



ЗАЩИТА ОТ ДИСКРИМИНАЦИЯ В БЪЛГАРИЯ, В ЕВРОПА И В СВЕТА

Сборник доклади

от международна научна конференция,
19-20 април 2024 г., НБУ

ЗАЩИТА ОТ
ДИСКРИМИНАЦИЯ
В БЪЛГАРИЯ, В ЕВРОПА
И В СВЕТА



П о р е д и ц а
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Book Three

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Цветя Попова

Challenges on European Non-Discrimination Law from the Social Model of Disability Approach

Beatriz Sánchez-Girón Martínez*

The European Union Framework Directive provides for protection against discrimination on various grounds, including disability. However, its material scope is only limited to the employment field. What seemed to be a breakthrough in anti-discrimination law (as it finally stepped forward to embrace protected grounds in addition to the traditional ones such as gender and race) has been evaluated and criticized from different points of view: it is argued that, nowadays, European regulation on protection against discrimination still is flawed. One of the prior issues that may be solved is the determination of the personal scope of application of the Framework Directive. Considering the European legislator avoided defining disability, this onus has been on the European Court of Justice, that has outlined a definition this term in order to implement the Directive provisions. In doing so, the influence of the disability model that has prevailed at each moment has been crucial, entailing a struggle among the former medical model and the emerging social model. Insofar as the criteria of this latter has been imposed, a Human Rights approach was developed, and the personal scope of the Framework Directive could be extended to a wide variety of health problems covered by the notion of disability. It is worth mentioning the case-law that has marked a turning point for the European definition of disability, as *Chacón Navas*, *HK Danmark*, *Z vs. A*, *FOA*, and *Daouidi*, all of them referred hereinafter. This article has two main objectives. First of all, to identify the elements given by the European Court of Justice for the purpose of defining disability, and for this purpose the leading cases will be analyzed. Secondly, according to the social developments in disabilities studies, some concerns about the evolution of the dynamic concept of disability will be outlined. The article concludes with brief final remarks on the future development of the disability concept within the European non-discrimination regulations.

Keywords: *Disability, impairment, limitation, non-discrimination, European Court of Justice, health condition, employment, equality*



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I. Disability as a protected ground in the EU Non-Discrimination Law

As it stands today, the European Non-Discrimination law draws its roots from the article 13 of the Treaty of Amsterdam, valid from 1999, which provided competences for the EU (European Union) to develop legal acts to fight against discrimination, in particular, against discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. As a result, in 2000 the Framework Directive (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation) entered into force. Finally, alongside sex or racial origin, which traditionally had been protected by the international and European laws, other personal circumstances came to be covered by a high level of protection when they are cause of an unfair and unjustified different treatment.¹

In point of fact, one of the key features of the right against discrimination is their dynamic nature, inasmuch as discrimination, stereotype, and marginalization of different groups of individuals evolves. The right not to be discriminated, which is considered to be the highest expression of the principle of equal treatment, recognized in articles 2 and 3 of the Treaty of European Union, bans treating a person less favorably than others on account of a consideration which should be morally irrelevant.² In particular, it does not allow direct or indirect discriminatory treatment or harassment on prohibited discriminatory grounds; although it allows a different treatment due to the possibility of developing positive action measures. To protect victims, it establishes procedural safeguards, including a reversal of the burden of proof, and the possibility for victims to receive monetary compensation.

Any legal system that aims to promote equality, such as that of the EU, has the responsibility of defining an effective personal and material scope to achieve its objectives, which is not always an easy task.

The EU framework has been harshly criticized for providing a dissimilar level of legal protection depending on the circumstances at stake. Disability is one of these under-protected groups, mainly because the scope of application

¹ Schiek, D. (2002) A New Framework on Equal Treatment of Persons in EC Law? – European Law Journal, vol. 8, 2, p. 300; Waddington, L., Bell, M. (2001) More equal than others: Distinguishing European Union equality directives – Common Market Law Review, vol. 38, p. 588.

