came to an end when Denmark in 1972 and Sweden and Finland later became members of the EU.

A.The Danish Constitution.

Denmark has no rules in its constitution - Danmarks Riges Grundlov af 5. juni 1953,- (The Danish Constitution of 5th June 1953) about non-discrimination, neither general rules nor specifically about disability. It is the same result when one takes an overall look on Danish legislation.

To understand the background for this one has to know that Danish disability policy has always been positive when it comes to social welfare and equally restrictive when it comes to non-discrimination and specific disability rights. In the field of disability Danish national policy has with very few exceptions within the last thirty years been based on consensus among the political parties in Parliament. The Danish organizations of disabled people have been very satisfied with this and have carefully avoided to become clients with any political party, in opposition as well as in government. In this way disability policy has become an almost apolitical question based on goodwill and positive attitudes towards persons with disabilities.

Until recently special individual rights for disabled persons were not what the disability movement claimed. Even human rights and other fundamental rights were considered either superfluous because disabled people were presumed to have exactly the same rights as the non disabled citizens or of little if any importance because of the high standard of the Danish welfare system. The main

disability issue in Denmark is not that the disabled as such are not entitled to rehabilitation, social benefits, pensions, technical aids, or participation in various vocational programmes, but on an individual basis to obtain these benefits. The rules and programmes were and are if not optimal so of a quality which are only seen better in very few countries, but interpretation and administration of the rules especially at the local level has often been criticized.

It is on this background a completely new trend that the disability movement in Denmark in recent years has been increasingly aware of the potential which a more rights orientated policy might represent not as an alternative to a welfare policy based on solidarity, integration and equal opportunities but as a supplement which can enhance the rule of law and make the enjoyment of social welfare benefits more fair and equal in all municipalities across the country.

The Danish Parliamentary Ombudsman and the Supreme Court have both been instrumental in the field of disability by criticizing and disallowing administrative practice and procedures in some cases. Within the last three years the Supreme Court has twice awarded social pension at a higher level to a disabled person than the National Social Appeal Board dealing with such cases. The leading cases have resulted in revision of a large number of similar cases and in a reform of law which shall secure that the National Social Appeal Board in the future do examine cases about social pension in the same way and in the same depth as the courts now have demonstrated it should be done.

During the latest twenty years human rights in general have been playing an increasingly and still more prominent role in Danish law. When the European Convention on Human Rights in 1992 was incorporated and made an integral part of Danish National law the influence of the convention became very strong and also much stronger than it was foreseen. The courts have made good use of the convention in a great number of cases and practice in many different fields has been remarkably influenced by its rules. It has been said that the European Convention on Human Rights has had more influence in the latest 10 years than the Danish Constitution in 50 years. From 1992 to 2001 the European Convention on Human Rights was cited in more than 150 cases published in the leading legal periodical, Ugeskrift for Retsvæsen. The courts both lower courts, the two courts of appeal and the Supreme Court have all welcomed the possibilities and chances which the European convention on Human Rights gives the judge to examine all cases in the light of human rights.

Constitutional development:

Denmark had its first democratic constitution in 1849. The constitution has been changed and amended in 1866, 1915 and 1953. The latest revision of the constitution took place after the Second World War and was naturally very much influenced by what the Danish people experienced during the German occupation 1940-45.

The Danish Constitution of 5th June 1953 - Danmarks Riges Grundlov af 5. juni 1953:

In 1953 some of the civil and political rights especially the right to liberty and security of person

was better protected than before. Persons with disabilities were however not in focus at that time neither abroad nor in Denmark. To illustrate this I just have to mention that the World Declaration on Human Rights (1948) does not mention disability in article 2 among all the other criterions according to which discrimination is prohibited. Because of lack of awareness disabled people were

not at that time mentioned in the constitution and no non-discrimination rule, neither a general nor a disability specific non-discrimination rule, is to be found in the Danish Constitution.

One could however draw the attention to various articles of the Danish Constitution which more or less directly shall protect the citizens against unequal treatment like for instance:

The Danish Constitution, Article 70, freedom of religion:

"No person shall for reasons of his creed or descent be deprived of access to complete enjoyment of his civic and political rights, nor shall he for such reasons evade compliance with any common civic duty."

The words discrimination and handicap/disability are not used in any text in the constitution. Nor is the word equality found in article 70 about protection of the freedom of conscience and religion although it is an equality rule. Article 70 states that no one shall be deprived of any civil or political right because of his/her religion or origin nor should anyone on basis of the same criteria evade fulfilment of his/her duties as a citizen.

Other articles in the constitution have similar elements like article 74 about the right to free and equal access to all sorts of trade, article 75 about the right to work, article 76 about the right of all children to education and article 77 about freedom of speech.

Non-discrimination on the basis of race or sex or any other distinction like age is equally unmentioned in the constitution.

