**Positive Action Measures and the UN Convention on the Rights of Persons with Disabilities**

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Case Note:Communication No. 9/2012 A.F. v. Italy, UN Committee on the Rights of Persons with Disabilities, 19 May 2015

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**Summary of Decision:**

Italian law (Law No. 68/1999 of 12 March 1999) requires that employers with a workforce of more than fifty employees ensure that at least 7 percent of their workforce are people who are registered as disabled. In addition, in order to fulfil this quota, the law requires that public employers reserve up to half of positions to be filled through competitive exams for registered persons with disabilities. The complainant, A.F., was a registered person with a disability who sat a competitive exam at the University of Modena and Reggio Emilia. Only one position was to be filled. A.F. obtained the third highest mark in the exam and was not appointed. He had previously been unsuccessful in such exams. He argued that Law No. 68/1999 had been breached, the 50 percent quota for public exams had not been respected, and that he should be awarded the relevant position. He was unsuccessful before domestic courts and submitted a communication to the UN Committee on the Rights of Persons with Disabilities (CRPD Committee) arguing that Italy had breached Article 27 of the UN Convention on the Rights of Persons with Disabilities (CRPD) on employment. The CRPD Committee found the communication to be admissible because the final court decision, which had examined the claim of discrimination on its merits, was rendered after Italy had ratified the Optional Protocol and A.F. had exhausted all national remedies. It also found that A.F. had not submitted evidence of a breach of his individual rights under the CRPD and that Article 27 had not been violated.

**Introduction**

Italy makes use of a mandatory employment quota to encourage the recruitment and retention of persons with disabilities. The quota law is found in Law No. 68/1999 of 12 March 1999 and exists alongside disability non-discrimination legislation (Law No. 67/2006). The latter law implements the Employment Equality Directive, which allows, but does not require, positive action measures such as an employment quota.[[1]](#footnote-1) Quota laws are also addressed in the ILO Recommendation No. 99 on Vocational Rehabilitation (Disabled), which recommends the “engagement by employers of a percentage of disabled persons” (Article 31).

In Italy, as in many other European states, quota laws have become integral to strategies to stimulate and support the employment of persons with disabilities. Such measures amount to positive action measures targeted at the group of persons with disabilities, but, in contrast to non-discrimination legilsation, do not generally confer enforceable rights on individuals. In short, disabled persons who are in principle eligible for employment under the quota, but are not recruited, generally have no individual right of action. However, in certain circumstances such a right does exist under Law No. 68/1999. In this case, the complainant A.F. sought to challenge the decision not to hire him under Law No. 68/1999 and, having been unsuccessful before Italian courts, submitted a communication to the UN Committee on the Rights of Persons with Disabilities (CRPD Committee) alleging a breach of Article 27 of the Convention on the Rights of Persons with Disabilities (CRPD) on employment. The CRPD Committee had to assess whether the author’s individual rights under the Convention, including that not to be discriminated against, had been breached. The decision is important given the high levels of unemployment experienced by persons with disabilities,[[2]](#footnote-2) the prominent role given to group-based positive action measures in many State Parties to the CRPD, and the limited impact that non-discrimination legislation—which does clearly confer individual rights—has had on increasing the percentage of disabled persons in employment.[[3]](#footnote-3)

**Factual Background and Italian Law[[4]](#footnote-4)**

At first sight the author of this communication seems to have little ground to argue that he should have been appointed to the position in question, having come third in a competitive exam with only one position available. Indeed, the CRPD Committee concluded that no provisions of the Convention had been breached. However, a deeper understanding of Law No. 68/1999 reveals that the claim was not as far-fetched as it may first seem. The law provides for an employment quota of 7 percent as well as requiring that at least half of positions to be recruited via competitive examinations in the public sector are filled by registered disabled people. The author sought to rely on the latter provision before the Italian courts. He was unsuccessful on the grounds that the University of Modena had reached an agreement with the provincial government to fulfil its 7 percent quota by other means – meaning that there was no obligation to give preferential access to disabled candidates who did not earn the highest score in competitive exams. The Italian courts also noted that there was only one vacancy at issue in this case, so it was not possible to award 50 percent of vacancies to disabled candidates “as 50 per cent of one post equalled zero.”[[5]](#footnote-5) One of the controversial points addressed by the Regional Administrative Court was whether a public employer could completely meet its quota obligation through an agreement with the provincial government, and therefore not be obliged to give preferential treatment to disabled candidates who took competitive exams. The Regional Administrative Court found that such an arrangement was possible. As a result, the Court found that the quota had been filled and, as A.F. did not obtain the highest grades, he had no right to be appointed. This was confirmed by the Council of State which noted that once an employer had met its quota obligation it was not subject to any additional obligations, other than the obligation to give preference to disabled candidates in a case of “tie-breaker” situation.

**Article 27 CRPD**

The author of this communication claimed that Italy had breached its obligations under Article 27, which provides that “State Parties recognize the right of person with disabilities to work, on an equal basis with others,” and sets out eleven steps that States Parties should take in this respect, including prohibiting discrimination. The author did not elaborate on the specific provisions of Article 27 breached, but simply argued that he had been the victim of discrimination.