² Costello C., Barry E. (2003), Equality in Diversity: The New Equality Directives, 2003, p. 2 [online version].

of the Framework Directive refers only to the employment area. What is more, compared to the rest of the protected grounds addressed in the Directive, there is a considerably wide number of the exceptions that may justify the difference in treatment when disability is *ratio decidendi*.³

Nonetheless, what is generally accepted is the role of the EU as a trigger in non-discrimination protection, and the recognition of disability as a protected ground by non-discrimination law implies an important swift and advance on the perspective of how equality is seen. EU embraces a substantive idea of equality that has overcome the Aristotelian idea of equity, and not only claims for likes treated alike, but to reach a sophisticated equality based in economic resources and personal opportunities of development.⁴ Disability became in a circumstance that, instead of being ignored, needed to be considered in order to guarantee the equality of opportunities.⁵ As evidence, we could mention the duty of employers to make reasonable accommodations or adjustments in the workplace for people with disabilities, unless they would constitute a disproportionate burden.

In the remainder of the article, a study will be carried out on the development of the concept of disability. The jurisprudence of the CJEU (Court of Justice of the EU) will be studied in order to clarify the personal scope of the Framework Directive when issues related to the health conditions of workers have to fit into the definition of disability and thus achieve non-discriminatory protection.

II. The EUCJ definition of disability

2.1 Evolution of the concept of disability

Despite the abovementioned, the Framework Directive does not include a definition of disability, and, moreover, there is also no referral to the State member for this purpose. Therefore, the CJEU has undertaken the task of outlining it, following different cases it has confronted. The effectiveness of the legal provisions included in this Directive will depend directly on the terms of its implementation, which in turn will depend on how each of its protected grounds is delimited.

³ Howard, E. (2006), The Case for a Considered Hierarchy of Discrimination Grounds in EU Law – Maastricht Journal of European and Comparative Law, vol. 13, 4.

⁴ Barnard C., Hepple, B (2000) Substantive Equality – The Cambridge Law Journal, vol. 59, 3, 2000.

⁵ Waddington L. (2011) Reasonable Accommodation: Time to Extend the Duty to Accommodate Beyond Disability? – NTM|NJCM-Bulletin, vol. 36, 2.

Furthermore, it has been taken into account that the listing of protected ground according to Article 1 is a *numerus clausus*.⁶

In any case, the absence of a definition of disability has become a somewhat problematic issue due to the lack of consensus among the different legal institutions and Member States, which translates into high legal uncertainty.⁷ Disability is a multifaceted phenomenon that could have implications for many areas of law, albeit we are referring in this case to the field of discrimination, and thus legal actors seem reluctant to introduce a formal definition. However, the CJEU has essentially limited itself to defining the characteristics of disability, in order to differentiate it from other situation related with health condition.

Along the way led by the CJEU to specify what should be understood as disability, it is important to point out the role of the International Convention on the Rights of Persons with Disabilities (CRPD). This is a binding legal international treaty, adopted in 2006, which made a shift in the perspective of the welfare treatment of people with disabilities, followed by the replacement of the traditional medical model with the social model of disability. Briefly, the medical model that has been the long-standing understating of disability considers it entirely from an individual point of view of those who suffer from it, and hence, disability for the medical model is the result of the physical, mental, sensory or psychological impairments that a person suffers from. On the contrary, the social model refuses to assume that disability is a medical problem, and draws attention to the context, the environment and the society. Disability is seen as a social consequence, a result of a social organization unable to develop effective structures to ensure the inclusion of all its members.

At the outset, the EUCJ provided a narrow definition of disability that has considerably limited the possibilities of people with health problems to be protected by the non-discrimination right. In case C-13/05, *Chacón Navas*, 11 July 2006, the CJEU was asked if a dismissal of an employee that had been absent from work due to sickness was covered by the Framework Directive. The EUCJ rejected it, and merely stated that disability could not be assimilated to illness or disease, due to the fact that this last only hindered the abilities and capacities for

⁶ C. 56 *Chacón Navas*: “However, it does not follow from this that the scope of Directive 2000/78 should be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof”.