According to article 63 of the Danish Constitution the courts can legitimately review any question concerning the limits of administrative authority. Such judicial review can take place during both civil and criminal cases encompassing both legal questions and the limits of discretionary decisions.

Danish Constitution Article 63, control of executive power:

"(1) The Courts of justice shall be entitled to decide any question bearing upon the scope of the authority of the executive power. However, a person who wants to query such authority shall not, by bringing the case before the courts of justice, avoid temporary compliance with orders given by the executive power.

(2) Questions bearing upon the scope of the authority of the executive power may be referred by Statute for decision to one or more administrative courts. Provided that an appeal from the decision of the administrative courts shall lie to the highest court of the Realm. Rules governing this procedure shall be laid down by statute."

There is however not much case law of relevance about non-discrimination in Danish law. One of the fundamental principles of administrative law in Denmark is the principle of equality. One can either ban discrimination by means of a non-discrimination rule or describe the same phenomenon in a positive way by demanding that a principle of equality is respected. In Denmark the traditional way of dealing with this issue is performed by following the principle of equality, cf. page 13.

Constitutional reform plans.

In recent years two political parties have been showing interest in proposing amendments to the Danish Constitution and both parties have made the issue of human rights a part of their proposals. The proposals have not been debated in Parliament but until now only at political meetings and in the newspapers.

The two latest Danish governments have however both been very reluctant and demonstrated little interest in starting any process that should lead to a revision of the constitution. The reason is that a referendum is needed and a proposal has to be adopted by a majority consisting of not less than 40% of the total electorate. Such a majority is hard to mobilize and there is therefore always a great risk that a constitutional amendment might not be adopted. No Danish prime minister is eager to run that risk.

At present the EU Constitution has so much political interest that this important issue together with a national election within the next one year and a half leaves little room for a constitutional reform. It is however not unlikely that the Prime Minister after 2005 - whoever it might be at that time - might very well set up a commission with the mandate to write a new Danish constitution.

The former Danish minister of foreign affairs, Niels Helweg Petersen, MP, a leading politician from a little but very influential political party, the liberal democrats, has in 2003 published a proposal for a new Danish Constitution. It has been printed in one of the leading Danish papers and a public conference about this proposal was held in October 2003 at Christiansborg in the hall where the former 1. chamber of Parliament held its meetings. In this draft for a new constitution chapter 2 is dealing with human rights, economic and social rights.

Art. 13 states that all persons are encompassed by all rights mentioned in this chapter without any restrictions due to gender, age, religion, political or other conviction, ethnic or national origin, language, physical or mental illness, disability, economic, social or other personal relation. The same goes for children depending on and in accordance with their state of development.

Art. 15 states among other that the European Convention on Human Rights art. 2-14 is an integral part of the rights of the constitution

Art. 17 deals with social care, the right to housing and institutions for children, elderly and weak persons.

Art. 18 deals with health care and prevention of illness.

Art. 19 deals with the right to education.

Art. 20 deals with the right to work, employment, trade and business.

Art. 21 about disability states that persons with disabilities have a right to participate in all parts of life in the community on equal footing with the rest of the population. Persons with disabilities have the same rights and the same right to protection by the law as all other citizens.

It shall be stated by statute that persons with disabilities have a right free of charge to medical care, rehabilitation, technical aids and other sorts of assistance. Disabled peoples' right to access to the physical environment, to information and to communication as well as their right to education, job and trade on equal terms/equal footing with other citizens shall be stated by statute. The right for disabled persons to make use of sign language or other linguistic communication shall be stated by statute.

At the moment no official translation to English has been made, so this translation has been made by the author of this text.

On 27th January 2004 a proposal to appoint a constitutional committee was tabled in Parliament by Mr. Niels Helweg Petersen (MP). It has not been adopted in this session but shall no doubt be tabled again when Parliament reconvenes in September this year.

B. Legislation.

General remarks.

Denmark has no general non-discrimination rules about disability, statutory or administrative rules.

Proposals for such legislation are not being prepared at the moment.

In two other areas Denmark has general statutes about non-discrimination. Discrimination both on the basis of race and sex is directly forbidden by law.

The Danish penal code has in article 266b a rule against public speech and spread of threats or insulting or degrading statements on the basis of race, colour, national or ethnic origin, religion or sexual orientation. This rule was given a wider scope in 1971 when Denmark ratified the UN Convention on Elimination of All Forms of Racial Discrimination (CERD).

We have several bills and statutory rules dealing with gender equality, equal pay and equal treatment of men and women.

The European Convention on Human Rights was in 1992 incorporated in and made an integral part of Danish National law. The non-discrimination rule in article 14 of the European Convention on Human Rights is thus now the most general non-discrimination clause in Danish law.

Discrimination on the basis of nationality has been tried by the Supreme Court in 2002:

Ufr. 2002. 1789.H.