**The Committee’s View**

Having found the communication admissible, the CRPD Committee considered whether the most recent domestic court decision, which affirmed previous rulings, violated the author’s individual rights under Article 27 CRPD. The Committee highlighted a number of obligations flowing from Article 27 and recalled that it was generally for the domestic courts to evaluate facts and evidence in a particular case. In a concise judgment, the Committee found that “the author did not prove any element which would enable the Committee to conclude that the provisions of the national legislation and its application amounted to a violation of his individual rights under the Convention.” It found that the Council of State had “thoroughly and objectively” assessed all elements of the case and there was no evidence that this decision was “manifestly arbitrary or amounted to a denial of justice”. It found no violation of Article 27 CRPD.[[6]](#footnote-6)

**Analysis**

Whilst the CRPD Committee’s assessment of the merits of the communication is certainly brief, it seems difficult to see how the decision could have been otherwise given the evidence available. A.F. performed less well than two other candidates in a competitive exam that gave access to only one position. Assuming that one of the better-performing candidates was awarded the job, that the exam process was not discriminatory, and that all necessary reasonable accommodations were made,[[7]](#footnote-7) A.F. does not appear to have been subject to discrimination in this case. Moreover, Italy had clearly taken significant steps to stimulate the employment of disabled people in the public sector through Law No. 68/1999 and this can be viewed as helping to fulfil its obligations under Article 27 CRPD. The quota law also applies to the private sector, although the compliance rate is much lower there than in the public sector. Moreover, even if the University of Modena had declined to employ A.F. in a situation when it had not met its overall quota obligation, it is far from clear that A.F. would have been successful in his arguments before the CRPD Committee because the CRPD does not necessarily include any provision capable of conferring individual rights in such a situation. Nevertheless the brevity of the operative part of the decision is notable, for A.F.’s case does raise important issues.

The CRPD and Article 27 require States Parties to take group-based measures to stimulate the employment of persons with disabilities. These measures include employing people with disabilities in the public sector (Article 27(g)) and promoting their employment opportunities and career advancement in the labor market (Article 27(e)). It is also clear from Article 5(4) CRPD that positive action measures (or “specific measures which are necessary to accelerate or achieve de facto equality”) are permitted under the CRPD Convention. Nevertheless, the Committee did not discuss the relationship of these group-based measures, which may involve positive action, with the CRPD provisions that provide for individual rights—including, most significantly, the prohibition of discrimination. The Committee also did not reflect on the role of structural discrimination, which can have an accumulative effect and is often difficult to identify. A.F. complained that he had taken part in numerous competitive exams but had always failed to be appointed. Whilst he may have never been the best candidate in any individual exam, and therefore have legitimately been excluded in each individual case, overall the education, training and work preparation which he received may have been of a lesser quality than that available to persons without disabilities, and this could have placed him at a continual disadvantage when compared to non-disabled candidates. It is impossible to know whether this was the case for A.F., but disabled people are often exposed to ongoing exclusion and disadvantage which reduces their opportunities on the labor market. A.F. also complained that the competitive exams that disabled people can sit give access to administrative rather than technical positions “and that this practice does not enable persons with disabilities to aspire to positions that correspond to their profiles and education”. This assertion seems to equate to a criticism frequently leveled at quota schemes overall: namely, that they are concerned with “quantity and not quality,” and can be met by employing disabled people in poorly paid low status jobs, without giving access to positions commanding higher salaries and higher status.[[8]](#footnote-8) This point is legitimate. Even though it did not support the complaint of discrimination in this instance, it may be relevant in a discussion of discrimination generally. The CRPD Committee failed to address the issue. In short, in terms of this individual job application, A.F. may not have experienced any identifiable discrimination and no individual right protected in the CRPD Convention may have been breached. In this light, the Committee’s judgment is completely understandable. However, this does not mean that A.F. and other disabled job applicants in Italy and elsewhere were not disadvantaged and excluded from (high-quality) employment opportunities. All may not have been well. A.F.’s arguments provided enough entry points for the CRPD Committee to discuss such matters, but it failed to do so. Nevertheless, it does have the opportunity to comment on such issues in its ongoing dialogue with States Parties and in the Concluding Observations it issues.

**Implications**

This communication reveals the difficulty for individual authors to base a claim on many elements of Article 27 CRPD. Although certain CRPD provisions prohibiting discrimination, including Article 27, undoubtedly confer individual rights, it is doubtful that individuals can base claims on the (Article 27) obligations that relate to disability policy or positive action more generally. This is also true at the domestic level in monist systems, where CRPD provisions need to be capable of conferring individual rights (or directly applicable) before they can be considered by domestic courts.

1. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ [2000] L 303/16. [↑](#footnote-ref-1)
2. See International Labour Organization, “Employment for Social Justice and a Fair Globalization” (Geneva: ILO, 2012), http://www.ilo.org/wcmsp5/groups/public/@ed\_emp/documents/publication/wcms\_140961.pdf. [↑](#footnote-ref-2)
3. See, for example, Daron Acemoglu and Joshua Angrist, “Consequences of Employment Protection? The Case of the Americans with Disabilities Act” (working paper no. 6670, National Bureau of Economic Research, 1998); Clare Bambra and Daniel Pope, “Evidence Based Public Health Policy and Practice: What Are the Effects of Anti-Discriminatory Legislation on Socioeconomic Inequalities in the Employment Con­sequences of Ill Health and Disability?” *Journal of Epidemiology and Community Health* 61, no. 5 (2007): 421. [↑](#footnote-ref-3)
4. I am deeply grateful to Dr. Delia Ferri of National University Ireland, Maynooth, for advice and help in understanding Law No. 68/1999 and the domestic case law that preceded this Communication and for commenting on a draft of this note. [↑](#footnote-ref-4)
5. Para. 2.2 of the communication, based on author’s translation of judgment of Italian Council of State. [↑](#footnote-ref-5)
6. Idem, paras. 8.3-8.5 [↑](#footnote-ref-6)
7. No arguments were raised before the CRPD Committee on either of these points. [↑](#footnote-ref-7)
8. See Lisa Waddington, “Legislating to Employ People with Disabilities: The European and American Way,” *Maastricht Journal of European and Comparative Law* 1, no. 4 (1994): 377. [↑](#footnote-ref-8)