⁷ Favalli S., Ferri, D. (2016) Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints – European Public Law, vol. 22, 3, 2016, p. 4 [online version].

a short period of time. Hence, disability is said to be “a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”. Notwithstanding, this judgement seems to forget mention two relevant facts. On the one hand, that the disease is a very heterogeneous and diverse reality; on the other, that there is a causal relationship between the disease and its consequence, the disability.⁸ The result was an outdated,⁹ and deficient legal regime from the perspective of the application of the substantive equality.¹⁰

At a later stage, the CJEU approached a social model of disability, allowing a more sensitive perspective to the inclusion difficulties that people with health problems could face. Had not been the EU become a party of the CRPD, this evolution would not have been possible. The definition of the latter treaty on disability is broader due to the social model impact. Article 1 of the CRPD states that “persons with disabilities are those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full effective participation in society on an equal basis with others”.

In cases C-335/11 and C-337/11, *Hk Danmark*, 11 April 2013, the CJEU recognizes that under some circumstances, an illness can be considered a disability in terms of the Framework Directive. In doing so, the temporal aspect of the impairment became paramount,¹¹ and the ECJ concludes: “the concept of ‘disability’ in Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one.” This decision-making has been shouldered in other succeeding cases;¹² however, as in section §III will be explained, its

⁸ Cabeza Pereiro, J. (2013) La discriminación por discapacidad: el caso Chacón Navas – Revista del Ministerio de Empleo y Seguridad Social: Revista del Ministerio de Trabajo, Migraciones y Seguridad Social, 102, p. 304.

⁹ Favalli, S., Ferri, D. (2016) Tracing the Boundaries between Disability and Sickness in the European Union: Squaring the Circle? – European Journal of Health Law, vol. 23, 1, p. 22.

¹⁰ Waddington, L. (2007) Court of Justice: Case C-13/05, Chacón Navas v. Eurest Colectividades SA – Common market law review, vol. 44, 2, p. 497.

¹¹ López Álvarez, M. J. (2018) A vueltas con la calificación del despido por enfermedad – Revista española de derecho del trabajo, 209, [online version].

¹² See C-36312, *Z vs A*, 18 March 2014; C-354/13, *Fago d Arbejde FOA*, 18 December 2014;

interpretation, which was expected to be more ambitious, dragged remains of the social model.¹³

The final relevant case is C-395/15, *Daouidi*, 26 May 2019. The factual account stated a work accident, which led to a situation of sick leave due to temporary incapacity. After a few weeks, the company dismissed the worker based on disciplinary reasons for not meeting expectations, although he had been enjoying a sick absence paid leave until that moment. For the CJEU, Framework Directive should be interpreted in the sense that the fact of being in a situation of temporary incapacity can, but does not necessarily imply, the limitation must be lasting. Documents and certificates referring to the status of the person were studied in order to make a decision and assess whether that limited capacity would be lasting or not. Based on these indications, the National Court classified this dismissal as discriminatory due to disability, and the company made its decision on the assumption that the worker's temporary disability was going to be lasting.

2.2. State of the art: requirements for assessing disability

The EU legal framework against discrimination, influenced by the international one, represented by the CRPD, does not provide for a definition on disability. Both handle an open-ended and evolving concept,¹⁴ based on the relation between individual impairment, social environment, and integration difficulties. The lack of a formal definition means that its content depends on the meaning given to each of its terms, resulting in a concept that fluctuates depending on the context. However, regardless of its strengths and weakness, its relational concept has expanded the possibilities of anti-discrimination protection for people with health problems, compared to the first definition that was only based on individual deficiencies.

To-date, considering the jurisprudence of the CJEU, a situation of disability can be acknowledged on the basis of the following requirements:

and a comment on Waddington L. (2015) Saying All the Right Things and Still Getting It Wrong: The Court of Justice's Definition of Disability and Non-Discrimination Law – Maastricht Journal of European and Comparative Law, 22, 4.