The Danish Parliament passed a bill in 1997, bill no. 329 of 14th May 1997, according to which only persons of Danish nationality, and persons from EU member countries in the future could obtain a license as taxicab owner. A taxicab owner of foreign nationality was according to the above mentioned bill denied a license for another taxicab. He disputed the validity of this new rule because it was incompatible with art. 14 of the European Human Rights Convention and art. 26 of

the UN Convention about Civil and Political Rights. While High Court upheld his contention The Supreme Court came to the opposite result granting Parliament a right to judge if nationality could be an appropriate criterion to make use of and because it was not considered out of proportion to the legitimate aim of the bill.

This decision has been criticised by some legal experts. The bill was changed in 1999 so that Danish nationality is now no longer a condition that shall be fulfilled to obtain license as a taxicab owner.

1) Employment law:

Denmark has no quota schemes for employment of disabled persons on the labour market, and never had. Even if the employment rate for persons with disabilities is much lower than the employment rate for the non-disabled quotas were given up in beforehand. A government committee made a report 15 years ago in which the issue of quota schemes was analysed. The conclusion was negative towards quota schemes. Quotas were not considered to be an effective instrument. Neither the organizations of employers, the unions nor the organizations of disabled people wanted quota schemes. The government therefore dropped the idea. But the problem with integration of persons with disabilities on the labour market unfortunately rested unsolved. Even disabled persons with high education have often difficulties in finding a job, especially the first job is a barrier which is hard to surmount.

By act of Parliament no. 55 of 29th January 2001 on compensation to persons with disabilities in job the integration of disabled persons on the job market has been promoted. This bill about how compensation for impairments is best given on the labourmarket has been supplemented by a new act of Parliament, bill no 577 of 19th June 2003. The general rules about how to promote and enhance employment for persons with (special) difficulties finding a job is now described in this bill, and among them also some measures aiming at creating better jobpossibilities for persons with disabilities. The two bills are not alternatives, but supplementary til each other.

The general aim of these bills is to enhance integration of persons with disabilities in the labour force by means of affirmative action and various other compensatory measures.

The philosophy is that if you compensate a person who is disabled for his/her impairment in relation to a certain job in a specific workplace then there should no longer exist any barriers that should prevent such a disabled person from working.

Discrimination on the labour market.

By Act of Parliament no. 459 of 12th June 1996 about non-discrimination on the labour market Denmark got its first general set of rules banning discrimination on the labour market. This statute was enacted because Denmark had to admit that Danish legislation had not implemented ILO convention nr. 111/1958 about non discrimination in relation to employment and trade and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1965, in a sufficient way. All differential treatment is banned by this bill.

Differential treatment means that a principle of equality shall be respected. Both direct and indirect discrimination are banned. The non-discrimination criterias in this bill are race, colour, religion,

political opinion, national, social or ethnic origin and sexual orientation. Neither disability nor handicap are mentioned and it is therefore doubtful if persons with disabilities are encompassed.

Direct discrimination means that a person because of or on the basis of one of the above mentioned criterias is given a negative differential treatment compared with how another person would be treated in the same situation.

Indirect discrimination is defined in the following way:

If a condition, rule or practice which to all appearances is or seems to be neutral results in negative differential treatment of a disproportionate character to persons covered by the above mentioned criterias compared with the treatment given to other persons in similar situations this is unlawful discrimination unless the disputed condition, rule or practice is aiming at a legitimate target or objective and that the means used to achieve this goal are both necessary and appropriate.

The above mentioned principle of equality is a general labour market rule covering all situations regulating employment, wages, work hours and other working conditions as well as dismissal.

2) Social law.

In the Danish Parliamentary bill about social services - statute nr. 755 of September 9th 2002 - there is a rule in § 71 about personal assistance. According to this rule the municipality has free of charge to offer personal assistance as well as practical assistance to cleaning and washing in the home and to shopping to persons who due to their functional limitations physical or mental or because of special social problems, temporarily or permanently, cannot themselves take care of such daily living activities.

Each person and his or her need for such assistance shall be evaluated on a concrete basis and not dealt with according to general rules.

Persons with severe functional limitations shall free of charge also be offered care, support, training and assistance to develop their capacity to manage their own affairs by the municipality free of charge.

3) Incorporation of Human Rights Conventions in Danish law:

A government commission has in 2001 finished its work on the incorporation of Human Rights Conventions in Danish Law. The report has the following title:

Betænkning nr. 1407/2001, Indkorporering af menneskerettighedskonventioner i dansk ret.

The report has a summary in English to which I refer, <http://www.jm.dk>.

The commission recommends that the respect for Human Rights are strengthened by incorporation of the following three conventions:

- International Covenant on Civil and Political Rights. (CCPR)

- The International Convention on the Elimination of All Forms of Racial Discrimination (CERD).
- The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

At that moment the commission did not recommend that the following conventions were incorporated:

- The International Covenant on Economic, Social and Cultural rights (CESCR).
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
- The Convention on the Rights of the Child (CRC).

