

**Maciej Perkowski**

University of Białystok

**Anna Drabarz**

University of Białystok

## THE INTERNATIONAL EVOLUTION OF THE NOTION OF DISABILITY AND ITS INTERPRETATION FROM THE EUROPEAN UNION LAW PERSPECTIVE

### 1. Introduction

The Paralympic Games – the ultimate international competition for world class athletes with a disability – and the movement surrounding them have played an important role in bringing attention to persons with disabilities and fighting discriminatory stereotypes regarding disabled persons. Undoubtedly, this year the London 2012 Summer Paralympics, being the largest Paralympic Games ever,<sup>1</sup> proved to be a great success in terms of attracting capacity crowds to each one of the sporting venues, in TV audiences and coverage, as well as in terms of giving the competing athletes an opportunity to challenge the notion of a disability. The discussion and controversies which arose around the subject of disability and its social, political and – consequently – legal implications across Europe (e.g.: the United Kingdom government’s controversial welfare reforms,<sup>2</sup> the lively public debate on perceptions of disability held in Poland<sup>3</sup> accompanied by the long-awaited ratification of the United Nations Convention on the Rights of Persons with Disabilities<sup>4</sup>) showed that the manner of understanding “disability” is con-

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<sup>1</sup> B. Wilson, *London 2012: Olympic and Paralympic sponsors count benefits*, <http://www.bbc.co.uk/news/business-19800583> (access date 01.10.2012).

<sup>2</sup> See: <http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0114/2012114.pdf> (access date 01.10.2012).

<sup>3</sup> T. Lis, *Jedni z nas*, *Newsweek Polska* 37/12 10.09.2012.

<sup>4</sup> United Nations Convention on the Rights of Persons with Disabilities, 13 December 2006, G.A. Res. 61/106. Available online at: <http://www2.ohchr.org/english/law/disabilities-convention.htm>

tinually evolving and some of the accessible instruments of disability policies still are based on traditional ways of perceiving persons with disabilities.

The process of globalization has broadened the legal perspective and legal concepts originating from national or international systems continually clash. Thus, it is not only desirable, but also reasonable to adopt the broader look while analyzing the concepts. In the era of “continuous global interactions” the achievements of the UN, other international organizations and influential countries cannot be ignored. They affect both EU law and national laws. At the same time, from a Polish researcher’s position, the issue should be substantially viewed from the perspective of EU law and that is the reason for applying the perspective in this paper.

The legal frameworks currently applied in the European Union and in Member States with respect to disability adopt a multiplicity of approaches and definitions. This paper outlines some of the key conceptual approaches to disability, and how they have evolved. It examines definitions of disability found in key international documents,<sup>5</sup> influencing EU and Member States’ policy and legal frameworks. Due to the broad subject the paper provides highlights of some aspects of these concepts and debates, insofar as they are relevant to the development and understanding of legal definitions of disability.

## **2. Legal Approaches to Disability: from “Personal Tragedy” to Interaction Model**

For most of the 20<sup>th</sup> century, there was a broad consensus among the general populace, academics, legislators and policy communities about the nature of disability – that it was a bio-medical issue, rooted in individual tragedies, and best addressed through charity and, where possible, treatment and rehabilitation. Definitions of disability were therefore not controversial: the issue was one of “common sense” and its meaning seemed obvious.<sup>6</sup> “Disability” has been commonly understood as the opposite of

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<sup>5</sup> A thorough overview of regulations considering “disability issues” in international law is provided by M. Jankowska in *Prawa osób niepełnosprawnych w międzynarodowych aktach prawnych*, Niepełnosprawność – zagadnienia, problemy, rozwiązania, 1/2011(1).

<sup>6</sup> However, a historical review demonstrates that disability has been understood from a variety of perspectives over time and across cultures. For example, until fairly recently in European history, disability was understood from a predominantly religious perspective. Disability was seen as a sign of divine judgment, a punishment for sins or wrongdoing, as well as a result of the action of supernatural powers. See, for example, the discussion in: C. Barnes, G. Mercer, T. Shakespeare, *Exploring Disability: A Sociological Introduction*, Polity Press, Cambridge 1999, pp. 17–18.

“ability” and the word evoked the most obvious types of disabilities (mobility impairments that require a person to use a wheelchair to move around, or perhaps visual or hearing impairments) – while disabilities may be physical or cognitive, readily observed or “hidden” (such as epilepsy, arthritis, diabetes), and may result from a variety of causes.