¹³ *Ibid.*, p. 588.

¹⁴ Favalli S., Ferri, D. (2016) Tracing the Boundaries between Disability and Sickness in the European Union, cit., p. 13; Grue, J. (2019) Inclusive Marginalisation? A Critical Analysis of the Concept of Disability, Its Framings and Their Implications in the United Nations Convention on the Rights of Persons with Disabilities – Nordic Journal of Human Rights, vol. 1, 37, p. 8.

(i) To be the result from physical, mental, sensorial or psychological impairments, as the CRPD mentions. At first, the CJEU did not include sensory disability, but with this definition we can say that all deficiencies are included.¹⁵ CJEU in *HK Denmark* defined disability as “a limitation which results from physical, mental or psychological injuries (...)”. In any event, the use of the mentioned adjectives – physical, mental, sensorial, or psychological– indicates that the origin of the impairment has to be biomedical.¹⁶ Disability does not reach any type of limitation of deficiency that a person may experience outside their health or their physiognomy. In point of fact, health condition is a core element in the understanding of disability provided by the International Classification of Functioning, Disability and Health (ICF),¹⁷ the World Health Organization classification whose aim is to provide a standardized and universal language for describing human body functioning and disability. Throughout the ICF, the idea that disability is conceived to explain the functioning of a person and the interaction between health states (diseases, disorders, injuries, traumas, etc.) and the contextual factors is repeated several times.

(ii) The existence of long-term impairments of uncertain duration. Although the inclusion of this temporal requirement excludes short temporal impairments from the scope of the Framework Directive, noteworthy is the reinterpretation made by the CJEU in *HK Denmark* and *Daouidi*. According to them, the Directive provides protection to those who suffer from an impairment of a long-term or uncertain duration, because their situation bears similarities with the hinder over a long period of time that characterizes disability.

Practical problems may arise from the concreteness of the parameters for identifying the long-term impairment. For example, in the United Kingdom, the Equality Act 2010 has opted for a fixed criterion and has set that long-term means twelve months at least. At the same time, it can be complex to determine what evidence must be provided to establish long duration, or whether the subjective character of the discriminating agent is sufficient.¹⁸

¹⁵ Iturri Gárate, J. C. (2021) Concepto jurídico de discapacidad – Anales de derecho y discapacidad, 6, p. 9.

¹⁶ Barnes C., Mercer G. (2003) Disability, Polity Press, UK, p. 67.

¹⁷ Available online: <https://iris.who.int/bitstream/handle/10665/42407/9241545429.pdf?sequence=1>

¹⁸ Beltrán de Heredia Ruiz, I. (2017) La enfermedad o dolencia de larga duración como supuesto de discapacidad: doctrina del TJUE –Trabajo y derecho: nueva revista de actualidad y relaciones laborales, Extra 6.

Notwithstanding, the main concern related to this issue is the onus to differentiate between a long-term limitation or a long-term impairment,¹⁹ which better reflects disability according to the social model. For some authors, this requirement seems to be strengthened by the fact that the impairments themselves must have a long or uncertain duration, over and above any limiting consequences it may have.²⁰ However, an excessive focus on the duration of impairments at the expense of their limitation effects could be criticized. From the social model point of view, perhaps it would be more accurate to focus not only on impairments per se but also to be aware on their limiting consequences for the purpose of assessing disability.

(iii) There is an interaction with social barriers. This third element is the core of the definition of disability according to the social model paradigm. Through its inclusion, disability goes beyond the individual sphere to become a social problem, and society is responsible for making necessary modifications to achieve effective inclusiveness. As can be inferred from the word interaction, there need to be two related elements: on one side, the impairment of the person, on the other, the society. Both internal and external elements will be essential elements for disability to exist.²¹ Society needs to promote universal design – design and composition of an environment so that it can be accessed, understood and used to the greatest extent possible by all people regardless of their age, size, ability or disability, and accessibility, because they enable people with disabilities to have access to goods, services, benefits (Article 9 CRPD).