The main reason for not incorporating these three conventions has been that they were not in themselves considered to be operational and clear enough to be used by the courts. Incorporation was therefore postponed until more international material about their interpretation has been developed.

The government has hesitated to take action on basis of the report mentioned above but has lately, end of 2003, decided not to follow any of the above mentioned recommendations given by the commission. This has given rise to much debate in Parliament and sharp criticism from the NGO's side. As the government has support for this decision from one political party outside government there is a clear majority vote in favour of not incorporating any of the Human Rights conventions.

The government's main argument is that incorporation is superfluous. Denmark has ratified all 6 Human Rights conventions and it is therefore a violation of international law if Denmark does not respect the conventions. If different interpretations of a rule of law, statutory or not, are possible a Danish court shall choose the interpretation which is in the best harmony with obligations undertaken by Denmark according to international law. There should therefore according to government be little if any risk that Denmark violates any treaty which has been ratified by the Danish Parliament. On the other hand it was exactly the same situation we had before incorporating the European Convention of Human Rights and that incorporation proved to be of great importance.

It is my personal view that even the best legal minds cannot foresee the examples which might later occur in practice. It is therefore not a very convincing argument that the opposition in Parliament has not proved where and when incorporation of the Human Rights conventions shall make a great difference. If government changes within at year or two this is a case which might very well be reconsidered.

4)Government Reports.

General Reports:

No specific reports on general reform of Danish disability law and policy are at the moment underway, nor is it to be expected that the government now in office is going to introduce any major reforms.

Specific Reports on employment discrimination law and disability:

The implementation of Council Directive 2000/78/EC of November 27th 2000 establishing a general framework for equal treatment in employment and occupation is being prepared by a commission under the ministry of employment.

This EU directive has unfortunately not yet been implemented for persons with disabilities and elderly persons in Denmark. In 2003 the directive was implemented by an act of Parliament for all other groups covered by this directive than the two earlier mentioned. The organizations of disabled persons have from the day this directive came into existence been very eager to have it implemented because it represents a major step forward from a legal point of view and also cannot avoid to make a great difference in practice. Already January 12th 2001 a conference was held in Copenhagen about implementation of the directive. Neither the representatives of government nor the labourmarket organizations seemed very enthusiastic at that time but stressed unanimously the many complicated problems which should be solved before implementation could take place in a good way compatible with Danish labour market and employment law. This does not mean that Danish law in this area is very complicated or sophisticated. The real issue is that we have a long tradition in Denmark for leaving so much regulation on the labour market as possible to the unions and the organizations of employers. Agreements obtained by collective bargaining by the labour market organizations are therefore the main source to labour market law in Denmark. Statute law in this area is an exception. The Danish government has therefore not passed an implementation bill in Parliament about EU directive no.2000/78/EC as it would have done if it had been an directive about any other subject than labour law. In stead the organizations on the labour market were asked to try to incorporate the rules of the EU directive in their collective agreements.

The Danish Council of Organizations of Disabled People has in March 2002 initiated a dialogue with the implementation commission about interpretation of the directive. So far the commission has not given any official reply to the many questions, which have been raised.

In accordance with Danish labour market tradition the implementation of the Council Directive 2000/78/EC has thus been left with the labour market parties, the unions and the employers' association, to negotiate among themselves to find solutions on which they can agree. These negotiations have now lasted for more than two years, perhaps because the problems are quite complicated and until now have not been given sufficient priority. Only little is known about how these negotiations have been proceeding.

The Organizations of disabled people have held negotiations with many organizations on the labour market as well with the implementation commission, however without much effect neither to speed nor to substance. Implementation should however have taken place before December 2nd 2003. The government has therefore asked the EU Commission for an additional implementation period of 1 year and at the same time asked the organizations to end their negotiations before May 1st 2004. The first collective agreement referring to and incorporating EU directive 2000/78/EC in an agreement has been adopted February 2004. During the spring this process has continued throughout the whole labour market.

The ministry of employment has as promised held a meeting with the Danish Council of Organizations of Disabled Persons in May this year. The outcome of the labour market negotiations have been meagre. Only a few agreements have included a reference to the directive. The government therefore has to table a bill implementing the directive in Parliament during the next parliamentary session starting in September this year. The ministry has stated that the bill is not going to introduce any new rights not contained in the directive. As the directive is based on minimum standards the memberstates are not obliged to set a higher standard and that is what the Danish government in spite of the NGO's appeal to do better, intends to stick to.

5) Miscellaneous.

The Danish National Disability Council has in 2002 published a report with the title:

"Danish Disability Policy. Equal opportunities through dialogue."

The publication provides a brief survey of the fundamental principles of Danish disability policy and an overall description of the way in which it functions.