Not infrequently, statutes and regulations referencing the term “disability” provide no definition of the term: the determination of who is and is not disabled for the purpose of an act is left to the decision-maker’s interpretation, and is generally decided on a case by case basis. When considering legal approaches to defining “disability”, it should be kept in mind that most statutes dealing with disability fall into the category of acts providing benefits, supports and accommodation for groups of people; maintaining the scope and integrity of the program is a main concern. Definitions of disability in such statutes generally operate as determinants of eligibility for programs and services, and there is therefore a perceived need to ensure that definitions provide a clear and easily administered mechanism for allocating services and determining eligibility. The requirement influences both the legislative definition and the case law – that develops around the terms also and contributes to revealing a fragmented approach to the terms.

Individuals seek the label of “disability” in order to access benefits and supports, while institutions restrain access to the label in order to maintain program standards. A similar dynamic is often at play in human rights case law, where the label of “disability” is essential to obtain the opportunity to obtain redress for the loss of employment or access to important services.

Not surprisingly, in states’ law there is considerable case law interpreting “disability”, “handicap” and related terms. A review of case law and legal commentary relating to the definition of disability reveals the ongoing dispute and evolution.<sup>7</sup> The circumstances giving rise to case law are not necessarily representative of the full spectrum of circumstances under which persons with impairments and/or disabilities may be affected by the law.<sup>8</sup> Human rights cases most frequently arise in the context of employment and access to instruments of vocational rehabilitation.

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<sup>7</sup> For example, conditions such as obesity, addictions, infertility and temporary medical conditions are in some cases considered disabilities and in others not.

<sup>8</sup> Decisions regarding “mental competency” and “capacity” arise in complex circumstances, frequently from situations where family members are in conflict with each other and seek declarations which may be contested by the person alleged to be incapable or incompetent, concerning acts of will.

Generally, the axis of differentiation has revolved around the role of “impairment” in the experience of disability. Many scholars categorize conceptual approaches to disability into two broad groupings: one focused on impairment and the other on the social construction of disability. However, based on a review of concepts of disability as they are revealed in statutory definitions of disability and the accompanying case law, legal definitions of disability can be categorized into four conceptual approaches:

### **A. Bio-medical approach**

The bio-medical conception of disability was the dominant policy model for understanding disability until the last few decades of the 20th century, and remains ascendant in the popular understanding of disability. Common understandings of the nature of disability, as well as many policy and legal frameworks, centre on the notion of disability as resulting from physical, sensory, psychiatric, cognitive or intellectual impairment.<sup>9</sup> That is, disability is intrinsic to the individual who experiences it.<sup>10</sup> In this model, impairments are dysfunctions that have the effect of excluding persons with disabilities from important social roles and obligations, leaving them dependent on family members and society. As such, disability is an individual tragedy, and a burden on family and society.

Under this approach, the most appropriate policy response to disability is medical and rehabilitative. The aim is to overcome, or at least minimize, the negative consequences of individual disability. Individuals with disabilities may, therefore, become the focus of intensive and sometimes coercive expert attention focused on accurately identifying and “fixing” the impairment causing the disability, which may lead to assumptions that persons with disabilities are defective and abnormal, and therefore in some way inferior to, and less worthy of consideration than fully-abled persons.

### **B. Functional limitations approach**

The functional limitations approach takes into account some aspects of how the experience of impairment is affected by the environment and identifies disability not so much in terms of an underlying medical condition, but by considering the functional limitations caused by impairments. Functional

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<sup>9</sup> The bio-medical model of disability has been exhaustively described and critiqued by disability theorists. A thorough and readable overview of the discussion may be found in: C. Barnes, G. Mercer, *Disability*, Polity Press, Cambridge 2003.

<sup>10</sup> For this reason, this model has sometimes been described as the “personal tragedy” model.

limitations are associated with the person's ability to appropriately engage in key social roles, such as employment or caring for family members.

Thus, the approach, while firmly maintaining the role of impairment in causing disability, recognizes that disability may be influenced by social factors, such as the roles that the individual inhabits, how they respond to impairment, and whether the environment is designed in a way that magnifies or minimizes the effects of the impairment. The functional limitations approach has been, and continues to be, immensely influential in both law and public policy.