Under no circumstances is the person suffering from impairments responsible for their limitation and for the barriers and hurdles that could be found in society. This is why this recent approach to disability that draws attention from the society where a disabled person is said to be the keystone on the recognition of their freedoms and rights,²² and to give them a citizenship status, thanks to the objectives and values the society should have.

¹⁹ Ferri, D. (2019) *Daouidi v Bootes Plus SL and the Concept of ‘Disability’ in EU Anti-Discrimination Law* – European Labour Law Journal, vol. 10, 1, pp. 77–79.

²⁰ Broderick, A., Waddington, L. (2018) *Combatting disability discrimination and realising equality: a comparison of the UN CRPD and EU equality and non-discrimination law*, Publications office of the EU, p. 58.

²¹ Kazou, K. (2019) *Analysing the definition of disability in the UN convention on the rights of persons with disabilities: is it really based on a ‘social model’ approach?* – International Journal of Mental Health and Capacity Law, 23, p. 38.

²² Crow, L. (1996) *Including All of Our Lives: Renewing the social model of disability* – Encounters with Strangers: Feminism and Disability, Women’s Press, London.

(iv) That a person's participation in professional life is hindered. As it has been already mentioned, the Framework Directive on Equality has a limited scope of application, in comparison with the other directives that make up European anti-discrimination law. As can be deduced from its title, and as it is developed in Article 3, its scope is restricted to the field of employment and occupation: access to employment, selection criteria, recruitment, promotion criteria, working conditions, pays and dismissals. The CJEU in case *Z vs. A* has made a restrictive interpretation, and pointed out that in the notion of disability enshrined in the Directive, the impairment must limit professional development in a direct way.²³ Consequently, according to the CJEU's decision in that case, the situation of women without uterus could be covered by the CRPD but, as long as it does not directly affect their ability to work, would not be covered by the Framework Directive.

In other news, CJEU explained that the loss of working capacity does not have to be absolute, and a mere capacity reduction of working capacity will be sufficient in terms of assessing disability. However, it is also difficult to establish how a reduction in capacity would be measured. Faced with this difficulty, one can resort to making a comparison between the development that is considered normal for a subject at an earlier point in time and that which results after the limitation.

(v) That there have to be equal conditions with other workers. One of the main criticism that scholars have made of the EU's concept of non-discriminatory law is the ever-present need to find a comparator when assessing a discrimination.²⁴ That is, what matters is not so much the negative consequences that may arise from a situation, but the very fact that they are different from the others. There are many reasons that can be considered to explain the practical disadvantages of its use, and we refer to an article for an in-depth study.²⁵

In the case of disability, the importance of the comparator is even more evident since it is part of its core elements. However, it has been argued, the comparator does not necessarily have to be adequate and has been found to be biased because it is used to refer to a socially dominant group, usually male,

²³ Waddington, L. (2015) *Saying All the Right Things and Still Getting It Wrong*, cit., pp. 588–589.

²⁴ Bolger M., Bruton, C., Cliona, K. (2012) *Employment Equality Law*, Round Hall Thomson Reuters, Dublin, Ireland, 2012; Fredman, S. (2016) *Substantive equality revisited – International Journal of Constitutional Law*, vol. 14; Schiek, D. (2016) *Revisiting intersectionality for EU Anti-Discrimination Law in an economic crisis – a critical legal studies perspective – Sociologia del Diritto*, vol. 27, 2.

²⁵ Fredman, F. (2016), cit.

white, heterosexual, and with a non-abled body.²⁶ Despite this, we wondered whether it is possible to define what full participation is, or when the participation in professional life is done on equal basis with others. Given the lack of any consensus parameters, a solution adopted by the stakeholders is to measure their development compared with what is considered “normal”.²⁷

(vi) That it entails a limitation. Defining a limitation is not an easy task. As a proof of its ambiguity, the CDPR does not even refer to it and its only in the case law of the CJEU where the wording “limitation” is mentioned. Nonetheless, following academics that have studied disability from a social model point of view, and in a very summarized way, it could be said that a limitation is a consequence of an impairment when faced with social barriers, and those altogether give rise to disability.²⁸ A limitation may arise because a person cannot develop capabilities due to weaknesses in the environment, which generates disability. At this moment, the limitation has to be directly tied to the impairment, as the CJEU has dictated on their cases as *FOA* or *Z vs. A*. Nevertheless, one of the demands to be studied on the pages below is to attach importance to the limitations rather than to the impairments.