3. The Legal Framework.

In Denmark we have so far no rules prohibiting discrimination on the ground of disability in the fields of employment and occupation neither general nor disability-specific. But implementation of EU directive 2000/78/EC is going to change this within a year from now.

Legislation with general rules of this sort is not being prepared at the moment.

The Principle of Equality.

Even if non-discrimination clauses are not to be found one can raise the question if the lack of such rules are at least compensated partly for by other rules for instance the principle of equality within administrative law.

Danish administrative law is where no special statutes are regulating an area governed by unwritten principles, which over time have been deduced from case law and the practice of the Danish Parliamentary Ombudsman. These general principles shall - unless otherwise provided by an individual special act - be applied by all administrative authorities in all types of cases. If the rules in a special area are not complete, they are supplemented by the principles of general administrative law. Likewise an act of Parliament is normally interpreted in the light of the general principles of administrative law.

In a society like the Danish the principles of administrative law are based on balancing of different principles and sometimes of opposing character: For instance the public interest, including the interest of an effective public administration, on the one side, and on the other side, the consideration of the individual citizen and his legal rights.

The leading and fundamental principles of Danish administrative law are among others:

- The principle of legality or the rule of law.
- The principle of proportionality and
- The principle of equality.

In this connection the principle of equality is of special interest. When an administrative authority is exercising discretionary power it is obliged to treat the citizens equally. This means that the citizens can only be treated differently if there is a legitimate reason to do so and here lies the burden of proof generally speaking with the administration.

Statutes are often formulated in a way that leaves some discretion to the administration. It is characteristic of Danish administrative regulation that it is relatively brief, and consequently leaves the more detailed regulations to the administration. It is traditionally a much debated issue in Danish jurisprudence what degree of freedom an authority has when it has been left with administrative discretion.

If an administrative authority makes use of discretionary power vested with it in a way that is discriminatory, for instance by denying persons with disabilities the same right as other citizens to make use of a public offer, this would no doubt be declared invalid when brought to court or by the Ombudsman. Depending on the evidence the result would be the same if the discrimination was indirect.

The principle of equality shall also be respected by public authorities when it comes to employment and dismissal of personnel.

A central and well-functioning element in the control of Danish public administration is the Ombudsman.

The Constitution of 1953, in article 55, provides for an Ombudsman. The Ombudsman institution was established in 1955. On behalf of the Danish Parliament the Ombudsman controls the administration, but he is not subjected to specific instructions from the Parliament, the Folketing.

His jurisdiction includes the administration of both central and local government. Anyone can complain to the Ombudsman, and on his own initiative the Ombudsman can start an investigation if important legal interests for instance the principle of equality is suspected to have been violated. Such investigations are not rare when a case gives rise to publicity.

Even though the opinions of the Ombudsman are not legally binding, they normally have a very great effect. This is due to the general prestige of the office, and the careful and generally very well supported reasoning on which the Ombudsman bases his conclusions

The development of principles of administrative law in Denmark is to a far degree due to the practice of the Ombudsman who has among other created a new principle, the principle of proper administrative practice and behaviour.

The principle of proper administrative practise gives the Ombudsman ample opportunities for investigating administrative practice in areas of relevance for among others persons with disabilities which he and his staff often does.

In 1993 the Danish Parliament after a general debate about disability affairs adopted a resolution (B 43) according to which the Ombudsman shall follow equal treatment of persons with disabilities with special attention and within his mandate institute prodceedings whenever the principle of equality seems to be violated.

The ombudsman can also on his own initiative make inspections on site visiting various administrative authorities for instance prisons, hospitalwards for detained psychiatric patients, municipalities, tax authorities, universities and so on. During such inspections the Ombudsman also take up lack of access to the facilities for persons with disabilities.

Twice a year the Ombudsman holds meetings with the National Centre for Equal Treatment of Persons with disabilities where general questions about equal rights and opportunities for persons with disabilities are discussed. This can among other inspire the Ombudsman to investigate certain disability issues on his own initiative, for instance like it happened a year ago because of lack of access for persons with disabilities to means of public transportation and the reluctance demonstrated by the minister of transport to table amendments to the existing legislation to redress disrespect of the rule of law and proper administration.

Among the guidelines which the Ombudsman makes use of in this connection are Human Rights Conventions and the UN Standard rules on Equalization of Opportunities for Persons with Disabilities which combined with the principle of proper administrative practice allow the Ombudsman to question decisions which do not respect the principle of equality. When public authorities, central and local administration, are acting as employers they have also in this area to respect the principle of equality vis-a-vis persons with disabilities.

Private employers are not within the competence of the Ombudsman. One cannot therefore without new legislation come to the same results in the private as in the public sector.

4.The Notion of Equality under current Law.

The principle of equality which is applied in Danish administrative law is based on a formal equality concept banning discrimination. Neither equal opportunities nor equality of results are a part of the equality concept as such. However this does not mean that one cannot argue for an interpretation which takes both equal opportunities and equality of results in consideration. If the courts should be willing to accept this, it will no doubt depend on the evidence of the case.