### C. Human rights model

This modified social model underlines the impact of impairment on the experience of disability and recognizes persons with disabilities as an oppressed group. The approach is primarily located in human rights legislation and was adopted at some point *inter alia* by the World Health Organization (WHO) which has had an important role in shaping approaches to disability.

The WHO has produced two important classification systems related to impairment and disability – the 1980 International Classification of Impairments, Disabilities and Handicaps,<sup>11</sup> and the 2001 International Classification of Functioning, Disability and Health.<sup>12</sup> WHO's 1980 International Classification of Impairments, Disabilities and Handicaps (ICIDH) was the first major classification system to focus specifically on disability and was extremely influential in the development of policy approaches to disability worldwide. The ICIDH adopted a three-pronged definition of disability as consisting of:

1. Impairment: any loss or abnormality of psychological, physiological, or anatomical structure or function.
2. Disability: a restriction or lack (resulting from an impairment) of ability to perform an activity in a manner or within the range considered normal for a human being.
3. Handicap: a disadvantage for a given individual, resulting from an impairment or a disability that limits or prevents the fulfillment of a role that is normal (depending on age, sex and social and cultural factors) for that individual.

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<sup>11</sup> *Literature Review of the WHO International Classification of Impairments, Disabilities and Handicaps (ICIDH) and Rehabilitation of People with Disabilities*, Council of Europe 1998.

<sup>12</sup> Available online at: <http://www.who.int/classifications/icf/en/>.

The ICIDH was widely criticized by disability activists and others for its reliance on medical definitions and the ableist assumptions underlying the use of a standard of “normalcy”. As well, the assumption that disability is always caused by some kind of impairment resulted in a focus on medical and rehabilitative responses to disability, ignoring the importance of legislative, policy, and environmental changes in removing disabling barriers.<sup>13</sup>

The functional limitations perspective is the most common statutory approach to defining disability and can be found in the Polish legal system which is reviewed in the following paragraph of the paper. Functional definitions of disability are appealing in the legal sphere as they provide clear, easily applied criteria for policy eligibility and the distribution of benefits. However, the emphasis on disability as arising from individual impairment rather than societal barriers reinforces the idea that individuals with disabilities require individual remediation rather than inclusion through the removal of physical, attitudinal, or policy-based barriers.

In the context it is worth mentioning that there is no agreement or unanimous legislative practice regarding temporary medical conditions, whether grave (such as cancer) or relatively minor (such as a broken limb). Generally, the functional limitations approach excludes persons with temporary conditions, on the basis that such conditions do not create ongoing limitations in life’s crucial activities. Thus, many statutes do not consider persons with temporary or episodic disabilities as persons with disabilities, by requiring the disability to be “continuous” or “prolonged” or to have lasted for a certain period of time.

#### **D. Social model**

The bio-medical approach to disability and the functional limitations model have been widely critiqued for failing to take into account the effect of social attitudes and structures in disabling individuals.<sup>14</sup> From this perspective of the social or interactive model, disability is, as a neutral feature, less an individual issue than it is a societal one.<sup>15</sup>

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<sup>13</sup> For an overview of the criticisms of the ICIDH see: C. Barnes, G. Mercer, T. Shakespeare, *op. cit.*, at pages 22–27.

<sup>14</sup> A person with a mobility impairment is not prevented from fully participating in society by the impairment, but by the failure of policy makers, planners and builders to take into account the existence of such persons and to create accessible buildings and services. Persons with epilepsy are not excluded from employment as much by their medical condition as by the fears, myths and lack of information that lead potential employers to refuse their applications.

<sup>15</sup> This model is generally traced back to the 1976 manifesto of the British Union of the Physically Impaired Against Segregation (UPIAS) *Fundamental Principles of Disability*.

In the social model, the negative consequences associated in the bio-medical model with disability, and hence with the persons with disabilities themselves, are understood to result from the interaction of a person with a disability with the environment. It is prevalent in countries where civil rights are particularly well established, such as the United States or the United Kingdom. Under the approach, a person with a disability ceases to be merely a recipient of social benefits or charity assistance and becomes an independent “actor” on the social stage, having the same civil rights and responsibilities as other citizens.