III. Time to broaden the scope of the European non-discrimination perspective on disability

3.1. Working with an illness

Suffering from an illness throughout life is a contingency that many people have to deal with. A person in good health can easily function in society and perform tasks of everyday life. But an illness is a circumstance that affects people’s state of health and can paralyze or slow their vital development. Despite the fact there is no legal definition of what an illness is or when a worker can be defined as a sick worker, it is generally accepted that any condition on the state of health of a person can have negative consequences for their work performance. Hence, many social security systems consider illness as a contingency to be protected; and also, the labor legislation on prevention of occupational hazards is concerned to prevent its occurrence.

However, as a matter of fact, sick workers are exposed to face complex issues in their workplace. Scholars have studied for ages the causes for their social

²⁶ *Ibid.*, pp. 717–719.

²⁷ Grue J. (2019) cit., pp. 11–12.

²⁸ Crow, L. (1996) cit.

stigma, prejudices, and stereotypes. Since the last few years, theories have placed the cause of the marginalization of sick people in their inability to be socially and economically productive.²⁹ With some frequency, illnesses keep sick workers away from work,³⁰ even if there are situations in which the job performance may continue just with slight adaptations. Furthermore, irrespective of the cause, medical leaves pose a risk on the continuation of the employment relationship.³¹

According to EUROFUND,³² workers suffering from a chronic disease are around 25%. Their working conditions face more struggles than fit workers and they are more likely to leave the market early, before the age of 60, although in most cases, this situation could be amended with a correct adaptation of the workplace. The results of the EUROFUND research allow us to affirm that sick workers, whether chronically ill or not, need greater protection. Protection against unfair attitudes, which in some cases could even be discriminatory, is practically non-existent within the EU framework.

3.2. The importance of the social model and its criticism

After the World War II, the medical model spread widely in Europe and its corresponding political organizations. The objective pursued by this model is to cure, repair, or eliminate the bodily defects that a person can have by promoting the health care system and social services. The social model is also known as the rehabilitative model or the care model. As a result, people with disabilities were marginalized and excluded from society, being considered as problematic, deficient, and useless, and separated them from citizenship involvement.

Gradually, since the 1970s, and particularly in the United Kingdom, academics changed their point of view and developed a new theory to explain disability: the social model. A starting point for disability studies had started, not only in the field of medicine, but also in any other area tied to human health concerns. The social model is a powerful instrument to expand human rights for all people, both with and without disabilities. Therefore, its ultimate consequence will be the effective eradication of social stereotypes that cause discrimination

²⁹ Nussbaum, M. C. (2011) *Creating Capabilities: The Human Development Approach*, Harvard University Press.

³⁰ Chimienti, M. (2023) *Unemployment Status Subsequent to Cancer Diagnosis and Therapies: A Systematic Review and Meta-Analysis – Cancers*, vol. 15, 5.

³¹ Fernández Martínez, S. (2015) *Enfermedad crónica y despido del trabajador: una perspectiva comparada – Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, vol. 3, 1.

³² Eurofound, *How to respond to chronic health problems in the workplace? – Publications Office of the European Union*, Luxembourg, 2019.

and social exclusion of people with disabilities. In the implementation of this latter social model, however the medical model is influencing the law and the legal operator's decisions. This is because its practical application offers tangible results in terms of healing and recovery of the health of a disabled person.³³

From an international perspective, legal standards have indeed embraced the social model, as the weight of the latter lies in its own influence. Although for some authors the CRPD has moved closer to the social model, which is a cause for celebration in terms of advancing the recognition of Human Rights, there are still some limitations that prevent it from being fully considered a system in compliance with the social model. In this case, it will be more accurate to use the term social-contextual model in contrast of the pure social model.³⁴ For both the CRPD and the CJEU, disability is not exclusively the result of social barriers because there must also be a concurrence of an impairment in the disabled person. The result of all this is that when assessing disability, a certain degree of severity is required for the deficiency, as is the case with its appearance (see FOA case) and its duration (see *Chacón Navas* case). Therefore, we can ask ourselves if the importance assigned to the characteristics of disability is an influence on the medical model that should be eliminated?