There is only little case law of relevance about equality in Danish law. The best and newest example is a Supreme court decision from 2001 about the fundamental principle of equality:

UFR.2001.1258H.

According to the Danish bill on social policy social benefits can only be granted to persons with Danish domicile. Exceptions are allowed but only if residence abroad is taken up for a shorter period.

A young Danish blind student wanted to study for two years finishing his university studies in history and German at the Lund University in Sweden. All Danish students receive a student wage paid by government for up to 5 years, approximately 6.000 Euro a year. The blind student was under rehabilitation and therefore instead received a social benefit covering his expenses and living costs and received a higher allowance than ordinary student wages.

The National Social Board of Appeal had decided that the blind student was not allowed to continue to live on rehabilitation benefit for more than 6-12 months studying abroad. If he had been living on student wages and loans given by government without interest until his studies were finished, he could stay at universities outside Denmark for the full length of his study, if he wanted.

The Supreme Court Majority (4-1) decided that it was not incompatible with a principle of equality to deprive the blind student of his rehabilitation benefit if he wanted to study abroad for two years.

The National Social Appeal Board had not by such a decision acted against the content and meaning of the bill and a principle of equality was not infringed. The UN Standard Rules on equalization of opportunities could not lead the majority to another result.

Definition of Discrimination.

There is neither a general legal definition of discrimination under Danish law, nor a special in relation to disability. About discrimination on the labour market I shall refer to page 9 - 10. Distinctions between discrimination - negative differential treatment - and affirmative action measures as well as between direct and indirect discrimination are wellknown concepts in Danish jurisprudence.

Discrimination is considered as direct when the negative differential treatment is aimed at a person or persons belonging to a group of persons with a certain common criterion according to which the negative differential treatment takes place.

The discrimination is considered as indirect if negative differential treatment takes place by use of a common criterion which is not disability but a neutral or what seems to be a neutral substitute which leads to the same results as if the criterion had been disability.

An instruction to discriminate would probably be seen as a prima facie evidence similar to admit discrimination or cooperation in or contributing to discrimination.

Harassment against a disabled person would presumably by the courts be seen as an offence similar to discrimination especially if the harassment is of a more severe character.

If a non-discrimination norm should cover also those who are "in association with" a person with a disability like a father or mother who wishes to return to work after caring for a disabled child during a period of leave clear support by statutory law - in the words of the bill or the intent of Parliament - is needed.

While there is no doubt that negative differential treatment very often is seen as the core of the concept of discrimination, this might not always give a full and precise description of discrimination. A more comprehensive and correct definition should be based on the concept of

equality. Discrimination should therefore be defined as non-fulfilment of an obligation to equal treatment. So defined it is clear that not only an action of negative differential treatment, but also lack of action to fulfil or omission of fulfilling a rule of equality is discrimination.

Rules about reasonable accommodation have not yet been adopted. When the directive 2000/78/EC within a year from now has been implemented in Danish law, cf. page 12. The concept of reasonable accommodation shall be applied by the administration as well as the courts. Even if it is a new concept in Danish law the application as such is not going to be especially difficult. Evaluation of opposing parameters, principles or phenomena to strike a balance or come to a result which is compatible with a principle of proportionality is a wellknown legal mechanism in Danish law. However coming to the right decisions when a case depends on if certain measures shall be considered to be or not to be reasonable accommodation will give rise to exactly the same difficulties in Denmark as elsewhere.

5. Definition of Disability.

Definition of "Person with a Disability."

In Denmark we have no legal definition of disability or of the concept persons with a disability.

Persons with disabilities are not registered as such but only in special relations for instance as pensionists, persons with an impairment in need of special sorts of medication or medical treatment, vocational training or severely disabled persons with a personal assistant paid by the municipality et cetera.

A common way of describing disability might however sound like this:

A person is considered to have a disability if he has a permanent, usually lifelong functional limitation that is significant, be it of mental, sensorial or physical nature.

A functional limitation is significant if a function is impaired or completely lost so that the person is unable to do or perform what other persons of the same age and gender belonging to the same cultural group can do or perform.

A functional limitation is not to be considered permanent if it is amenable to treatment and cure within a foreseeable period of time.

Disability is often by doctors and health professionals seen as an intrinsic feature of the person while rehabilitation experts and disabled persons themselves usually consider disability as the function of an interaction between the person and his environment.

Perceived but totally unfounded disability, e.g. a person with a facial disfigurement, is usually not what would be included in the concept of disability in Denmark. One could perhaps here in stead talk about a socially generated handicap because of prejudices among ordinary citizens and employers which might have a similar effect as disability, especially when it comes to non-integration

6. The Notion of Positive Action under current Law.

The rules about equalization of job opportunities and positive differential treatment on the labour market of persons with disabilities was compiled in the act of Parliament on promotion of employment for persons with disabilities, bill no. 55 of 29th January 2001, cf. now as well act of Parliament, bill no 577 of 19th June 2003, cf. page 9.