This perspective has had a profound impact on disability theory and public policy over past years, and is now the dominant approach among scholars and activists. Under the social approach, disability is best addressed by a concerted effort to remove the socially constructed barriers that disable individuals, and to develop a society that is inclusive and respectful of persons across a wide spectrum of differences – as disability is no longer regarded as anomaly, but as a difference. Then persons with disabilities can be considered members of an oppressed group, similar to women, racialized persons, older persons, or members of the LGBT community.<sup>16</sup>

Some commentators have argued that the social model takes insufficient account of the actual experience of impairment and the way that impairment itself, apart from societal reactions, can have a profound impact on lived experience.<sup>17</sup> The social approach has also been criticized for failing to sufficiently incorporate the experiences of persons with non-physical disabilities, particularly persons with psychiatric, developmental and cognitive disabilities.<sup>18</sup> It has also been pointed out that the social approach has been slower to benefit persons with cognitive and developmental disabilities and

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<sup>16</sup> It is worth mentioning that, for example, in the deaf community there has been a strong movement towards considering deaf people not as persons with a disability, but as a language and cultural minority. See: H. Lane, *The Mask of Benevolence: Disabling the Deaf Community*, DawnSignPress 1999.

<sup>17</sup> Different types of impairments have different implications for health and individual capacity, much as stereotypes, social attitudes and barriers also differ depending on the type of impairment. The experiences of a person who is, for example, Deaf, deafened or hard of hearing differ considerably from those of persons with a learning disability, or cerebral palsy or bipolar disorder. Due to that the writers emphasize the importance of an “embodied” understanding of the experience of disability. For an overview of this critique see: T. Siebers, *Disability in Theory: From Social Constructionism to the New Realism of the Body*, in: L. Davis, ed., *The Disability Studies Reader*, Routledge, New York 2007, p. 173 and following.

<sup>18</sup> The historical practice of labelling certain types of refusal to conform to social norms (such as homosexuality, or refusal to comply with gender norms) as mental illness makes “barrier removal” an inadequate response to such conditions.

to confront the profound devaluation of their worth in a society focused on production and profit.<sup>19</sup>

Recently, it has been argued that the dichotomy between impairment and social construction can be misleading, as illness, frailty and impairment are a part of the human condition and all people are in some way impaired, just as the aging process is likely to result in increased impairments for most people. However, not everyone with an impairment experiences oppression because of it, only some are additionally disabled by societal processes.<sup>20</sup> Any single model of the experience of disability runs the risk of obscuring the profound variations in the experiences of persons with disabilities, depending not only on the kind of impairment they have, but also on gender, socio-economic status, racialization, sexual orientation, age and other characteristics.<sup>21</sup>

### **E. The Human Rights Approach**

The human rights approach to disability is a variant on the social approach and stems from the protection of equality and dignity of persons with disabilities. The human rights approach recognizes persons with disabilities as a disadvantaged group and emphasizes the role of social attitudes and falsely neutral systems in creating and perpetuating that disadvantage. The role of impairment in disability is recognized insofar as it is necessary to design accommodations to permit persons with disabilities to achieve equality. The aim of the human rights approach is to achieve equality and inclusion for persons with disabilities through the removal of barriers and the creation of an environment of respect and understanding.<sup>22</sup>

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<sup>19</sup> C. Barnes and G. Mercer, op. cit., pp. 69–70.

<sup>20</sup> See, for example: T. Shakespeare, N. Watson, *The Social Model of Disability: An Outdated Ideology?*, Research in Social Science and Disability, Vol. 2/2001.

<sup>21</sup> An overview of the issues of gender and disability is provided by A. Vernon, *Multiple Oppression and the Disabled People's Movement*, in: T. Shakespeare, ed., *The Disability Reader: Social Science Perspectives*, Continuum, London 1998, p. 201. At this point it is also worth pointing at the legal concept of multiple discrimination which is widely discussed across Europe as well as in the EU; see: S. Burri, D. Schiek, eds., *Multiple Discrimination in EU Law. Opportunities for legal responses to intersectional gender discrimination?*, European Network of Legal Experts in the Field of Gender Equality for the European Commission DG Employment, Social Affairs and Equal Opportunities, 2009; K. Monaghan, *Multiple and intersectional discrimination in EU law*, European Anti-Discrimination Law Review 13/2011; J. Maliszewska-Nienartowicz, *Zwalczanie dyskryminacji wielokrotnej (na przykładzie działań Unii Europejskiej)*, Państwo i Prawo 2/2012.

<sup>22</sup> G. L. Albrecht, K. D. Seelman, M. Bur, *Handbook of Disability Studies*, SAGE 2001, p. 565 and following.

In 2006 the United Nations adopted the International Convention on the Rights of Persons with Disabilities (ICRPD). The ICRPD is likely to have a significant impact on policy makers in the EU and its Member States, and on approaches to domestic human rights statutes as it is the first legally-binding international human rights instrument to which the EU is a party.

The purpose of the ICRPD is to promote, protect and ensure the equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent worth and dignity. A key principle of the ICRPD is respect for difference and acceptance of persons with disabilities as part of human diversity and humanity. The ICRPD adopts an expansive approach to disability, recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others. It recognizes the diversity among persons with disabilities. In Article 1 of the ICRPD it is stated that: *“persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”*.

## **F. Multi-Dimensional Models**

In recent years, there has been a movement towards a multi-dimensional approach to disability, aimed at incorporating the insights of both impairment based models and those that adopt the social approach. The most prominent and influential of these is the WHO’s International Classification of Functioning, Disability and Health, which replaces the International Classification of Impairments, Disability and Handicaps.

The WHO made a significant shift in approach to disability with the 2001 International Classification of Functioning, Disability and Health (ICF). The ICF is intended to provide a standard framework for the description of health and health-related states and to provide a tool for measuring function in society, regardless of the reason for a person’s impairments. It approaches the notion of disability in a manner considerably more nuanced than its predecessor, attempting to synthesize the biomedical and social models of disability. The WHO describes the conceptual approach putting the notions of “health” and “disability” in a new light. It acknowledges that every human being can experience a decrement in health and, thereby, experience some degree of disability. The ICF thus mainstreams the experience of disability and recognizes it as a universal human experi-

ence. By shifting the focus from cause to impact it places all health conditions on an equal footing allowing them to be compared using a common metric – the ruler of health and disability. Furthermore ICF takes into account the social aspects of disability. By including Contextual Factors, in which environmental factors are listed, ICF allows recording the impact of the environment on the person’s functioning,<sup>23</sup> calling it a “biopsychosocial model” of disability.

However, its retention of individualistic medical notions of disability and its causes have been criticized as unnecessarily limiting the scope of disability and perpetuating the biomedical culture.<sup>24</sup> Concerns have also been raised regarding the attempt to integrate the medical and social models, on the basis that the social model is a paradigm, the application of which shifts the entire framework for social policy, and therefore cannot be implemented on a piecemeal basis. Due to these concerns, despite some movement towards the development of a mixed model, it has not yet been reflected in legal structures.

### 3. Defining Disability in European Union Law

The European Union has adopted and implemented instruments of disability policy since the mid-1970s; it only acquired the power to address disability discrimination in 1999 with the coming into force of the Amsterdam Treaty.<sup>25</sup> The potential of the Article 13 EC<sup>26</sup> was quickly acted upon, and the Employment Equality Directive (henceforth: Directive),<sup>27</sup> which prohibits employment related discrimination with regard to *inter alia*

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<sup>23</sup> *Towards a Common Language for Functioning, Disability and Health*, World Health Organization, Geneva 2002), p. 3.

<sup>24</sup> M. A. McColl, *Disability Policy Making: Evaluating the Evidence Base*, in: D. Pothier, R. Devlin, eds., *Critical Disability Theory, Essays in Philosophy, Politics, Policy and Law*, UBC Press 2006, pp. 27–28, and C. Barnes, G. Mercer, T. Shakespeare, op. cit., p. 27.

<sup>25</sup> The Treaty Establishing the European Community of 1997 (the Amsterdam Treaty) Official Journal C 340 of 10 November 1997. It put great emphasis *inter alia* on the rights of individuals.

<sup>26</sup> “Without prejudice to the other provisions of this Treaty, and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission, and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

<sup>27</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>.

disability, was adopted in 2000. The major Community institutions – the Commission,<sup>28</sup> Council<sup>29</sup> and the Parliament, have all recognised the need to base policy on the social model of disability, and have committed themselves thereto. Indeed, the Directive is, in some ways, a manifestation of this approach.

In line with the general approach found in EU non-discrimination directives, the Directive does not include a definition of disability or guidance on the personal scope of the legislation with regard to disability. The question of who is protected from discrimination on the grounds of disability by the Directive has proven to be problematic for national courts, which *have* been called upon to interpret the national implementation legislation, and has led, thus far, to the only two references to the European Court of Justice (henceforth: ECJ) relating to disability under the Directive.

The term of disability in EU law has been interpreted for the purposes of the Directive in two judgments of the ECJ which both concern a dismissal. In the first case *Chacón Navas v. Eurest Colectividades SA*<sup>30</sup> the ECJ examined the relation between sickness and disability, answering the question whether the term sickness falls within the scope of protection provided by the Directive. With regard to the definition of disability, the ECJ noted that the Directive is designed to combat employment discrimination and defined disability, in that context as, “*a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life*”.<sup>31</sup> For any limitation to be regarded as a “disability”, “*it must be probable that it will last for a long time*”.<sup>32</sup>

According to the opinion of the ECJ the concept of disability is different from the concept of sickness. The ECJ interpreted the concept of disability in relation to the concept of reasonable accommodation which demonstrates that it is envisaged for situations in which participation in professional life

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<sup>28</sup> See e.g.: Communication of the Commission on Equality of Opportunity for People with Disabilities of 30 July 1996, COM (96) 406 and EU Disability Action Plan (Equal opportunities for people with disabilities: a European Action Plan), COM (2003) 650.

<sup>29</sup> See e.g.: Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council of 20 December 1996 on equality of opportunity for people with disabilities, Official Journal C 12, 13 January 1997.

<sup>30</sup> *Chacón Navas v. Eurest Colectividades SA* (Case C-13/05) [2006] ECR I-6467. For further commentary on this case see: L Waddington, *Case C-13/05, Chacón Navas v. Eurest Colectividades SA, Judgment of the Grand Chamber of 11 July 2006*, Common Market Law Review 44 (2007), pp. 487–499.

<sup>31</sup> Op. cit., para 43.

<sup>32</sup> Op. cit., para 45.

is hindered over a long period of time. There is nothing in the Directive to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness.<sup>33</sup>

The ECJ's interpretation has limited the definition of disability as well as "medicalising" it,<sup>34</sup> which stands in contrast to EU policy makers' attempts to introduce the social model, which is entrenched, *inter alia*, in the Convention on the Rights of Persons with Disabilities. The ECJ may have left itself some room to reach a different conclusion in the future. Its wording excludes "a person who has been dismissed solely on account of illness",<sup>35</sup> and it may allow the ECJ to argue that adverse treatment in response to sicknesses which lead to long-term or permanent limitations which hinder professional activity does fall within the Directive's scope, because such treatment is not based "solely" on sickness. It is unfortunate that the ECJ did not clarify if this was its intention, as its judgment can only lead to speculation and doubt on this point and, with its reliance on the medical approach, may reinforce the model in the EU Member States, and perhaps other international jurisdictions.

In the second case *Coleman v. Attridge Law and Steve Law*<sup>36</sup> the ECJ dealt with the question whether the Directive only protects from direct discrimination and harassment person who is disabled, or whether the principle of equal treatment and the prohibition of direct discrimination apply equally to an employee who is not themselves disabled but who is treated less favourably by reason of the disability of their child, for whom they are the primary care provider required by virtue of the child's disability.

Following its Advocate General, the ECJ noted that the "principle of equal treatment ... applies not to a particular category of person but by reference to the grounds mentioned in Article 1."<sup>37</sup> Directly targeting a person who has a particular characteristic is not the only way of discriminating against him or her; there are also other, more subtle and less obvious ways of doing so. One way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong

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<sup>33</sup> Op. cit., para 46.

<sup>34</sup> See: M. Oliver, *Understanding Disability: from theory to practice*, Macmillan Press Ltd., Basingstoke 1996.

<sup>35</sup> Judgment of the ECJ in *Chacón Navas v. Eurest Colectividades SA*, para 47.

<sup>36</sup> *Coleman v. Attridge Law and Steve Law* (C-303/06).