Since the social model approach began to become widespread, disabled people have improved their quality of life, among other reasons, because it has proven to be a useful tool in the fight against discrimination. However, reviewers of the social model have returned to the traditional theses of the medical model to correct the flaws that the social model had demonstrated on explaining disability totally.

As an example, let us read what the scholar T. Shakespeare has written: "The difference between my interactional approach and the social model is that while I acknowledge the importance of environments and contexts, including discrimination and prejudice, I do not simply define disability as the external disabling barriers or oppression. (...) The difference between my approach and what social modellists would describe as the medical model is that I do not explain disability solely in terms of impairment. My approach is non-reductionist, because

³³ de Asís Roig, R. (2013) Sobre el modelo social de la discapacidad : críticas y éxito – IDHBC – Papeles el tiempo de los derechos, p. 11.

³⁴ Ferri, D. (2022) The Unorthodox Relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and Secondary Rights in the Court of Justice Case Law on Disability Discrimination – European Constitutional Law Review, vol. 16, 2; Kazou, K. (2019), cit.; Waddington L. (2015) Saying All the Right Things and Still Getting It Wrong, cit., p. 588.

I accept that limitations are always experienced as an interplay of impairment with particular contexts.”³⁵

The social model has been revisited with new contributions that highlight the importance of impairments as a keystone on the understanding of disability. These impairments are defined from a biological perspective as a loss or weakness in the functioning on the human body. Thus, disability must require that there is always a functional impairment related to the body of a disabled person. Otherwise, one could reach the undesirable point that any difficulty in social development were covered under the umbrella of so-called disability.³⁶ From the point of view of the social model, what is claimed is that anyone would be treated in a less favorable manner on the basis of its impairment, but impairment has to deal with considerations of the medical model.

Aware of the risks that can arise from an exaggerated interpretation of disability under the social model standards, it is necessary to provide an adequate response that, from a legal point of view, is capable of effectively contending discrimination based on the ground of disability. That is to say, whoever alleges discrimination in a legal proceeding should not dedicate an exaggerated effort in providing evidence of their physical, mental, sensorial, or psychological impairment.³⁷ In doing so, they could leave aside the importance of assessing discrimination, which is the different and unfair treatment based on the interaction between their impairments and the society, which leads to disability. Nevertheless, the answer of this question will bring the reader to the starting point of this article: what is disability and why people with disabilities are discriminated?

At this point, it can be stated that the definition of disability should fit the social model, and at the same time it must amend the possible shortcomings it has, that have been already explained. Its ultimate goal must be effective in combating discrimination and stigmatization that people with disabilities face.

3.3. A brief review on future concerns: disability from the social model approach

European disability doctrine is stuck and no new rulings on this topic have been recently issued. The current definition of disability, that has been studied above, has brought up some advantages and disadvantages. It has been repeatedly said that its dynamic nature is very positive, but it can also be said that there are

³⁵ Shakespeare, T. (2016) *Disability Rights and Wrongs*, Routledge, New York, p. 56.

³⁶ Crow, L. (1996), cit.; Grue, J. (2019) cit.

³⁷ Cabeza Pereira, J. (2013), cit., p. 492.

some contradictions in the disability requirements given by the CJEU. If the aim of the EU legislation is to provide an updated response to the phenomenon of discrimination on the ground of disability and to adopt the guidelines outlined by the revisited social model, it is worth expressing some ideas on future concerns.

More than twenty years ago, the Equality Framework Directive came into force. Already then, its limited scope of application was subject to criticism.³⁸ Since 2008, a proposal of a Horizontal Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation is paralyzed on their legal procedure of approval. Therefore, the notion of disability for the purposes of EU anti-discrimination law is still limited today to the field of work and occupation. Furthermore, it can be argued that the CJEU makes a restrictive interpretation of the relation between the impairment and their limitation effects in the workplace. Considering the case *Z vs. A*, it is a fact that fertility problems of a worker are not directly related to their ability to perform their duties. Nevertheless, a general overview of the limitations of people with disabilities in the development of their day-to-day lives will find that indirectly, there is a relation between work and health conditions such as fertility.

The CJEU does not consider impairments themselves nor social barriers as sufficient evidence to prove disability, but rather it is their interaction that constitutes a limitation which hinders the full participation of a person concerned in professional life. However, the CJEU requests tend to be very restrictive as well when evaluating the degree of limitation. In case *FOA*, for example, the CJEU does not consider sufficient the obesity of a worker at stake and his dismissal as a limitation effect. From our point of view, and according the social model approach, the limitations a person with a disability could face can be of different nature, tangible or intangible.

Last but not least, it is worth making some references considering the requirements related to impairments. Any impairment is the necessary substrate for assessing disability. Disability “is the form of discrimination that acts specifically against people with, or who have had, impairment. This does not mean that impairment causes disability, but that is a precondition for that particular oppression”.³⁹ Once the impairment is occurs, its interaction with social barrier causes disability. However, when analyzing the severity and duration of impairments, the CJEU resolutions mention in several occasions the limitation of the capacity, and not the

³⁸ Waddington L., Bell, M. (2001), cit.

³⁹ Crow, L. (1996).

impairment itself. For instance, “for a limitation of the capacity to participate in professional life to fall within the concept of ‘disability’, it must be probable that it will last for a long time”⁴⁰, or “it must therefore be concluded that if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of ‘disability’”⁴¹. From our point of view, the intention of the CJEU has to be interpreted to strengthen the consequences of the limitation in the ability and working capacity of the person who suffers from it. Although the CJEU has stated that sickness and disability are two separated concepts,⁴² this way of understanding limitations, which undoubtedly derives from a particular interpretation of the social model, blurs the frontiers between sickness, chronic illness, and disability. Any health condition, regardless of its pathological characteristics such as its treatment and duration, could be considered disability when it has limitative effects on the capacity of the person for a long-period of uncertain time.⁴³ Nevertheless, this leads to difficult interpretative questions such as how limitation could be proven or measured.

IV. Conclusions

The social model of disability sheds new light in the definition of disability, causing changes in the legal application of the provisions assessing disability. The social model has been able to define disability as a consequence of involving individual pathologies and social structures. However, disability cannot be reduced to societal related aspects, and a proposed review of the social model reinforces the importance of the individual impairments.

The CJEU has made a definition on disability in order to determine the personal scope of application of the Equality Framework Directive, whose aim is to combat the discrimination on the grounds of disability, sexual orientation, religion or belief, and age in the workplace. Its decisions are strongly influenced by the CRPD, which embraces the social-contextual model approach. The structural elements that define disability are the following: (i) to be a result from physical, mental, sensorial, or psychological impairments; (ii) for a long time or uncertain

⁴⁰ *HK Denmark*, recital 41.

⁴¹ *Chacón Navas*, recital 46.

⁴² *Chacón Navas*, recital 44.

⁴³ Ferri, D. (2018) *Daoudi v Bootes*, pp. 77–79.

duration; (iii) that interact with social barriers; (iv) that hinders the participation of a person in professional life; (v) on equal basis with other workers; and consequently (v) entailing a limitation.

If the social model is imposed on the CJEU's doctrine, it is necessary to analyze the future concerns and shifts that can suffer its rulings. Basically, if disability is seen as the consequences of the interaction between impairment and social barriers, the limitative effect should be the core element when assessing disability. It would open the door to other health conditions to be covered under the concept of disability.

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