The aim is by means of affirmative action measures to enhance integration of persons with disabilities on the labour market.

The main elements in this bill are the following:

- Priority in relation to certain jobs:

Persons with disabilities shall be given a preferential treatment as applicants to certain jobs in public service, to stalls and stands in a marketplace and to license as a taxi driver if the disabled is as equally qualified as the non-disabled applicants.

This scheme is one of the first job integration initiatives, which was taken in Denmark 20 years ago. These rules have however not been very effective.

- Personal assistance.

A disabled person can be granted a personal assistant on the job for up to 20 hours a week paid by the public. Personal assistance is also offered to disabled persons during supplementary and in-service and on job training.

- "The Icebreaker Scheme":

When a disabled person has finished an education qualifying him/her for a job on the labour market and therefore is entitled to unemployment insurance, but cannot find a job, an employer who is willing to take the disabled on is entitled to a wage compensation- 50% of the wage up to 11.000 kr. a month approximately 1.600 Euro - for 6 months, in special cases 9 months.

The idea is that the disabled person shall be able to prove that he/she is able to perform a job on the labour market and have a job-reference and recommendations for his/her next job-application.

- Technical aids:

Technical aids are free of charge for the disabled in Denmark.

Usually technical aids are granted by the municipality. Technical aids which are needed on the job can however be granted by disability consultants (advisors) in the local job assignment centres. The idea is that this should make the administrative procedure and decision making more simple and swift.

- Adaptation of the workplace:

If special tools, technical aids, changes at the place of work are needed for a disabled person to perform a job such equipment and adaptations can be paid for by the municipality. It goes also for

specially designed tools, work chairs, installations of grab handles, widening of doorways, an installation of ramps, accessible toilets and lifts.

Not surprisingly very expensive adaptations like a lift and a new accessible toilet can be quite difficult to obtain.

-Wage subsidy:

If a disabled person's capacity to work is so reduced that he/she cannot get an ordinary job a wage subsidy scheme might be applied. A so-called "flex job", a job with flexible working hours and other arrangements, should be offered to the disabled by the municipality. In practice it will however quite often depend on the initiative of the disabled to find an employer who is willing to take him/her on. The employer public or private will pay full wages for the job performed to the disabled but 1/2 or 2/3 of the wages will be reimbursed by government depending on how many hours the disabled is able to work. The wage depends on the qualification of the employee.

- A mentor scheme.

If a disabled person needs more instruction or on the job training for longer time than other employees a special mentor scheme can be applied. The mentor can be another employee, or a consultant hired from outside to do the job. All costs for such a scheme are paid by the government.

- Quota schemes:

There are no quota schemes for persons with disabilities in Denmark. Quotas have never been considered as an effective instrument in mainstreaming disabled people into the labour force.

There is at present no clear legal distinction between social security measures and affirmative actions measures in relation to the labour market. Social security measures belong to the competence of the ministry of social affairs and encompass general compensatory regulations in favour of all persons with disabilities while the specific positive action measures aiming at the labour market are affairs belonging to the ministry of labour.

Affirmative action measures are not seen as exceptions to the principle of equal treatment but as necessary compensation enhancing equal opportunities.

7. The Treatment of Medical Examination under current Law.

Act of Parliament no. 286 of 24th of April 1996 about use of health information on the labour market was enacted to implement government report no. 1269 of 1994 about use of information about the health of employees on the labour market. This report was written by the so-called genetic test committee.

The main rules of the bill are the following:

The employer is only allowed to ask for information about the health of an employee if the following conditions are fulfilled:

- such information, during employment or by engaging new personnel, shall be highly relevant for the employee's ability to perform the job,
- if permitted by the minister of labour because it is highly relevant for the security or health of the consumers or other persons, the environment or other public interests,
- if permitted by the relevant union or the minister of labour to protect and safeguard the running of the factory and
- if it is an offer to the employee given to protect him/her when this is reasonable and appropriate because of the working conditions.

The employee shall on his/her own initiative inform the employer about his/her health if such information is relevant for the job he/she shall perform and if the employee is aware of that this is the case.

The employer is neither allowed to ask for health information, if such information is not relevant for the job allocated to the employee, nor when the issue is only that the employee is running a risk - higher or lower - of becoming ill in the future.

This bill does not encompass:

- examination and interviews aiming at establishing if the employee can perform what is needed for the job and how good he/she is at it compared with others,
- tests aiming at identifying persons with abuse of alcohol and narcotics when the goal is not to examine the health of the employee, and
- health information given in accordance with special statutes for instance by civil servants before they are engaged in jobs with a right to sick- and disability-pension and workers engaged in production of certain forms of food and provisions.

