

DISABILITY AND WORK: THE INTERNATIONAL AND SUPRANATIONAL LEGAL FRAMEWORK

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RESUMEN: Este artículo se centra en la promoción del empleo de personas con discapacidad en el marco legal internacional y supranacional (Unión Europea y Consejo de Europa). A partir de la definición de discapacidad y cómo ha cambiado en las últimas décadas, el capítulo define la protección del derecho al trabajo de las personas con discapacidad y los instrumentos jurídicos para su promoción, teniendo también en cuenta la jurisprudencia reciente.

ABSTRACT: This chapter focuses on the promotion of employment of persons with disabilities provided by international and supranational (id. European Union and Council of Europe) legal framework. Starting with the definition of disability and how it has changed in the last decades, the chapter defines the protection of the right to work of disabled people and the legal tools to promote it, also taking into account recent case law.

PALABRAS CLAVE: discapacidad, derechos, empleo, ajustes razonables.

KEYWORDS: disability, rights, employment, reasonable accommodation.

“All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”.

Declaration of Philadelphia, International
Labour Conference, 1944

1. INTRODUCTION

People experiencing disabilities represent around 15% of the world's population (about 1 billion people)¹, one of the largest minority groups in the world. According to the International Labour Organization (ILO), in the world an estimated 470 million people in working-age live with some type of disability².

Despite the relevance and the size of the phenomenon, persons with disabilities have not always been object of direct interest for international law, in particular during the first three decades after the birth of United Nations. The *Universal Declaration of Human Rights* of 1948, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* of 1966 do not mention explicitly persons with disability among the protected categories, indeed. Only starting in the 1970s, disability has become a specific international issue related to human rights.

After a long history of tragedies “hidden in the collective unconscious”³, disabled people had been considered as objects of charity and care; but since the 1970's the human rights perspective has started to change the legal scenario. This process began

¹ World Report on Disability, 2011, World Health Organization, document available at www.who.int/disabilities.

² Facts on Disability World of Work, International Labour Organization, November 2007, document available at www.ilo.org/employment/disability.

³ G. LOY, “La disabilità nelle fonti internazionali”, in C. LA MACCHIA (ed.), *Disabilità e lavoro*, Ediesse, Roma, 2009, pp. 33-35, referring to R. TARDITI, “L'olocausto delle diversità, un passato poco conosciuto”, *La rivista psichiatrica/informazione*, Vol. 1/2007, num. 32, 2005.

with the very first UN Declarations⁴ and was completed with the approval of the Convention on the Rights of Persons with Disabilities (UNCRPD), adopted by the General Assembly with Resolution 61/106, on 13 December 2006, which came into force on 3 May 2008, the same year of the 60th anniversary of the Universal Declaration of Human Rights (UDHR).

Not only the United Nations but also other international organizations, such as the European Union for instance, have developed norms or standards about disability which, even though different in contents, approaches and scopes, are all meant to promote the human rights of persons with disabilities and to fight against their discrimination or social exclusion which could involve restrictions (or even denial) of opportunities in education, housing, transport, cultural life and access to public places and services and, for what concerns this research, employment, because of physical or social barriers. All these situations are now considered violations of the human rights of persons with disabilities.

The path towards the UNCRPD has been long and has changed in terms of concepts and language over the years. Traditionally, the starting point for legislation and policies was the assumption that disability was an individual obstacle to the exercise of the same rights as non-disabled persons; consequently the situation of persons with disabilities was often addressed in terms of rehabilitation and social services. Now that assumption has radically changed.

Appropriate measures⁵ are now required to promote the rights of persons with disabilities, and to participate in social life and development on the basis of equality.

As the recent history of disability could tell, international legislation is one of the most powerful tools of change, progress and development in society. International norms concerning disability are useful for setting common standards that need to be appropriately reflected in policies and programmes in order to effect positive changes in the lives of disabled persons.

The most important international sources of law are treaties that are legally binding to States parties, creating legal obligations for them. All international human rights instruments protect also persons with disabilities, because they include the

⁴ Declaration on the Rights of Mentally Retarded Persons of 1971, adopted by the General Assembly with the Resolution 2856 on 20 December 1971, and Declaration on the Rights of Disabled Persons of 1975, adopted by the General Assembly with the Resolution 3447 on 9 December 1975.

⁵ This expression often occurs in the UNCRPD.

principle of universality together with the principles of equality and non-discrimination⁶.

Some international and regional human rights conventions are addressed directly to the protection of the rights of disabled people or have some provisions regarding them, such as the ILO Convention concerning Vocational Rehabilitation and Employment (Disabled Persons) of 1983, the European Social Charter (article 15) of 1961 revised in 1996, the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities of 1999, the African Charter of Human and People's Rights [art. 18(4)] of 1981, the African Charter on the Rights and Welfare of the Child (article 13) of 1990, the Protocol of San Salvador (Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights) (art. 6 e 9) of 1988.

Some international human rights treaties, such as the Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948, and some of their specific provisions, such as the principle of non-discrimination, have become part of customary international law and are considered as legally binding on all States, even those that have not ratified these treaties.

Then there are also international soft law instruments, such as resolutions, principles, declarations, guidelines and rules which are not legally binding but are generally accepted as a moral and political commitment by the States, in order to enact and empower legislations or policies about protection of disabled people, such as the Declaration of the Rights of Mentally-Retarded Persons of 1971, the Declaration on the Rights of Disabled Persons of 1975, the World Programme of Action concerning Disabled Persons of 1982, the Tallinn Guidelines for Action on Human Resources Development in the Field of Disability of 1990, the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care of 1991, and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities of 1993. Then, in 1994 the Committee on Economic, Social

⁶ The most relevant United Nations human rights conventions are: the International Covenant on Civil and Political Rights of 1966, the International Covenant on Economic, Social and Cultural Rights of 1966, the Convention on the Elimination of All Forms of Racial Discrimination of 1965, the Convention on the Elimination of All Forms of Discrimination against Women of 1979, the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment of 1984, the Convention on the Rights of the Child of 1989, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990.

and Cultural Rights adopted a General Comment on persons with disabilities⁷, an authoritative statement of the Committee understanding of rights enshrined in the International Covenant on Economic, Social and Cultural Rights, which is useful to guide States in the implementation of international human rights norms and to measure the level of compliance of States Parties with regard to the specific rights contained in human rights conventions.

Translation from international conventions, standards or norms to national law, and then to local implementation, is slow and complex but fundamental. States are primarily responsible for adapting legislative, administrative and judicial practices in order to empower persons with disabilities to exercise their human rights.

This chapter focuses on the international and supranational law framework, considering thus the main provisions and legal principles on employment promotion of persons with disabilities of the UNCRPD and, then, those ones set by the European Union's institutions and by the European Court of Human Rights.

2. THE UN CONVENTION ON RIGHTS OF PERSONS WITH DISABILITIES

The State parties of the UNCRPD, in the preamble, recall the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world, as well as the principle whereby everyone is entitled to all the rights and freedoms set in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, without distinction of any kind. The preamble is also the opportunity to put the new provisions in line with the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms, ensuring that persons with disabilities can fully enjoy these rights.

The preamble underlines also the importance of the principles and policy guidelines contained in two different documents: the World Programme of Action

⁷ General Comment n. 5, Persons with disabilities (Eleventh session, 1994), U.N. Doc E/1995/22 at 19 (1995), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 24 (2003).

concerning Disabled Persons⁸, and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities⁹; these tools have the purpose of promoting at national, regional and international level all the necessary policies, plans, programmes and actions to further equalize opportunities for persons with disabilities.

As others international organizations or institutions had already done, the UNCRPD aims to accelerate the process of mainstreaming of disability issues, detecting them as an integral part of relevant strategies of sustainable development¹⁰.

For the purposes of this research, it is necessary to analyse, as far as it is possible in this brief chapter, the two key concepts for the promotion of the right to work of persons with disabilities: firstly, the notion of “persons with disability”, which is useful to define the scope of the UNCRPD, and then, the notion of “reasonable accommodation”, the real legal “crowbar” system through which employers are obliged to intervene in their organization in order to facilitate the working inclusion of people with disabilities.

2.1. Disability and Rights

According to art. 1 of UNCRPD, «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». This definition is evidently wider than that one given by ILO Convention 159 of 1983, according to which «the term disabled person means an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment».

⁸ This Programme has been adopted by the General Assembly on 3 December 1982, by its resolution 37/52 - United Nations document A/37/51, Official Records of the General Assembly, Thirty-seventh Session Supplement No. 51. Visit the web: <http://www.un.org/disabilities/default.asp?id=23>.

⁹ The Standard Rules on the Equalization of Opportunities for Persons with Disabilities have been adopted by the United Nations General Assembly, forty-eighth session, Resolution 48/96, annex, of 20 December 1993. Visit the website: <http://www.un.org/disabilities/default.asp?id=26>.

¹⁰ Concerning the World Bank, see R. L. METTS, “Disability issues, trends and recommendations for the World Bank, 2000. The document is accessible to the following website: <http://siteresources.worldbank.org/DISABILITY/Resources/280658-1172606907476/DisabilityIssuesMetts.pdf>.

In the latter definition indeed, the formal recognition of the impairment and the substantial reduction of opportunities in labour market are very restrictive in terms of identification of the category. The UNCRPD, on the contrary, has brought a great innovation: it does not require a formal recognition of the impairment which in turn does not necessarily imply the outbreak of a handicap, which emerges definitely only facing some social barriers. This definition aligns itself with the recent tendencies of the World Health Organisation¹¹.

In order to achieve the fundamental principles of dignity, equality, non-discrimination, individual autonomy, participation and inclusion in society, the Convention establishes some instrumental principles, like the accessibility of every right or need to everyone, the adoption of reasonable accommodation, the strengthening of the role of representative organizations and the mainstreaming of disability in the overall process of development. Undoubtedly UNCRPD promotes the acceptance of disability as part of human diversity.

Like women, migrants, children and other vulnerable groups, persons with disabilities are thus protected by a binding legal instrument that does not merely prohibit discrimination but requires a proactive protection. According to the new model of disability introduced by the Convention, the elimination of barriers for people with disabilities is no longer perceived only in terms of social security measures but requires also to work on the social perception of disability.

The traditional medical model which means disability as a deficiency or deviation from normality, located in the individual who encounters difficulties to participate in social, cultural or economic life is now denied by the social model which focuses the experience of disability within the social dynamics and their barriers¹². In this way, disability is considered a form of social oppression.

¹¹ According to the International Classification of Functioning, Disability and Health (ICIDH-2) of 1999, which represents a revision of the International Classification of Impairments, Disabilities, and Handicaps (ICIDH), first published by the World Health Organization for trial purposes in 1980, disability is considered in terms of activities and participation, *id est*: activity limitations and participation restrictions. This version has been developed after systematic field trials and international consultation over the last five years and is to be considered by WHO governing bodies for approval for international use.

¹² For further studies on this topic, see C. BARNES, G. MERCER, "Theorising and Researching Disability from a Social Model Perspective", in C. BARNES, G. MERCER, *Implementing the Social Model of Disability: Theory and Research*, The Disability Press, Leeds, 2004, pp. 1-17.

The affirmation of the social model approach to disability is strictly linked to the affirmation of the rights-based approach, according to which the condition of disability is due to the violation of human rights, and therefore States are asked to remove all sorts of barriers that preclude disabled people to fully participate in social, cultural, political and economic life.

The principle of the need considers the impairment of the persons with disabilities not as a failure but as a positive dimension, a richness of human diversity.

The general principles underlying the Convention can be divided in two main groups: the first group includes founding principles of the approach to disability and the person with disabilities, like respect for the inherent dignity of the person, non-discrimination, full and effective participation and inclusion in society, respect for the differences of people with disabilities as part of human diversity, and respect for the evolving capacities of children with disabilities and their identity.

The second group concerns the general conception of the fundamental principles of human rights upheld in the Convention: the principle of universality, indivisibility and interdependence of human rights above all, as well as the recognition of disability issues as an integral part of the strategies for the promotion of sustainable development, and the need to pay particular attention to international cooperation for improving the living conditions of persons with disabilities in every country, especially in developing countries.

The overall objective of the Convention is to promote, protect and ensure full and equal enjoyment of all human rights by all persons with disabilities and to promote respect for their inherent dignity¹³.

The correlative obligations entered into by States parties in the ratification of the Convention concern both negative obligations of non-interference (related to the profile of non-discrimination) and the positive obligations of active promotion of the rights listed therein.

The rights focus primarily on the removal of all forms of discrimination. The term "discrimination" is defined indeed as "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of reducing or nullifying the recognition, enjoyment or exercise, on an equal footing, of all human rights" (Art. 2).

In this context, the idea of "reasonable accommodation", or the request to modify and adapt the treatments (mainly in the workplace, identifying the tasks best suited to each individual disabled person), to ensure to persons with disabilities the

¹³ P. HARPUR, "Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities", *Disability & Society*, 27:1, 2012, pp. 1-14.

enjoyment or exercise of human rights on an equal basis, assume great importance. It requires that the difference is taken into account in order to avoid indirect discrimination. Note that, while positive action measures are general and not tailored on the individual, the concept of reasonable accommodation, however, is essentially individual¹⁴. It means that the person is in interactive dialogue with the employer to find the right kind of placement required by the circumstances of the case.

The obligation for reasonable accommodation creates in the worker's legal sphere a right to ask for it and protects workers when the employer fails to fulfil this particular duty.

The rights of persons with disabilities have radically changed their shape with the new approach emerging in the international arena: the UNCRPD, which is clearly the biggest result of this pathway, and indeed offers an integrated view in which non-discrimination and autonomy of people with disabilities are mutually integrated with active engagement in the removal of social, economic and cultural obstacles to their full participation in the social and economic life.

The UNCRPD contains, therefore, also new and wider formulations of traditional human rights, as in the case of rights related to the development of self-awareness, the reduction of poverty, the aim to better ensure the rights of persons with disabilities where other negative conditions are present at the same time, like in the case of indigent persons with a disability, for instance.

Reading through the lines of the UNCRPD, the justiciability of both negative and positive rights seems to overcome the dichotomy between them thanks to an innovative fusion between civil and social rights in a perspective of genuine interdependence and indivisibility.

2.2. The Promotion of Employment

Together with other social rights, the UNCRPD affirms the centrality of the right to work, essential key so that persons with disabilities could earn a living as individuals and part of their families, and realize other human rights. States Parties shall guarantee persons with disabilities do not suffer from slavery or servitude, as well as from forced or compulsory labour, as the second paragraph expressly states.

First of all, the State Parties establish the promotion of the skills and merits of people with disabilities as well as their specific contribution in the workplace (art. 8).

¹⁴ For a wider focus on reasonable accommodation, *see* the next paragraph 2.2.

This principle is fundamental to ensure the substantive equality of disabled people through the development of tools for the realization of equal opportunities, applying the minority rights approach.

The core of the issue is represented by art. 2, where the right of persons with disabilities to work is recognized to all persons with disability, even those who acquire a disability during the course of employment: the right to achieve a life by an employment freely chosen or accepted, within a labour market and work environment which must be open, inclusive and accessible.

State parties are required to guarantee the effectiveness of this right, through different levels of protection. The first level refers to antidiscrimination measures, which could concern all aspects of working conditions, from recruitment to dismissal, including continuance of employment, career advancement and safety and health at workplace, equal opportunities and equal remuneration for work of equal value, and finally protection from harassment and the redress of grievances. The effectiveness of the right to work is closely linked also to the promotion of the right to exercise labour and trade union rights on an equal basis with others. State parties are also required to promote the employment of persons with disabilities in the public and the private sector, through affirmative action programmes, incentives and every other appropriate policy or measure. A relevant importance is given to the acquisition of work experience on the one hand, also through vocational and professional training, and on the other hand, the recovery of working capabilities through the vocational and professional rehabilitation, job retention and return-to-work programmes.

In a huge definition of work, obviously self-employment and entrepreneurship are included. Therefore, State parties should promote also this other way to achieve social and economic inclusion of persons with disability.

The success of any kind of measure to promote the employment of disabled persons is strictly linked with the implementation of effective reasonable accommodations.

According to UNCRPD, reasonable accommodations are all “necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms” (art. 2).

This expression is not new, but is perfectly in line with similar notions already present in domestic antidiscrimination legislations, such as “reasonable adjustment or adaptation, and effective or suitable modifications or measures”¹⁵.

The reasonable accommodations are a result of the principle of equality, viewed in a substantial and active way: treating equal situations in an equal way and the different situations in a different way. The persons with disabilities are a minority to be protected, and therefore to be treated not only in a different way, compared to the majority, but in their case it is necessary to use non-majoritarian measures which deploy their anti-discrimination effects. In this way, any appearance of privilege these measures can show are indeed denied by the fact that they represent precisely the application of the principle of equality for disabled people who, on the contrary, when subjected to normal rules, would be undermined, marginalized or even oppressed¹⁶. The reasonable accommodation may consist of any tailored or tailorable device, which can also be generated from a negotiation between the parties; it clearly represents the tendency towards a “particular” legislation, and, by its nature, can be anything but the result of a legislative measure, which on the contrary has a general and universal vocation. As it has been told properly, “in terms of right at workplace, the concept of reasonable accommodation entails that legal measures requiring employers to provide reasonable accommodation of the impairment and disability related need of employees and prospective employees should be put into place, so as to permit to preserve this right and also to allow employers to ask for funding when accommodations imply substantial, not foreseen, financial costs”¹⁷.

The employers, therefore, are asked to set up an accessible and enabling working environment, according to the type and quality of the impairment suffered by workers. In particular, the employers could arrange adjustments and modifications to the enterprise organisation (from the assignment of tasks to the revision of working time, leave and rests systems) to the physical changes of workstations or the adoption of new tools and devices. Of course, special training and some tailored management

¹⁵ P. WELLER, “Developing Law and Ethics – The Convention on the Right of Persons with Disabilities”, *Alternative Law Journal*, Vol. 35:1, 2010, pp. 8–12.

¹⁶ D. LOPRIENO, S. GAMBINO, “L’obbligo di “accomodamento ragionevole” nel sistema multiculturale canadese”, in G. ROLLA, *L’apporto della Corte suprema alla determinazione dei caratteri dell’ordinamento costituzionale canadese*, Giuffrè Editore, Milano, 2008, pp. 217-240.

¹⁷ S. FERRAINA, “Analysis of the legal meaning of Article 27 of the UN CRPD – Key challenges for adapted work settings”, Working Paper, European Association of Service Providers for Persons with Disabilities, p. 15. Visit the website: www.easpd.eu.

supervision could be also very helpful in reshaping the working environment in a more empowering way.

The UNCRPD's purposes are very relevant, so the phase of implementation and enforcement plays an important role. For that reason, the monitoring of the Convention is assigned to a very well structured group of different subjects. By the way, the most important body is the Committee, "endowed with several notable innovations of significant potential"¹⁸; among its tasks, indeed, it can activate and lead reporting and investigative procedures, collaborating in an active way with the other bodies established in the UNCRPD¹⁹.

3. THE EUROPEAN UNION'S FRAMEWORK

The European Community has adopted many instruments to address the issue of persons with disabilities since the mid-1970s, and above all from the mid-1980s to the mid-1990s. For instance, in 1986, on the basis of Article 235 of the Treaty establishing the European Economic Community, the Council of the European Communities delivered a recommendation²⁰ to the Member States to take "all appropriate measures to promote fair opportunities for disabled people in the field of employment and vocational training, including initial training and employment as well as rehabilitation and resettlement". To this end, Member States should have eliminated all the legal causes of negative discrimination and implemented positive actions for persons with disabilities. This recommendation, in its "whereas", refers to the Council Resolution of 21 January 1974 on a social action programme providing the implementation of a programme for the vocational and social integration of handicapped persons, the following Council Resolution of 27 June 1974 establishing the initial Community action programme, and then to the Resolution of the Council and of the Representatives of the Governments of the Member States of 21 December 1981 on the social integration of handicapped people and the Resolution of European Parliament of 11 March 1981. For the purpose of this Recommendation, the Council

¹⁸ M. A. STEIN, J. E. LORD, "Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities and Future Potential", *Human Rights Quarterly*, Vol. 32:3, 2010, pp. 689-728.

¹⁹ For a particular focus on the Committee, *see* J. E. LORD, M. A. STEIN, "The Committee on the Rights of Persons with Disabilities", in P. ALSTON, F. MÉGRET, *The United Nations and Human Rights: A Critical Appraisal*, Oxford University Press, New York, 2013.

²⁰ Council Recommendation of 24 July 1986 on the Employment of Disabled People in the Community (86/379/EEC).

has also the opportunity to specify that the definition of “disabled people” includes all persons with serious disabilities which result from physical, mental or psychological impairments. In 1994, the European Commission approved a White Paper, European Social Policy – A Way Forward for the Union, in which there is a part expressly addressed to the promotion of social integration of persons with disabilities²¹. In 1996, the European Commission issued a Communication on equality of opportunity for people with disabilities, A New European Community Disability Strategy²², followed by the Resolution of the Council of 20 December 1996 on equality of opportunity for people with disabilities.

²¹ The Commission states: “22. More than 10% of the total population of the European Union have disabilities. The needs of individual disabled people may vary considerably depending on the nature of their disability, coupled with factors such as their previous experience, their level of skill and their personal circumstances. Assistance often needs to be tailored to the severity of a disability. However, as a group, people with disabilities undoubtedly face a wide range of obstacles which prevent them from achieving full economic and social integration, and there is therefore a need to build the fundamental right to equal opportunities into Union policies. 23. Considerable help has been given from the European Social Fund, the HORIZON Initiative and the HELIOS Action Programme including the Handynet system, to support and promote the training of disabled people so as to enable them to enter or re-enter the labour market. The aim of this assistance is to demonstrate that enabling people to develop their abilities is beneficial not only to themselves but also to society as a whole. This work will continue. In addition, the Commission will: build on the positive experience of the European Disability Forum to ensure through appropriate mechanisms that the needs of disabled people are taken into account in relevant legislation programmes and initiatives. This includes ensuring that to the maximum extent possible Union programmes are accessible to disabled people and that they are actively encouraged to participate in them; prepare an appropriate instrument endorsing the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities; as part of a process to encourage model employers, prepare code good practice in relation to its own personnel policies and practices, and encourage discussions within the framework of the social dialogue on how such model could be extended more widely. 24. It will also examine how Union action could contribute to the key issue of improved access to means of transport and public buildings, and press for the adoption of the proposed Directive on the travel conditions of workers with motor disabilities”.

²² 30 July 1996, COM(96) 406 final, not published in the Official Journal.

But only with the Treaty of Amsterdam²³, the European institutions made the deciding qualitative leap, even though “what was finally approved [...] in 1997, however, was a watered-down version of what had been agreed at the IGC”²⁴.

The EU Charter of Fundamental Rights, proclaimed at the Nice European Council on 7 December 2000 and legally binding as EU Treaties since 1 December 2009, with the entry into force of the Treaty of Lisbon, recognises in Article 26 the right of persons with disabilities to “benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”. The major aim should be to enable them to fulfil the roles and responsibilities of citizenship and have the same individual choices and control over their lives as non-disabled people.

According to Article 151 TFEU (ex Article 136 TEC), the Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. In order to achieve the objectives of Article 151 TFEU, Article 153 (1) and (2) TFEU (ex Article 137 TEC) confers on the Union the power to support and complement the activities of the Member States in the fields of integrating persons excluded from the labour market and combating social exclusion, among the others.

In 2000, on the basis of former Article 13 EC, now Article 19 TFEU, the Council on the EU adopted one of the most important regulatory acts, *id est*, Directive 2000/78, also known as the “EU Framework Directive on Employment”, whose purpose is to put into effect in the Member States the principle of equal treatment, laying down a general framework for combating discrimination in employment and occupation with regard to a number of several grounds, including disability together with religion or belief, age or sexual orientation.

²³ Article 6a of the Treaty establishing European Community: “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”.

²⁴ A. O'REALLY, “The Right to Decent Work of Persons with Disabilities”, International Labour Office, Geneva, 2007, p. 42.

According to Article 2 of the Directive, the “principle of equal treatment” means that there shall be no direct or indirect discrimination²⁵ whatsoever on any of the grounds referred to in Article 1.

Under this principle, with regard to persons with a particular disability, the employer is obliged, under national legislation, to take appropriate measures in order to eliminate disadvantages.

According to Article 5, the compliance with the principle of equal treatment in relation to persons with disabilities could be guaranteed through the provision of reasonable accommodations. The Directive 2000/78, where needed in a particular case, introduces a real obligation to the employers who shall take “appropriate measures” to enable a disabled worker to have access to, participate in, or advance in employment, or to undergo training; this obligation finds a limit in what the Directive calls a “disproportionate burden” on the employer. Article 5 ends clarifying that this burden is not disproportionate “when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned”. These appropriate measures could be effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources. To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance, as Recitals 20 and 21 in the preamble to the directive affirm. Anyway, these two aspects will be further analysed in the next paragraph.

The European Commission crystallized its commitments in the European Disability Strategy for 2010-2020²⁶ which, adopted on 15 November 2010, is a comprehensive framework, showing a wide-range approach and taking into account

²⁵ See *inter alia*, L. VENTURA, *Il principio di uguaglianza nel diritto del lavoro*, Milano, 1984; L. ISEMBURG, *Divieti di discriminazione nel rapporto di lavoro*, Giuffr  Editore, Milano, 1984; D. IZZI, *Eguaglianze e differenze nei rapporti di lavoro*, Jovene, Napoli, 2005; A. LASSANDARI, *Le discriminazioni nel lavoro: nozioni, interessi, tutele*, Cedam, Padova, 2010; S. FORSHAW, M. PILGERSTORFER 2008. “Direct and Indirect Discrimination: Is there something in between?” *Industrial Law Journal*, 2008, n. 4, PP. 347-364; K. LIPPERT-RASMUSSEN, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination*, Oxford University Press, New York, 2013.

²⁶ COM(2010) 636 final, Communication from the Commission to the European Parliament, the Council, The European and Social Committee and the Committee of the Regions.

both soft and hard law measures in order to accomplish its eight objectives, which could include from non-discrimination to social protection, education, training and above all the promotion of employment: it states indeed that “quality jobs ensure economic independence, foster personal achievement, and offer the best protection against poverty”²⁷. The European Disability Strategy 2010-2020 is accompanied by a List of Actions 2010-2015²⁸, that sets a series of key-actions *inter alia* on employment of persons with disabilities, like for instance increasing knowledge on employment situation of people with disabilities, identifying challenges and proposing remedies, optimizing the use of the new strategy for jobs and growth, “Europe 2020”, for the benefit of people with disabilities or giving special attention to difficulties of young people with disabilities in transition from education to employment and address intra job mobility including those working in sheltered workshops. The latter key-action foresees the involvement of Public Employment Services (PES) at EU level, by accessibility of actions and material, dialogue with temporary and special agencies or specific disability oriented seminar in the PES Peer review, for example.

In December 2007, the European Commission created the Academic Network of European Disability Experts (ANED)²⁹, whose purpose is to create a European network of researchers in the field of disability studies, which could join the Disability Unit and support the design of appropriate policies. One of the most relevant documents issued by ANED is “Targeting and mainstreaming disability in the context of EU2020 and the 2012 Annual Growth Survey”³⁰, of June 2012, in which the experts have monitored and provided input to EU2020 Strategy co-ordination.

Within the European Employment Strategy (EES)³¹, each Member State has to yearly report back to the European Commission on national plans on employment, regarding the disability issue as well as other related issues.

Since European Union concluded the UNCRPD, under Article 44, on 22 January 2011, EU is in duty bound to implement its provisions. To this purpose, European Commission issued a Report on the Implementation of the UN Convention

²⁷ COM(2010) 636 final, p. 7.

²⁸ SEC(2010) 1324 final.

²⁹ Visit the website: www.disability-europe.net.

³⁰ A synthesis report of the document, prepared by Mark Priestley on behalf of the ANED is accessible at the following link: <http://www.disability-europe.net/theme/employment/reports-employment>.

³¹ It is a “soft law” mechanism, which aims to coordinate the employment policies of the EU Member States. At EU level are decided only goals and priorities, whilst the implementation of the necessary policies is up to the each country.

on the Rights of Persons with Disability by the European Union³², in which the state of the art is defined. In the section dedicated to the implementation of Article 27 UNCRPD, all the legal tools used by European institutions are listed. One of the most significant tools for employment inclusion of disabled people is the faculty of public authorities, by virtue of Directive 2004/17/EC and Directive 2009/81/EC, to reserve the “right to participate in contract award procedures to sheltered workshops and specify that such contracts should be carried out in the sheltered employment context, where 50% of the workers have a disability” (paragraph. 144 of the Report). Then, the revised public procurement Directives should extend the possibility to reserve public contracts not only to sheltered workshops but also to “economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, and 30% of whose employees are disabled or disadvantaged”. This kind of measures could be really effective to ensure persons with disability their right to work.

3.1. The Meaning of “Disability” and “Reasonable Accommodation” according to the ECJ

Since the Treaties and the Directive 2000/78 did not give the definition of “disability”, they left open space to the intervention of the European Court of Justice on the prohibition of dismissal and disability discrimination, enshrined in Art. 2, n. 1 and 3, n. 1, letter c) of the Directive 2000/78 with the *Chacón Navas Sonia Case*³³.

The Court said that the concept of “disability” for the purpose of Directive 2000/78 “must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”.

So, defining the concept of disability, the Court defined also the scope of the Directive and its protections; the judgment, indeed, marked the difference between “disability” and “sickness”, two concepts that cannot therefore simply be treated as being the same.

As far as the Directive 2000/78 does not state that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness, according to the judges of Luxembourg, the importance which the European legislator attaches to measures for adapting the workplace to the disability

³² SWD(2014) 182 final, of 5 May 2014.

³³ C-13/05 of 11 July 2006, ECLI:EU:C:2006:456.

demonstrates that only situations which last for a long period of time could be relevant.

In accordance with Article 5 of Directive 2000/78, reasonable accommodation is to be provided in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities. That provision means that employers are to take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, unless such measures would impose a disproportionate burden on the employer. The prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post. Thus, the ECJ has stated: “a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78”. On the other hand, there is an obligation to provide reasonable accommodation for people with disabilities and, always according to Articles 2(1) and 3(1)(c) of Directive 2000/78, dismissal could not be justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his/her post.

In this case of 2006, the ECJ adopted evidently the medical model of disability, although the Directive 2000/78 could have been interpreted as a result of the approach based on the social model, as all the major European Institutions had already shown before³⁴.

With the HK Danmark case³⁵, the ECJ returned to disability in 2013 trying to keep the track on the previous judgment, but it finally expanded the definition of disability, expressly towards the social model as held by the UNCRPD: the judge of Luxembourg 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

³⁴ It is enough to consider among others the Communication of the Commission on Equality of Opportunity for People with Disabilities of 30 July 1996, COM (96) 406 final and, more recently, EU Disability Action Plan (Equal opportunities for people with disabilities: a European Action Plan, COM (2003) 650 final), for the European Commission, and the 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, 1 for the Council.

³⁵ Joined cases C-335/11 and C-337/11 of 11 April 2013, ECLI:EU:C:2013:222.

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» within the meaning of Directive 2000/78”. It is a concept that strives to keep a certain balance between the two different models.

But the judges of Luxembourg have also affirmed that a disability does not necessarily imply complete exclusion from work or professional life, so an illness which affects the working ability of a person only to a limited extent is not an obstacle to the application of the Directive 2000/78: “the concept of «disability» as defined in paragraph 38 above must be understood as referring to a hindrance to the exercise of a professional activity, not, as DAB and Pro Display submit, to the impossibility of exercising such an activity. The state of health of a person with a disability who is fit to work, albeit only part-time, is thus capable of being covered by the concept of «disability»”. Then, the ECJ affirmed that the nature of the measures to be taken by the employer is not decisive for considering that a person’s state of health is covered by “disability” concept.

In accordance with the second paragraph of Article 2 of the UN Convention, and with respect to Directive 2000/78, that concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers. So, Article 5 of Directive 2000/78 must be interpreted as meaning that a reduction in working hours may constitute one of the accommodation measures referred to in that article. It is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employer.

Always about the obligation under Article 5 of Directive 2000/78, the ECJ stated that the circumstance that an employer has failed to take those measures might imply that the absences of a worker with a disability are attributable to the employer’s failure to act, not to the worker’s disability. Conclusively, the judges of Luxembourg consequently have stated that a national legislation, like Danish law in this case, that allows an employer to reduce an employee’s notice period after a prolonged period of absence where that absence was caused by “the employer’s failure to take the appropriate measures” is unlawful, unless that legislation is necessary to pursue a legitimate aim.

Finally, the ECJ has returned to the concept of disability with a very recent case³⁶, concerning Ms. Z., employed as a post-primary school teacher in a school

³⁶ Case C-363/12 of 18 March 2014, ECLI:EU:C:2014:159.

managed by the *Board of Management*, who had a baby through a surrogacy arrangement in California, USA. Ms. Z. brought an action against the Government department, responsible for her employment conditions, because her application of leave equivalent to adoptive leave had been refused. The judges of Luxembourg have ruled, among other issues, that Directive 2000/78 “must be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who is unable to bear a child and who has availed of a surrogacy arrangement does not constitute discrimination on the ground of disability”.

In this case, the ECJ, even though it has recalled the principles stated in *HK Danmark*, seems to adopt a narrow concept of “disability”, joining the Opinion of Advocate General³⁷: Ms. Z’s impairment (the lack of uterus) is surely a condition of limitation, but within the meaning of Directive 2000/78, it does not represent an obstacle to her full and effective participation in professional life on an equal basis with other workers.

³⁷ “95. I do not think that the condition from which Ms. Z suffers hinders, within the meaning of the Court’s case-law, ‘in interaction with various barriers [...] the full and effective participation of the person concerned in professional life on an equal basis with other workers’ (emphasis added). Indeed, as the Court has observed, the concept of ‘disability’ within the meaning of Directive 2000/78 is to be understood in relation to the possibilities for that person to work, and to exercise a professional activity. (60) This approach appears to be consistent with the aims pursued by the directive, namely, to combat discrimination in the specific context of employment and, consequently, to enable a person with a disability to have access to and participate in employment. 96. In other words, because of the inherently contextual nature of disability, the issue of what constitutes a disability for the purposes of Directive 2000/78 ought to be examined on a case-by-case basis in light of the rationale underlying that legal instrument. In consequence, the issue is whether the impairment in question constitutes –in interaction with specific barriers, be they physical, attitudinal or organisational– a hindrance to exercising a professional activity. 97. As profoundly unjust as the inability to have a child by conventional means may be perceived to be by a person who wishes to have a child of his or her own, I cannot interpret the existing EU legislative framework as covering situations which are not linked to the capacity of the person concerned to work. (61) In that respect, it is necessary to highlight the inherently functional nature of the concept of disability under Directive 2000/78. In my view, in order for a limitation to fall within the scope of that directive, an interrelationship must be established between that limitation and the capacity of the person concerned to work. That link appears to be missing in circumstances such as those of the case before the referring court. (62) It does not appear from the case-file that the limitation from which Ms. Z suffers would have prevented her from participating in professional life. 98. I therefore take the view that the less favourable treatment of which Ms Z complains cannot be construed as falling within the scope of Article 5 of Directive 2000/78”, Opinion of Mr. Advocate General Whal of 23 September 2013, ECLI:EU:C:2013:604.

The ECJ has had also the opportunity to express itself on the relationships between UNCRPD and EU legislation: indeed it has stated that the validity of Directive 2000/78 cannot be assessed in the light of the UN Convention, because its provisions are not unconditional and sufficiently precise (according, for example, to *Intertanko and Others*³⁸ and *Air Transport Association of America and Others*³⁹) and consequently they do not have direct effect in EU law. Following the opinion of Advocate General, the ECJ has considered the obligations imposed by UNCRPD to Contracting Parties as merely “programmatic”.

4. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS INSTITUTIONAL FRAMEWORK

All members of the European Union also belong to the Council of Europe, which is a regional intergovernmental organization, made up by 45 countries that have signed up the European Convention on Human Rights, aiming to defend human rights, parliamentary democracy and the rule of law. The Convention does not expressly refer to disability –and even less about employment issue–, with the only exception of Article 5(1) in which it refers to the lawful detention of persons of “unsound mind”. Anyway, all the rights set up in the Convention belong to all individuals, including those with disabilities, so it is meant nevertheless as a relevant tool for the promotion of the rights of persons with disabilities.

According to the principle of prohibition of discrimination, as stated in Article 14 of the European Convention on Human Rights, the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The list is not meant to be exhaustive, and disability has become a relevant ground for discriminatory acts or behaviours.

The European Court of Human Rights has for the first time found a violation of the right to non-discrimination on the basis of the applicant’s disability, referred to the United Nations Convention on the Rights of Persons with Disabilities, in the case of *Glor v. Switzerland*⁴⁰: Mr. Glor argued that he had been subjected to discrimination on the basis of his disability because he had been prohibited from carrying out his

³⁸ C-308/2006, ECLI:EU:C:2008:312.

³⁹ C-366/2010, ECLI:EU:C:2011:864.

⁴⁰ ECtHR, *Glor v. Switzerland* (No. 13444/04), of 30 April 2009.

military service, and consequently was obliged to pay the exemption tax –as Swiss legislation provided– as his disability was not judged severe enough to be excepted from the payment. The applicant had offered to perform the “civil service” instead, but this was refused.

In its judgement, the ECHR has restated that Article 14 contains a non-exhaustive list of prohibited grounds, which also includes discrimination based on disability and found that the State had treated the applicant comparably with those who had failed to complete their military service without valid justification. This treatment has been judged discriminatory⁴¹.

Echoing Article 2 of the UN Convention on the Rights of Persons with Disabilities, which defines –as seen before– reasonable accommodation, ECHR has stated that the Swiss authorities failed to provide an equitable solution which could have responded to Mr. Glor’s circumstances by, for example, filling posts in the armed forces which require less physical effort by persons with disabilities. In highlighting the failure of the Swiss authorities, the Court points to legislation in other countries which ensure the recruitment of persons with disabilities to posts which are adapted to both the person’s (dis)ability and to the person’s set of professional skills.

In April 2006, the Council of Europe adopted a Disability Action Plan 2006-2015⁴², which contains fifteen action lines, including participation in political, public and cultural life, education, information and communication, accessibility of the built environment, transport and, of course, employment. With a call for Member States, action line n. 5 of this Plan indeed aims, *inter alia*, to mainstream issues relating to the employment of people with disabilities in general employment policies, ensuring them, for instance, an “access to an objective and individual assessment which: identifies their options regarding potential occupations; shifts the focus from assessing disabilities to assessing abilities and relating them to specific job requirements; provides the basis for their programme of vocational training; and helps them find appropriate employment or re-employment” (p. 3.5.3, lett. i and ii).

The Plan also calls for actions to ensure people with disabilities an effective and efficient access to vocational guidance, training and employment-related services at the

⁴¹ See *Handbook on European non-discrimination law*, Publications Office of the European Union, Luxembourg, 2011, p. 101.

⁴² Recommendation Rec(2006)5 of the Committee of Ministers to Member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015.

highest possible qualification level, making reasonable adjustments where necessary (p. 3.5.3. lett. iii)⁴³.

5. CONCLUSIONS

Employment is one of the most important ways to ensure social inclusion and economic independence for all citizens. The right to work, thus, is strictly related to fundamental social and human rights⁴⁴.

⁴³ The other specific by Member State provided in the Action line n. 5 are: “ iv. to ensure protection against discrimination in all stages of employment, including selection and recruitment, as well as in all measures related to career progression; v. to encourage employers to employ people with disabilities by: – applying recruitment procedures (for example advertising, interview, assessment, selection) which ensure that job opportunities are positively made available to people with disabilities; – making reasonable adjustments to the workplace or working conditions, including telecommuting, part-time work and work from home, in order to accommodate the special requirements of employees with disabilities; – increasing the disability awareness of management and staff through relevant training; vi. to ensure that general self-employment schemes are accessible and supportive to people with disabilities; vii. to ensure that support measures, such as sheltered or supported employment, are in place for those people whose needs cannot be met without personal support in the open labour market; viii. to support people with disabilities to progress from sheltered and supported employment to open employment; ix. to remove disincentives to work in disability benefit systems and encourage beneficiaries to work when they can; x. to consider the needs of women with disabilities when devising programmes and policies related to equal opportunities for women in employment, including childcare; xi. to ensure that employees with disabilities enjoy the same rights as other employees in relation to consultation on employment conditions and membership and active participation in trade unions; xii. to provide effective measures to encourage the employment of people with disabilities; xiii. to ensure that health and safety legislation and regulations include the needs of persons with disabilities and do not discriminate against them; xiv. to promote measures, including legislative and integration management, that enable persons who become disabled while employed to stay within the labour market; xv. to ensure that especially young disabled people can benefit from employment internships and traineeships in order to build skills and from information on employment practices; xvi. to consider, where appropriate, signing and ratifying the European Social Charter (revised) (ETS No. 163), in particular Article 15; xvii. to implement Resolution ResAP(95)3 on a charter on the vocational assessment of people with disabilities”.

⁴⁴ See, *inter alia*, J. FUDGE, “The New Discourse of Labor Rights: From Social to Fundamental Rights?”, *Comp. Lab. L. & Pol'Y J.*, 29, 30, 2007; P. ALSTON, *Labour Rights as Human Rights*, Oxford University Press, New York, 2005.

Internationally, the situation of persons with disabilities in the labour market is dramatic: their employment and activity rates are always (and in every country) lower than those ones of non-disabled persons.

Social policy innovation could evidently bring new energy to increase the activity rate and empower the employment potential of disabled people, overcoming all the barriers to participation in the workforce. But first of all, stronger efforts should be addressed towards the implementation of international and supranational provisions by National States and their effective enforcement in courts, not only domestic ones but also supranational like the European Court of Justice, which sometimes seems not to translate correctly these principles into real cases.

The promotion of the employment of people with disabilities would not only benefit the single individuals with disabilities and their families but also employers and society; in other words, if the situation does not change for the best as soon as possible, this enormous waste of human richness and working energy which lays behind the social exclusion of disabled people will bring not only negative effects in terms of social justice but it could also affects the economic and, in some ways, democratic health of our civilisation.

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