<sup>37</sup> Judgement of the ECJ of 17 July in *Case S. Coleman v. Attridge Law and Steve Law* (C-303/06), para 38 and 51.

to the group. A robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they too affect the persons belonging to suspect classifications. Indeed, the dignity of the person with a suspect characteristic is affected as much by being directly discriminated against as it is by seeing someone else suffer discrimination merely by virtue of being associated with him. In this way, the person who is the immediate victim of discrimination not only suffers a wrong himself, but also becomes the means through which the dignity of the person belonging to a suspect classification is undermined.<sup>38</sup>

In its judgment the ECJ gave the notion of disability an extensive interpretation. It agreed with the opinion of the Advocate General. In the opinion of the ECJ, it does not follow from those provisions of the Directive that the principle of equal treatment which it is designed to safeguard is limited to people who themselves have a disability within the meaning of the directive. On the contrary, the purpose of the directive, as regards employment and occupation, is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the Directive applies not to a particular category of person but by reference to the grounds mentioned in Article 1. The ECJ concluded that, when an employee suffers direct discrimination on the grounds of disability, an interpretation of the Directive which limited its application only to people who had a disability themselves “*is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.*”<sup>39</sup> An interpretation of the Directive limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.<sup>40</sup>

In spite of the fact that various international or non-governmental organizations have been trying to provide unified and standard language in this field, no universal definition of disability in EU law exists. Such a situation is especially unsatisfactory in relation to such an extremely vague and open-ended term as disability.<sup>41</sup> National laws of Member States provide

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<sup>38</sup> See the Opinion of Advocate General Poiares Maduro in Case *Coleman v. Attridge Law and Steve Law* (C-303/06) para 12, 13.

<sup>39</sup> See Judgement of the ECJ of 17 July in Case *S. Coleman v. Attridge Law and Steve Law* (C-303/06), para 38.

<sup>40</sup> *Op. cit.*, para 51.

<sup>41</sup> E. Ellis, *EU Anti-Discrimination Law*, Oxford University Press, Oxford 2005, p. 35.

various notions of disability.<sup>42</sup> Moreover, a lot of national laws of Member States contain more definitions of disability with respect to the area in which this group of persons are to be protected (e.g. education, employment, social security or social protection). Some national laws protect against discrimination not only persons with disabilities but also persons who are not themselves disabled but are in certain relation to a person with disability.<sup>43</sup>

However, it should be emphasized that with respect to the notion of disability the Directive does not state that it should be provided for in the national laws of the Member States. It follows from the need for uniform application of EU law and the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU, having regard to the context of the provision and the objective pursued by the legislation in question.

The need seems to be of a great importance also from the Polish law perspective. The rights of people with disabilities in Poland are protected by various international<sup>44</sup> and domestic laws and official documents.<sup>45</sup> The legal definitions of disability provided by Polish acts interpret the notion exclusively in order to establish the group of beneficiaries of disability pensions<sup>46</sup>

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<sup>42</sup> A comprehensive study which analysed definitions of disability in the social policies and anti-discrimination laws of Member States of the European Union and Norway as of 2002 may be found in: *Definitions of Disability in Europe. A Comparative Analysis*, European Commission, Directorate-General for Employment and Social Affairs, Unit E. 4, September 2002.

<sup>43</sup> A review of Member State legislation reveals four different approaches to the issue of how and whether to define disability. For details see: *Disability and non-discrimination law in the European Union. An analysis of disability discrimination law within and beyond the employment field*, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2, July 2009.

<sup>44</sup> In September 2012 Poland ratified the UN Convention on the Rights of Persons with Disabilities.

<sup>45</sup> The Polish Constitution guarantees equal or preferential treatment to people with disabilities. In 1997, the Polish government adopted the Charter of Rights of Disabled People which embodies the official policy and may serve as guidance for the interpretation of rights and obligations referred to in other legislation applicable to people with disabilities defining disability in terms of functionality. Accordingly, persons “whose physical, psychological, or mental capacity, permanently or temporarily, hinders, limits, or disables their everyday life, study, work, or fulfillment of social roles, according to legal or customary rules” are considered disabled and entitled to special protection or treatment under the constitution. However, these policies have not led to special legislation.

<sup>46</sup> Law of 17 December 1998 on pensions from the Social Insurance Fund – Journal of Laws (Dz.U.) of 2009, No. 153, Text 1227 as amended.

or the State's support in employment,<sup>47</sup> who are to be officially certified as disabled persons to benefit from the State's policies. The Republic of Poland also implemented the EU nondiscrimination directives – however, not including a definition of disability in the transposition legislation.

On the one hand, the situation should leave the way open for national courts to follow the definition of disability developed by the ECJ in *Chacón Navas* or subsequent judgments. There also exists the risk that courts will draw on definitions of disability found in other national legislation, specially social security legislation defining eligibility for a disability pension, when interpreting the concept of disability within the non-discrimination context. Such an approach would be wholly inappropriate as social security and nondiscrimination legislation serve very different purposes. In the case of the former, the establishment of a limited definition of disability is needed since the definition is the gateway to financial support and other benefits funded by the state, whilst in the case of the latter, it is important to spread a broad net to protect against discrimination, prejudice, and stereotypes which does not imply similar financial commitment on the part of the state. Thus, should the courts interpret protection from disability discrimination as only applying to individuals who are officially recognised as disabled by the social security system, this would result in an excessively limited personal scope of the national legislation, and, it is submitted, amount to a breach of the EU Directive. However, there is insufficient Polish case law to determine if this constitutes a problem as yet.

#### 4. Closing Remarks

The pointed shift among theorists, activists and policymakers away from the bio-medical and functional approach to disability, towards the social and human rights approach has not yet been fully mirrored in legislative definitions of disability in the EU and domestic legal systems of Member States. The continued dominance of biomedical and functional definitions in legislation affecting persons with disabilities is due to the power of the biomedical

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<sup>47</sup> Among them the most important legal act concerning the disabled is the Act of 27 August 1997 on Occupational and Social Rehabilitation and Employment of the Disabled – Journal of Laws (Dz.U.) of 1997, No. 123, Text 776 as amended. The act defines the disabled as persons whose physical, psychological or mental condition permanently or temporarily impedes, limits or makes it impossible to fulfill social roles and, in particular, impairs capabilities to carry out a professional activity, provided that they have obtained an appropriate certificate.

mindset, which remains the “common-sense” in popular understanding. The disjunction between current international and domestic policy frameworks and the legal approach embodied in statutes may be ameliorated by the use of flexible interpretative approaches to statutory definitions, as is evidenced by the evolution in the interpretation and application of the definition of “disability” in human rights law.

Many definitions of disability effectively operate as eligibility criteria for access to government programs and benefits and in this case functional definitions of disability are easier to administer. They allow policy developers and program administrators to focus scarce public resources on the most “deserving” persons with disabilities, those with the most substantial needs or disadvantages. Functional criteria allow benefits providers to manage their caseloads and allocate their resources.

It is difficult to find models of legislation that have thoroughly operationalized the social model of disability. A legislative shift from a functional definition to a social one requires a thorough re-imagining of assumptions and procedures. Programs and policies should take as their starting point the development of a barrier-free society, not the amelioration of the disadvantage experienced by persons with disabilities. In the human rights context, the shift from a functional to a social definition of disability required that fewer questions be asked regarding the nature of an individual’s condition, and more asked about the nature and extent of the disadvantage experienced by persons with disabilities. Similarly, the provisions of the ICRPD regarding decision-making, envision less focus on determining the “capacity” of individuals and more on the supports that individuals can be provided in order to maximize their autonomy. The direction should be perceived and applied in the EU legal system – especially through ECJ case law which can be shaped in a more flexible and adequate manner. No definition of disability might be a solution to the possible tension between discrimination and other social disability laws. Nonetheless, the effective protection of rights of persons with disabilities requires the limitation, suitable to a situation, of its personal scope which may be reached by the right interpretation of the term of “disability.”

## **Abstract**

Recently, the concept of disability has been in rapid flux. Beginning in the late 1960s, consensus concerning the common understandings of disability has fragmented, and since then activists and academics have introduced

new approaches to disability and challenged them. The area is now one of complex and ongoing debate and developments in public policy and law on many levels, with multiple competing perspectives.

Despite the efforts of the World Health Organization which resulted in the classification systems for disability developed in 1980 and again in 2001, there is no international universal legal definition of disability, neither is there one in European Union law. A study of definitions of disability in various EU Member States shows that disability definitions vary from state to state but also inside each state and they differ in relation to different legal purposes.

This debate has had a large impact on European disability policy and it has led to a paradigm shift from charity-based to rights-based disability policy and it has helped to understand disability as a social construct, which is reflected in the United Nations Convention on the Rights of Persons with Disabilities. The major EU institutions have all recognised the need to base policy on the social model of disability. Nevertheless, the European Court of Justice case law does not seem to be fully consistent with it. The situation implies the need of developing an autonomous and uniform interpretation of the notion throughout the EU, which also is to be emphasized from the Polish law perspective.

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**Maciej Perkowski**, Associate Professor, Department of International Law, University of Bialystok

**Anna Drabarz**, MA, doctoral student at the Faculty of Law, University of Bialystok