According to Danish labour law and jurisprudence the following is what can be said about this subject in more general terms:

An employee who is seeking a job is obliged to inform his employer if he suffers from an illness which might compromise his work performance in a substantial way because of risk of frequent or prolonged periods of illness.

In this respect the result should probably be the same if an impairment or functional limitation has similar negative effect on a disabled person's ability to work. If an employee does not fulfil his obligation to inform his employer about such a risk this might, depending on the impairment or functional limitation and the time for and duration of the latest period when he was unable to work, be considered as fraud.

In general employers do not have a right to require medical examinations as a prerequisite to employment. This is rather the exception like for instance in certain special jobs in the food processing industry or if the employee applies for pension insurance.

Seeking a job you are not obliged to inform your employer about any impairment you might have as long as it does not interfere with your job performance. If it is a visible impairment it is up to the employer to ask the questions which he want to raise and if it is an invisible impairment it is up to the employee to judge if it is relevant or not to give any information about his impairment.

If relevant information is not given the employer has a right to cancel the contract without paying damages or further wages to the employee.

8. Vicarious Liability of the Employer.

As a general rule an employer is responsible for what his employees do when they act in his service.

According to Danish law an employer is responsible not only for his own negligence and faults but also for faults committed by his employees acting on his behalf. If a sub-contractor is an independent legal entity, person or company, the responsibility lies with the sub-contractor and not with the contractor.

Peer-workers and other workers as well who are employed by a firm belong to its personnel. Faults committed by such staff are the employer's responsibility if (new) statutory rules do not lead to another result. Harassment by such personnel is however not a part of their job performance and will therefore be considered not to be included in or a part of the employer's responsibility, unless he has neglected his duty to instruct or correct his personnel as a good employer ought to do to avoid harassment among the employees.

9. Enforcement, Sanctions and Remedies..

A person who considers himself discriminated against or subject to unequal treatment because of disability has until Council Directive 2000/78/EC enters into force only limited legal remedies at his disposal. The Directive is however even before it is implemented in Danish law an integral part of international, European law, which shall be taken in consideration when Danish courts has to interpretate Danish law in accordance with the international obligations which the Danish government has to respect.

Towards a private employer a disabled person at the moment can do nothing or only little. Towards a public employer he can start administrative procedures because the principle of equality has been infringed and at the end ask the Parliamentary Ombudsman to intervene. Such a case can also be brought to court against a public employer.

The burden of proof lies with the employee who has to substantiate that he has been treated unequal. When that has been proven beyond any reasonable doubt it is up to the public employer to prove that he had legitimate reasons to do so.

In cases about gender-discrimination shared burden of proof follows from statutory law. Where no such statutory rule is given by Parliament it is up to the courts to decide which evidence is needed and which of the parties who have to provide it. If unequal treatment is manifest and indisputable and the more unreasonable the unequal treatment appears the harder it becomes for an employer to prove that his treatment nevertheless should be upheld and considered legitimate.

The Ombudsman can state his opinion and declare that a decision is void but cannot award damages. The Ombudsman can also recommend that legal aid is granted so that the case can be brought to court free of charge for the plaintiff.

Damages would be the ordinary sanction in a civil law cases like these. Punitive damages cannot be awarded according to Danish law. Neither has an employee a right to regain a job from which he was dismissed even if the court states that his dismissal was illegal because of discrimination and therefore void.

10. Conclusion.

Until about 1990 human rights were not much discussed in Danish jurisprudence and only seldom raised in our courts. Fundamental rights were not claimed neither by persons with disabilities nor by organizations of persons with disabilities.

This has changed during the last decade and a half. A new trend in the opposite direction has become evident and within a few years this trend shall no doubt be visible also in Danish legislation.

As a symptom of this change in attitude one can point to the great interest in Denmark for a UN convention about the rights of persons with disabilities. Not only the organizations of persons with disabilities have been and still are much engaged in enhancing the process leading to such a convention but this is also a matter of high priority for the Danish government as the government stated in its latest National Disability Plan, February 2003. This statement fortunately has proven not only to be words but has been followed up by both the ministry of social affairs and still better by the ministry of foreign affairs in a very instrumental and cooperative way. The government has from the moment this process started on a regular basis consulted the organizations of disabled persons and listened carefully to the advice coming from these NGO's. Denmark has also included a representative from the organizations of disabled people in the delegation to the UN Ad Hoc Committee which is preparing the text for such a convention.

When this convention is finished, signed and ratified Denmark is going to have disability rights not only as a consequence of what is going on in the EU, and the EU treaty-convention but also emanating from the UN.

Denmark is still not an avant garde country when it comes to a disability rights orientated policy, but is now prepared and soon ready for integrating human rights and other fundamental rights both in our next Constitution and in our welfarestate disability legislation. Within a few years from now Denmark is going to have binding rules about explicit disability rights.

: