SOCIAL INCLUSION OF PERSONS WITH DISABILITIES AS A HUMAN RIGHTS ISSUE: NEW DEVELOPMENTS AND CHALLENGES UNDER EUROPEAN LAW

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Key words

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Abstract

This paper explores the treatment of handicapped individuals in relation to the principle of non-discrimination, adopting the perspective that social inclusion of persons with disabilities is a human rights issue. Such discrimination, often a consequence of social stigma, places persons with disabilities at a disadvantage, preventing their full participation in areas such as employment, access to welfare or goods and services. This paper discusses how key steps to achieve an effective disability equality strategy have been set down through anti-discrimination legislation and the clarifications of the judiciary, both at EU and Council of Europe levels. This paper also emphasizes the need to reach a reasonable balance between the needs of society and the economy on the one hand, and the promotion of effective remedies against differential treatment on grounds of disability and the total inclusion of such a vulnerable group, on the other.

I. INTRODUCTORY REMARKS ON THE EVOLUTION AND CURRENT STATUS OF PERSONS WITH DISABILITIES

The biggest challenge disabled people have had, as individuals and as a group[1], is to convince society that, despite having a handicap, they should not be negatively discriminated or ignored. In fact, this concern has been taken to a legislative level as of recently, being present since the end of the 20th century, when this outlook started to change, and was slowly incorporated to binding legal instruments. Such legal instruments include the UN Convention on the Rights of Persons with Disabilities (UNCRPD), which marked a turning point[2], and was significant in the process of recognizing that disabled people have the same interests, needs and rights as the rest of the population[3], making it the point of departure for legal action at both regional and national levels[4].

This realization, increasingly shared over time, makes sense, taking into account that the legal order must adapt to the social needs and search for a real protection of all citizens, in all facets of life, including persons with disabilities. As such, said protection should never limit basic fundamental rights, but, on the contrary, it should mitigate the negative effects that their differentiated characteristics pose. Indeed, legal orders must be able to implement the necessary changes to make the lives of individuals, particularly but not limited to persons with disabilities, easier, and to truly integrate them with the rest of society, taking the necessary measures to counterbalance any direct or indirect discriminatory treatment.

The history of human rights in the 20th and 21st centuries has been described as an open process towards non-discrimination[5]. The recognition of social rights and the

[1] P. Cuenca Gómez, «El impacto de la Convención Internacional sobre los Derechos de las Personas con Discapacidad en los derechos constitucionales», en *Estudios sobre el impacto de la convención internacional sobre los derechos de las personas con discapacidad en el ordenamiento jurídico español*, Instituto de DDHH Bartolomé de las Casas Universidad Carlos III, Dykinson, Madrid, 2010, p. 43.

[2] M. Pereña Vicente, «La Convención de Naciones Unidas sobre los derechos de las personas con discapacidad. ¿El inicio del fin de la incapacitación?», *La Ley*, núm. 7691, 2011, p. 14.

[3] See a contextual analysis of this set of needs, interests and rights, in light of the international human rights instruments, in I. Biel Portero, *Los derechos humanos de las personas con discapacidad,* Tirant lo Blanch, Valencia, 2011.

[4] This approach in J. Cardona Llorens, A. Sanjosé Gil, «Un cambio de paradigma en la protección de los derechos humanos: la Convención de 2006 sobre los derechos de las personas con discapacidad», en *Protección de personas y grupos vulnerables: especial referencia al derecho internacional y europeo*, Tirant lo Blanch, Valencia, 2008, pp. 163-204.

[5] R. de Asís et al., «Algunas reflexiones generales sobre el impacto de la CIDPD en el Derecho Español», en *Estudios sobre el impacto de la convención… cit.*, p. 12.

understanding that certain people or groups, for various reasons, face difficulties in achieving actual equality, has allowed for development, especially within Europe[6].

This transcendental shift of paradigm in the treatment of disability left the health and welfare model of disability behind, and incorporated the so-called social model based on human rights' perspectives[7]. This social model points to the fact that society, and as some scholars have defined it, social reasons[8], create an exclusionary and discriminatory environment that prevents certain social groups, like persons with disabilities, from achieving the same opportunities as other citizens.

This change in perspective has impacted current rules governing the matter in Europe[9]. The EU has been actively promoting the inclusion and full participation of disabled people in society, in line with the EU human rights approach to disability-related issues. This can be seen in the drafting of both primary and secondary legislation; the former includes binding rules in the TFEU and the CFREU, and the latter ranges from EU Directives to Council recommendations and Commission reports.

The European Commission's European Disability Strategy 2010-2020, has built on the UNCRPD; it has also taken into account the experience of the Disability Action Plan 2004-2010 and its objectives are pursued by actions in eight priority areas, one of which is equality.

The notion of discrimination refers to an unjustified and unfair differentiation, based on features or social circumstances of specific persons or groups that significantly impairs them or creates a disadvantage. Discrimination can be targeted to a specific collective, causing damage directly to the group as a whole and, indirectly, to the people who integrate it, therefore turning an individual case into a collective issue[10]. This type of situation of social power among groups causes unjust treatment not simply because of belonging to a specific group, but because said group is in a subordinate position, or at a disadvantage, in comparison to others.

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6 D. Mabbett, "The Development of Rights-Based Social Policy in the European Union: The Example of Disability Rights", *Journal of Common Market Studies*, Vol. 43, 2005, pp. 97-120.

7 M.ª.B. Andreu Martínez, «Discapacidad y autonomía en el ámbito sanitario a la luz de la convención de los derechos de las personas con discapacidad», *Estudios jurídicos sobre la protección de las personas con discapacidad*, Thomson Reuters Aranzadi, Navarra, 2014, p. 73.

8 M.C. García Garnica, «Consideraciones generales. La eficacia transversal del modelo social del tratamiento jurídico de la discapacidad y la dependencia», *Estudios sobre Dependencia y Discapacidad*, Thomson Reuters, Pamplona, 2011, p. 103.

9 E. Serna Meroño, «La protección de las personas con discapacidad y el respeto a la autonomía en el ámbito personal y familiar», *Estudios jurídicos sobre la protección de las personas… cit.*, p. 281.

10 S. Ribotta, «La Convención Internacional sobre los Derechos de las Personas con Discapacidad y el Derecho antidiscriminatorio español. Desafíos y ajustes que la Convención le exige al derecho antidiscriminatorio español», *Estudios sobre el impacto de la convención internacional sobre los derechos de las personas…cit.*, p. 455.

Consequently, through the realization that the lack of opportunities of disabled persons is the product of a structural discrimination, the EU has established a number of legal instruments to fight against such discrimination, especially seen in the marketplace, to guarantee equal opportunities and an effective inclusion of persons with disabilities in the labor market[11]. The EU has even gone a step forward with the Commission's proposal for a Council Directive on the principle of equal treatment of all citizens, irrespective of religion or belief, disability, age or sexual orientation, to set out a framework of non-discrimination on grounds of disability, among others, outside the labor market. This would establish a uniform minimum level of protection, within the European Union, for people who have suffered such discrimination. However, this anti-discrimination law beyond the employment field is still being debated within the EU.

This paper reflects on current challenges and possible improvements of the anti-discrimination framework both at a EU and CoE level, focusing not only on the normative advances but also on the jurisprudential developments (in particular, the CJEU, ECtHR and the ECSR). I herein suggest that a human rights approach is taken in order to develop the idea that persons with disabilities should not be discriminated against in any area, and that, therefore, full and effective participation in society should be guaranteed by socially inclusive measures extended to all facets of life[12].

II. PROTECTION OF PERSONS WITH DISABILITIES WITHIN THE SPHERE OF THE EUROPEAN UNION

1. Current anti-discrimination law

In the context of the European Union, the principle of equal treatment, otherwise known as the prohibition of discrimination, has existed prior to its creation, since the entry into force of the Treaty of Rome. However, its scope was not extended to other grounds, including disability, until the Amsterdam Treaty[13]. In its Article 13 (now Article 19.1 of

[11] I. Shima, and R. Rodrigues, "The implementation of EU social inclusion and social protection strategies in European countries with reference to equality for disabled people", *Report prepared for the Academic Network of European Disability Experts (ANED)*, n.º VT/2007/005, 2009, p. 11.

[12] See extensively L. Jimena Quesada «El derecho a la autonomía de las personas con discapacidad», *Derechos sociales y tutela antidiscriminatoria*, Aranzadi Cizur Menor, Pamplona, 2012, pp. 1393-1486. More specifically, the synergies between constitutional and European provisions that have been underlined by M.J. Terol Becerra, «Algunas reflexiones sobre los discapacitados», *Assistenza, inclusione sociale e diritti delle persone con disabilità*, Editoriale Scientifica, Napoles, 2013, pp. 383-387.

[13] R. Whittle, "Disability Rights after Amsterdam: the way forward", *European Human Rights Law Review*, Issue 1, 2000, pp. 33-48.

the Treaty of the Functioning of the EU, as amended by the Lisbon Treaty in 1992) the following declaration was made:

> *"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".*

The now known as Article 19.1 of the Treaty of the Functioning of the European Union (TFEU) provides a legal basis for the protection of the principle of equality, allowing EU institutions to fight against discrimination with a widened set of grounds, which included, for the first time, disability. This step created a new and widened legal paradigm for the protection of this general principle of EU Law. Also, among the main legal instruments of the EU in regards to discrimination against persons with disabilities, we have the Charter of Fundamental Rights of the European Union (the Charter) of 2000 (entered into force in December 2009 through the Lisbon Treaty); it devotes an entire Title to equality.

Hence, in Article 26 of the Charter, linked to the general prohibition of discrimination on the grounds of disability of Article 21.1[14], it establishes that:

> *"The Union recognises and respects 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".*

Moreover, Article 10 TFUE establishes that:

> *"In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".*

The TFEU introduces the principle of the transversal nature of EU competences, which implies a legal and political commitment in the defense of the effectiveness of the principle of equality. Therefore, it will be up to the 'derivative legislation' (secondary Law) to offer a more substantial field of protection, more detailed in the issue of non-discrimination on the grounds of disability. More specifically the competence base in Article 19 of the TFEU allows the EU to legislate on a number of protected grounds. However, as

14 As L. Jimena Quesada, points out in "Panorama Nacional: España", *VII Informe sobre Derechos Humanos: Personas con Discapacidad,* Federación Iberoamericana de Ombudsman - Trama Editorial, Madrid, 2010, p. 275, one expressly prohibits discrimination on grounds of disability and the other includes a specific provision under the heading "Integration of persons with disabilities".

we will see below, current EU anti-discrimination legislation with respect to disability is not applied to other areas beyond the field of employment.

A ban on such discrimination was later introduced through the Framework Directive of the European Council 2000/78/EC (Employment Equality Directive)[15], limiting the circumstances under which the national law of Member States may permit employers to subject employees to different treatment on the grounds of disability[16]. Although sexual orientation, religious belief, disability and age are only protected grounds in the context of employment and occupation, a proposal to extend the protection to other areas such as the access to goods and services (Horizontal Directive) is currently being debated in the EU institutions[17]. This Directive attempts to bridge the gaps in legal protection of the different grounds of protection from discrimination, extending the prohibition of discrimination to areas beyond employment for those grounds not yet covered, including disability. The aim is to establish a uniform and standardized framework of protection within the EU for all grounds through a 'horizontal alignment', hence its name.

The Employment Equality Directive sets minimum standards for Member States, so that equal treatment can be guaranteed, and therefore, it allows discretion at a national level to apply as they consider appropriate, and go beyond the standard requirements, if desired. Article 21 of the Charter sets a more wide-reaching prohibition of discrimination based on very diverse and open grounds, including disability, where States are able to add areas of protection of said grounds, and adopt discretionary measures with the aim of ensuring "full equality"[18] and true practical integration.

15 Council Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation of November 27th 2000.

16 Recitals 8, 11, 12 and 15 in the preamble of the Directive read as follows: "*The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force […] Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons […] To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community […] The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence*".

17 European Commission (2008), proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation, COM (2008) 426 final, Brussels, 2 July 2008. This Directive would extend beyond employment.

18 See Art. 7 of Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation.

The emerging case-law of the Court of Justice of the EU (CJEU) on issues of discrimination on grounds of disability shows the acknowledgment of the significance of the prohibition of discrimination of persons with disabilities, while also linking it with the general principle of equal treatment, which it now recognizes as a fundamental norm of the EU legal order. Both the normative regulation and the equality case-law is worth a more detailed analysis, because it shows the EU's and the CJEU's shift of perspective of social inclusion and discriminatory treatment of persons with disabilities towards a social-based model.

2. Normative developments of the anti-discrimination framework for persons with disabilities

In line with EU human rights' approaches to disability issues, the EU promotes active inclusion and full participation of persons with disabilities within society. In this spirit, the European Commission has adopted, to this day, two very important *soft law* policy documents that characterize the equality and social rights perspective (first enshrined in the Amsterdam Treaty and later established and reinforced in the Treaty of Lisbon along with the Charter of Fundamental Rights of the Union): the Disability Action Plan (2004-2010) and the European Disability Strategy 2010-2020,[19] which departs from the experience gained through the former.

In regard to the latter, and in relation to the right of equality or the prohibition of non-discrimination on the grounds of disability, the European Disability Strategy has the overall aim of reaching full economic and social participation of people with disabilities, empowering them, so they can enjoy their rights fully, and truly benefit from participation in society. Consequently, the European Commission has identified eight main areas of action, one of which is equality, and about which a two-sided approach is to be adopted. Firstly, by using existing EU legislation to provide protection from discrimination and by implementing an active policy to combat discrimination and promote equal opportunities in EU policies and, secondly, by supplementing national policies and programs to promote equality in disability-related issues[20]. Its actions will try to break down the barriers that prevent persons with disabilities from participating in society on an equal basis.

The European Commission regularly reports on the achievements of these strategic actions and their progress complying with its obligations under the UNCRPD to which the EU is a signatory. Such strategies aim at harnessing the objectives of the Charter, the

[19] See COM (2010) 636 final- Communication from the Commission to the European Parliament, the Council, the European economic and Social Committee and the Committee of the Regions European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-free Europe-.

[20] See COM (2010) 636 final, pp. 6-7.

TFEU, and the UN Convention, in order to fully integrate people with disabilities, so that they can participate and be fully included in society, on an equal basis with others.

The current 2000 Directive, which combats discrimination on grounds of disability, among others, only applies to the field of employment. Disability is classified under this binding secondary legislation as a protected ground in its Article 1. In its Article 2, the scope of direct and indirect discrimination and its subsequent prohibition in employment and occupation is provided. Additionally, Article 5 is specifically dedicated to persons with disabilities whilst establishing that *"[…] to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall 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, or to undergo training […]"*. Therefore, it recognizes that, in order to ensure equal opportunities for people with disabilities, it is necessary to address work practices and barriers which might exclude or put certain people with disabilities at a disadvantage.

However, the provision continues by establishing that *"unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned"*, allowing Member States still a significant margin of discretion. This has proven to be one of the reasons for the challenging implementation of said provision in the different Member States.

Interestingly enough, a proposal for a Council Directive to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation was suggested in 2008 within the EU, building upon the Employment Equality Directive, among other EU norms. This new anti-discrimination norm was proposed to be able to extend protection to all other areas aside from employment, such as the access of goods and services. The proposed Directive will try to address all of the particularities specific to disability discrimination, such as structural and architectural barriers or social segregation. The Directive has many positive aspects although there are still growing concerns for the full enjoyment of rights for the disabled in a number of provisions[21].

In conclusion, EU Law (including constitutive treaties and derivative law) provide a strong legal basis for anti-discrimination law. However, it does not provide a strong-enough follow-through in policies for persons with disabilities. In other words, EU disability discrimination law is expanding with different standards, leaving still a broad margin of appreciation to Member States and social partners, which sometimes results

[21] J. Arsenjeva, "European Disability observations on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (Article 13 Directive)", *EDF Revised version of 7 August 2008*, 2008, pp. 3-10.

in a limited interaction between EU law and national policies and in the impossibility of persons with disabilities to enjoy their rights fully.

3. Specific and recent case-law on the principle of non-discrimination on the grounds of disability

There has been noticeable influence of the Court of Justice of the European Union's (CJEU) development of an EU non-discrimination law, through its preliminary ruling procedure. There are several cases directly related to the prohibition of non-discrimination on the grounds of disability that have been brought forth to the CJEU. Interestingly enough and unsurprisingly so, most of the case-law is linked to the above-mentioned Council Directive 2000/78/EC of 27 of November of 2000.

One of the most pressing disability-related issues has been to establish exactly who is protected from discrimination on the grounds of disability and to clarify the concept and obligations of 'reasonable accommodation'.

In the scope of this paper, the first judgments and the jurisprudential doctrine on these issues will be extracted and summarized, including the *Chacón Navas*[22] and *Coleman*[23] cases. However, recent case-law developments in disability discrimination will be also be brought into question and analyzed, including the *Odar*[24], the joined *HK Danmark*[25], and *Glatzel*[26] cases.

The Directive did not include a definition of disability or guidance on who was to be protected from discrimination on such ground. Hence, the CJEU had to clarify the scope and delimitation of what was to be considered 'disability'; in the *Chacón Navas* case: "*a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life*". Furthermore, according to the judgment, for any limitation to be regarded as a disability, it had to be probable that it would last for a long time and should be different from mere sickness, The CJEU further stated that the definition it gave of disability was to be interpreted in an autonomous and uniform way.

This definition however entails certain problems for it adopts the medical model of disability, and therefore, the cause of the disadvantage or limitation is the impairment

22 Case C-13/05 *Chacón Navas v. Eurest Colectividades SA*, judgment of 11 July 2006.

23 Case C-303/06 *Coleman v. Attridge Law and Steve Law*, judgment of 17 July 2008.

24 Case C-152/11 *Johann Odar v. Baxter Deutschland GmbH*, judgment of 6 December 2012.

25 Joined Cases C-335/11 and C-337/11 HK Danmark, acting on behalf of *Jette Ring, Dansk almennyttigt Boligselskab* (C-335/11), and HK Danmark, acting on behalf of *Lone Skouboe Werge, v Dansk Arbejdsgiverforening*, acting on behalf of Pro Display A/S, in liquidation (C-337/11), judgment of 11 April 2013.

26 Case C-356/12 *Wolfgang Glatzel v. Freistaat Bayern*, judgment of 22 May 2014.

itself that an individual has, which hinders said individual's participation in the professional field, in this case. However, the problem does not always lie in the individual; sometimes, it is the reaction of society to said impairment that triggers discrimination. This last position is the social model of disability, which is rooted primarily in the creation of an exclusionary and discriminatory environment from social reactions or stigmas regarding persons with disabilities that prevents them from being able to fully adapt to and be included in said environment.

In the *Coleman* case, the CJEU focused its analysis on the fact that the Directive prohibited direct discrimination and harassment on said ground, and established that the Directive was also meant to protect individuals who were discriminated against or harassed on the grounds of disability of someone they were directly associated with. As a consequence of this judgment, Member States were obliged to ensure that national non-discrimination legislation on disability provided protection to those who experienced direct discrimination or harassment as a result of their association with a disabled person, such as a family member[27].

Recent CJEU case law on the principle of non-discrimination on grounds of disability has shed some light on some of the uncertainties that the current anti-discriminatory disability legislation had created.

The *Odar* case dealt with the need of interpreting Article 2(2)[28] of the Directive 2000/78. The issue in this case was that eligibility to receive a retirement pension, under German law, was subject to a minimum age requirement and that age happened to be different for severely disabled persons: age 60 instead of 63 years of age, like the case of non-disabled workers. Therefore, the problem that required analysis was if such apparent neutral method, based on the criteria of pensionable age, led to a situation where severely disabled workers, who were eligible for a pension at an earlier age, and therefore had a lower compensation amount upon termination of their employment, were discriminated against on grounds of disability, since such situation gave rise to a difference in treatment based, indirectly, on reasons of disability. The aforementioned objectively and reasonably justified difference in treatment was defended by the German national authorities on the grounds that severely disabled workers had the advantage of being able to claim a retirement pension three years earlier than nondisabled workers.

27 L. Waddington, A. Lawson, "Disability and non-discrimination law in the European Union: An analysis of disability discrimination law within and beyond the employment field, *European Network of Legal Experts in the non-discrimination field paper*, European Commission, 2009, p. 18.

28 Regarding the distinction of direct and indirect discrimination on grounds of disability, among others, also establishing the margin of appreciation that Member States can have in such cases.

However, the CJEU did not find such reasoning justified nor pursuant to a legitimate objective: "*Firstly, there is discrimination based on disability when the disputed measure is not justified by objective factors unrelated to such discrimination […]. Moreover, such a line of reasoning, if accepted, would undermine the effectiveness of the national provisions providing for that advantage, the rationale for which is generally to take account of the specific difficulties and risks faced by severely disabled workers*"[29].

The CJEU, upon analyzing the facts of the case and the applicable legislation, established that redundancy pay agreement based on proximity to retirement age is disability discrimination, which is contrary to the Directive[30]. In other words, EU Law allows for a social plan to provide for a reduction in redundancy compensation paid to workers approaching retirement age, however, EU law prohibits the calculation of a lower compensation for retirement based on grounds of disability on the basis that it constitutes discriminatory treatment.

Similarly, the *HK Danmark* case dealt with a reference for a preliminary ruling concerning the interpretation of Article 6(2) of the aforementioned Directive 2000/78/EC. The CJEU was asked: (1) to clarify the concept of 'disability' and (2) to decide whether a reduction in the working hours could be regarded as a reasonable accommodation measure and if, subsequently, the Danish legislation on the shortened notice period for dismissal was contrary to EU law since, in this case, the workers' absences were caused by their disability.

The CJEU, in this judgment, further developed its interpretation of 'disability', already given in the *Chacón Navas* case (C-13/05) and held that the concept of 'disability' had to be understood as a "*limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers*", which could include conditions caused by an illness medically diagnosed as curable or incurable, existence of which could hinder the full and effective participation of the person concerned in their professional life on an equal basis with other workers[31]. Hence, the CJEU also observed that appropriate accommodation could be considered as reducing the

[29] See paragraph 67 of the C-152/11 case judgment of 6 December 2012.

[30] The CJEU concluded that said article must be interpreted as "*precluding rules of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, the compensation to which they are entitled is calculated on the basis of the earliest possible date on which their pension will begin – unlike the standard formula, under which account is taken inter alia of the length of service – with the result that the compensation paid is lower than the standard formula compensation, although still at least one half thereof, and that alternative calculation method takes account of the possibility of receiving an early retirement pension on the ground of disability*".

[31] See Conclusion 1 of the judgment of Joined Cases' C-335/11 and C-337/11, of 11 April 2013.

working hours for it makes it possible for the handicapped worker to continue in their employment. The CJEU ended the judgment confirming that the national legislation was contrary to EU law and it put disabled workers at a disadvantage, since they were more exposed to the risk of application of the shortened notice period than a worker without a disability, because they had an additional risk of contracting an illness connected with his or her disability[32].

Lastly, the *Glatzel* case dealt with the compatibility of the Charter to Directive 2006/126/EC[33] and whether the physical conditions for drivers constituted discrimination on the grounds of disability and, hence, violate the principle of equal treatment (Article 20 Charter), and more specifically, the principle of non-discrimination on the grounds of disability (Article 21(1) Charter) as well as the principle of integrating persons with disabilities (Article 26 Charter). One of the interesting aspects of this case is that the CJEU examined the UN Convention on the Rights of Persons with Disabilities to analyze the possibility of a violation of the principle of non-discrimination on grounds of disability[34].

The CJEU alluded to the general principle of equal treatment in the context of others grounds such as age or sex, through the analysis that a difference of treatment based on a characteristic related to such grounds did not constitute discrimination, since such characteristic constituted a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate, which in this case seemed to be the consideration of road safety. And through this realization the CJEU stated that: "*In the same vein, it must be held, for the purposes of the present case, that a difference in treatment applied to a person according to whether or not he has the visual acuity necessary to drive power-driven vehicles is not, in principle, contrary to the prohibition on discrimination based on disability within the meaning of Article 21(1) of the Charter, in so far as such a requirement actually fulfils an objective of public interest, is necessary and is not a*

[32] See paragraph 76 of the said judgment of 11 April 2013: "*A worker with a disability is more exposed to the risk of application of the shortened notice period laid down in Paragraph 5(2) of the FL than a worker without a disability. As the Advocate General observes in point 67 of her Opinion, compared with such a worker, a worker with a disability has the additional risk of an illness connected with his disability. He thus runs a greater risk of accumulating days of absence on grounds of illness, and consequently of reaching the 120 —day limit provided for in Paragraph 5(2) of the FL. It is thus apparent that the 120— day rule in that provision is liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability within the meaning of Article 2(2)(b) of Directive 2000/78*".

[33] Amended by Directive 2009/113/EC laying down minimum standards relating to the physical fitness to drive a motor vehicle as regards visual acuity.

[34] C. O'Brian, "Driving Down Disability Equality? Case C-356/12 *Wolfgang Glatzel v. Freistaat Bayern*, Judgment of 2 May 2014", *Maastricht Journal of European and Comparative Law*, Vol. 21 MJ 4, 2014, p. 723: "*On addressing the UNCRPD, the Court found, rather swiftly, that its provisions were not 'unconditional and sufficiently precise' to allow a review of the validity of a EU measure. Instead, such measures should be interpreted, if possible, as being in line with the UNCRPD. However, as the measure in question was unequivocal, no reinterpretation would be possible 'to circumvent the clear rule'*".

disproportionate burden"[35]. The CJEU's analysis of Article 20 and 26 of the Charter was brief, describing such provisions as principles which cannot by "*itself confer on individuals a subjective right which they may invoke*"[36] and ended up concluding that none of the issues raised affected the validity of the visual acuity requirements in the Directive.

In *Glatzel,* the social-model language is highlighted, though the CJEU does not apply it, because it seemed to understand that to analyze the facts of the case and its compliance with EU instruments, it had to comprehend disability as directly related to the impairment itself (medical-model based perspective), for which it considered it did not *"have sufficient information to ascertain whether such impairment constitutes a disability"*[37].

Hence, although protection against discrimination in the field of employment is extended across all protected grounds provided for under the non-discrimination directives, including disability, it is not the case for access to welfare and other forms of social security, nor for access or supply of goods and services, for which only the commonly-called Racial Directive guarantees protection in the case of the former and both Gender and Racial Directives do in the case of the latter.

In conclusion, although the case-law of the CJEU has helped develop non-discrimination law to counterbalance the risks faced by persons with disabilities in their everyday life, protection though judicial guarantees still has a long way to go in shaping and improving the rights of disabled people.

III. INCLUSION OF PERSONS WITH DISABILITIES WITHIN THE SPHERE OF THE COUNCIL OF EUROPE

The term European non-discrimination law suggests that a single Europe-wide system of rules related to non-discrimination exists. However, it is in fact made up of a variety of legal contexts, predominantly EU and CoE Law. After having briefly analyzed the normative and jurisprudential developments in the sphere of the European Union, in this section we will focus on the advancements of the rights of persons with disabilities through the protection systems established at the CoE level.

1. Current protection and advances on the normative front

1.1. *Binding treaties*

In the context of the Council of Europe, the European Convention on Human Rights (ECHR) and its interpretation by the European Court of Human Rights (ECtHR), have

35 See paragraph 50 of C-356/12 case judgment of 22 May 2014.
36 See paragraph 78 of C-356/12 case judgment of 22 May 2014.
37 See paragraph 47 and final ruling of C-356/12 case judgment of 22 May 2014.

influenced the interpretation of the prohibition of discrimination on the grounds of disability. The use of their considerations holds particular significance, especially the ECtHR, in applying EU Law. At a similar level, the European Social Charter has also occasionally been referred to by the CJEU in the interpretation of EU Law.

Article 14 ECHR establishes that:

> *"The enjoyment of the rights and freedoms set forth in this 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"*

Although the guarantee of the prohibition of discrimination is set forth in this provision, discrimination based on disability is not explicitly mentioned. Because Article 14 could only be invoked as long as discriminatory grounds were held in relation to another right protected by the Convention, Article 1 of Protocol 12 to the ECHR was established, as will be discussed below. This was to allow an extended protection or general prohibition of discrimination to all rights containing a non-exhaustive list of prohibited grounds of discrimination. This may be one of the reasons why the ECtHR does not have a far-reaching case law, specifically related to discrimination of persons with disabilities on such grounds.

The relevant provision of the Revised European Social Charter of 1996 is Article 15 as the right of social inclusion of persons with disabilities, which can be understood as the protection against discriminatory or disadvantageous treatment based on grounds of disability

Said article establishes that:

> *"With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular: 1. to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes […] 2. to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled […] 3. to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure".*

The jurisprudence of this discrimination ground is found in the case-law of the European Court of Human Rights and the European Committee of Social Rights on the basis of Articles 14 and 15 respectively.

Hence, the European Convention of Human Rights (ECHR) sets out a legally binding obligation for its States Parties to guarantee a list of human rights whose implementation is reviewed by the European Court of Human Rights (ECtHR). As was mentioned

in the introduction to this paper, the prohibition of discrimination is guaranteed by Article 14 ECHR, which guarantees equal treatment in the enjoyment of other rights enshrined in the ECHR, meaning that the principle of non-discrimination is protected as far as it is in relation to other rights enshrined in the Convention. However, under Protocol 12[38], said prohibition becomes free standing, meaning that counter to the non-discrimination provision of the ECHR, this is of limited scope (it only prohibits discrimination associated to other rights in the ECHR[39]). The Protocol removes this limitation and guarantees that under no circumstance should there be discrimination against any ground by any public authority[40].

The principle of non-discrimination is a governing principle in a number of other CoE instruments, most importantly the 1996-revised version of the European Social Charter.

The European Social Charter (ESC), originally signed in 1961, was adopted as a complement to the ECHR in the field of economic and social rights. As a matter of fact, the ESC of 1961 did not contain a provision that expressly regulated the principle of non-discrimination, for its only mention was a statement in the Preamble: *"Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin"*.

Nevertheless, States Parties to the ESC, and those who have accepted Article 1.2 of said ESC, have the obligation to protect certain employment rights effectively, and according to the European Committee on Social Rights (ECSR) this was an implicit referral to the prohibition of all forms of discrimination in employment. The emphasis of the legal framework upon the effectiveness required to provide protection against discrimination along with other factors such as the development of the ECSR case-law have influenced the evolution of anti-discrimination law within the sphere of the CoE, including that of persons with disabilities.

The adoption of the 1996 Revised European Social Charter meant an expansion of the list of substantive rights protected under said document. The ESC of 1961, in its Article 15, guaranteed the right of disabled people to vocational training, rehabilitation and social resettlement. In other words, the right of social inclusion of persons with disa-

38 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 177).

39 Article 14 establishes: *"The enjoyment of the rights and freedoms set forth in this 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"*.

40 Meaning that said Protocol does in fact expand the scope of the prohibition of discrimination by guaranteeing equal treatment in the enjoyment of any right, including, among others, discrimination on the grounds of disability.

bilities was explicitly guaranteed but focused on employment matters. It was not until the Revised ESC of 1996 that this article was amended to encompass the right of persons with disabilities to independence, social integration, and participation in the life of the community. Therefore, current Article 15 of the Revised ESC explicitly guarantees the full protection of persons with disabilities, extended to all facets of their life, and, advises States Parties to develop coherent policies for this vulnerable group. Said provision *"not only provides the possibility, but to a large extent, obliges Parties to adopt positive measures for the disabled"*[41].

In addition, Article E of the Revised ESC recognizes the principle of non-discrimination by establishing that: "*the enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status*". Hence, persons with disabilities are further protected through the notion of 'other status'.

1.2. ***Recent Soft law***

The Parliamentary Assembly of the Council of Europe (PACE) takes up the task of uncovering human rights violations, monitoring, among others, whether states keep their promises. One of the relevant tasks that it undertakes is the promotion of social cohesion and social rights. In the context of *soft law*, the main legal instruments that the PACE, uses to achieve these objectives, are recommendations and resolutions.

In relation to the principle of non-discrimination on the grounds of disability, there have been several *soft law* instruments adopted in the sphere of the CoE, most recent of which will be analyzed below.

Firstly, in the Resolution entitled "Access to rights for people with disabilities and their full and active participation in society"[42], the Assembly noted that the access of persons with disabilities to their rights on an equal basis with those without still remains unsolved and its regulation proves to be insufficient. In this resolution, the PACE welcomed the ongoing preparation of the Disability Action Plan[43] to promote the rights and participation of people with disabilities in society for 2006-2015, which undertakes the task of finding practical solutions to the serious and most common problems encountered by people with disabilities, and most importantly, to promote equality of opportunities in

[41] See amendment explanation of the European Social Charter of 1996 in the *European Social Charter Collected texts (6th edition)*, p. 181.

[42] See RES 1642 of 26 January 2009. Available in http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17697&lang=en (20.10.2015).

[43] See Recommendation Rec (2006)5 of the Committee of Ministers.

all aspects of everyday life (access to education, health care, social facilities, among others). In other words, the PACE requires the implementation of two actions: (1) to promote and implement the aforementioned action plan at both national and local levels and to begin the necessary reforms to rectify the inequalities that continue to involve persons with disabilities, and (2) to speed up the access to rights for people with disabilities it invites for the ratification and implementation of Article 15 of the Revised Social Charter and the United Nations Convention on the Rights of Persons with Disabilities and the Optional Protocol.

Secondly, a number of PACE resolutions have dealt with this vulnerable group and with respect of the principle of non-discrimination on grounds of disability in more open-topic resolutions such as the Resolution entitled "Measuring and fostering the well-being of European citizens"[44] or in specifically-oriented ones such as the Resolution "Guaranteeing the right to education for children with illnesses or disabilities"[45]. Both the principle of non-discrimination and the right to equality recognized to persons with disabilities and by the PACE asks States Parties to identify trends in inequalities for different categories of the population, based on disability, among others, and to promote practices that guarantee the respect of their most fundamental rights.

In my opinion, it is the three most recent PACE resolutions that really highlight the problems associated with social exclusion of persons with disabilities and underlines the importance of resolving these problems all throughout Europe. In the Resolution entitled "Social exclusion: a danger for Europe's democracies"[46] there is a statement that establishes that social exclusion is sometimes linked to the membership or legal status of certain groups such as persons with disabilities, excluding them from full participation in society for non-material reasons. For said reasons the PACE advises to *"develop targeted measures for groups in need of special protection and support, who are often particularly threatened by social exclusion in a given national context and disproportionally hit by the crisis"* in particular, people with disabilities.

The PACE Resolution "Equality and inclusion for people with disabilities"[47] focuses directly on the social inclusion of said vulnerable group, and informs that measures to secure the rights of the handicapped, especially to equality and full participation in

44 See RES 2023 of 18 November 2014. Available in http://assembly.coe.int/nw/xml/XRef/Xref-XML-L2HTML-en.asp?fileid=21321&lang=en (20.10.2015).

45 See RES 1761 of 7 October 2010. Available in http://assembly.coe.int/nw/xml/XRef/Xref-XML-2HTML-en.asp?fileid=17910&lang=en (20.10.2015).

46 See RES 2024 of 18 November 2014. Available in http://assembly.coe.int/nw/xml/XRef/Xref-XML-L2HTML-en.asp?fileid=21322&lang=en (20.10.2015).

47 See RES 2039 of 30 January 2015. Available in: http://assembly.coe.int/nw/xml/XRef/Xref-XML-2HTML-en.asp?fileid=21553&lang=en (20.10.2015).

society, must be taken. It mentions explicitly the importance of complying with the rights of persons with disabilities enshrined in the ECHR, the revised ESC and the UNCRPD.

The Resolution entitled "Towards a new European Social Model"[48] stresses the challenges that have accompanied Europe in recent years, with rising social and economic inequalities, jeopardizing social cohesion. Hence, the PACE has established that the non-compliance of the principle of non-discrimination and measures against equality such as *"reduction of the scope and quality of public services, including for the most vulnerable* [persons with disabilities]" calls for action at a CoE level with the development of socio-economic policies which promote non-discriminatory measures.

Several of the Recommendations of the respective Resolutions laid down by the members of the PACE come into play when dealing with the rights of persons with disabilities and the principle of non-discrimination as promoter of social inclusion.

Hence, as can be seen, the Council of Europe has tried to ensure that persons with disabilities are not discriminated against due to their handicap. It not only has done this by stressing the problems and challenges that they face, but also by stressing the ways of combating them, in the legal, economic and social spheres, through legislative and policy channels. This has been most recently reflected in the Recommendation 2064 dealing with equality and inclusion for people with disabilities[49].

As can be seen in the study of the resolutions and recommendations previously analyzed, disability and its social effects are a growing concern within the CoE, for it has not been able to clarify certain notions regarding disability discrimination. However, in the most recent resolutions of the PACE, fighting discrimination against persons with disabilities has been a central issue.

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[48] See RES 2068 of 25 June 2015. Available in: http://assembly.coe.int/nw/xml/XRef/Xref-XML-2HTML-en.asp?fileid=21972&lang=en (20.10.2015).

[49] See paragraphs 2 and 3 of Recommendation 2064 of 30 January 2015 for the Assembly *"welcomes the contribution of 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 to the development of national policies which take account of the rights of people with disabilities. The action plan has also helped to make people see disability as a human rights issue"* and notes that *"the full enjoyment of the rights of people with disabilities has by no means been achieved in Council of Europe member States. The principles set out in international instruments are not reflected in the everyday reality experienced by people with disabilities. Resolute action by the Council of Europe and the member States in the area of disability is therefore necessary"*. Therefore, it recommends to evaluate the Action Plan 2006-2015 for people with disabilities, outline the basis for a roadmap of promotion and protection for the period 2016-2020, focusing on the adoption of measures to ensure full inclusion in society of said vulnerable group, among others.

2. New developments of the ECtHR

Unlike the CJEU and EU legal systems, the ECtHR does not have an extensive and well-established doctrine in the field of discrimination on grounds of disability. Nevertheless "*there is no water-tight division separating* [the sphere of economic and social rights] *from the field covered by the Convention*"; while the latter *"sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature"*[50].

Both Article 14 of the ECHR and Article 1 of Protocol 12 to the ECHR prohibit discrimination on any ground, including 'other status', making this list an open-ended one. It was with the Explanatory Report to Protocol 12 that stated that *"expressly including certain additional non-discrimination grounds (for example physical or mental disability, sexual orientation or age)* [appeared to be] *unnecessary from a legal point of view since the list of non/discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included"*[51].

The ECHR and ECtHR offer a differentiation between 'non-suspect' and 'suspect' grounds of discrimination, when regarding the violation of equal treatment. However, even though, according to the ECtHR, 'suspect grounds' range from race, ethnic origin, gender, sexual orientation and nationality, in general, it did not seem to consider, at first, religion nor disability as a suspect ground[52], although disability is rapidly rising out from such characterization. This is especially true in the *Glor v. Switzerland*[53] case as Article 14 (prohibition of discrimination) was analyzed in conjunction with Article 8 (right to private life) of the ECHR. The ECtHR concluded that national authorities failed to provide reasonable accommodation for the applicant, who suffered diabetes and was deemed unfit, medically, to carry out the compulsory military service or any other alternative service within the military for lack of medical care therein, but whose condition was considered not severe enough for exemption from military service, and reasoned that there was an obligation to ensure the adaptation of persons with disabilities in such circumstances (Court noted that an individual's physical integrity relates to the exercise of a person's right to private and family life)[54].

50 See *Airey v. Ireland*, ECtHR judgment of 9 October 1979.

51 See paragraph 20 of Explanatory report.

52 O. de Schutter, "The Prohibition of Discrimination under European Human Rights Law: Relevance for the EU non-discrimination directives-an update", *European Network of Legal Experts in the non-discrimination field,* European Commission Directorate-General for Justice, 2011, pp. 16-17.

53 See Application No. 13444/04, ECtHR case judgment of 30 April 2009.

54 See paragraph 94 of judgment of 30 April 2009.

This judgment was of outmost importance as it was the first ruling by the ECtHR in which the Court found a violation of Article 14 on the grounds of disability, opening the door for such ground in the open-ended concept of 'other grounds'. Through its suggestion in finding a solution which responds to his individual circumstances, the ECtHR echoes Article 2 of the UNCRPD, which defines reasonable accommodation as the *"necessary and appropriate modification 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"*; hence, the ECtHR calls for the implementation of reasonable accommodation by filling posts in the armed forces which require less physical effort with persons with disabilities. In addition, it considered that there was a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment.

It is truly commendable that the ECtHR has attempted to limit State discretion in the establishment of different legal frameworks for persons with disabilities in an effort to promote their full inclusion. Hence, the *Glor v. Switzerland* judgment has paved the way for the fight against discrimination based on grounds of disability whilst applying both international and regional instruments.

3. Recent notes of the ECSR

The European Social Charter (ESC) has been understood as the highest European pact for a social democracy and as a social fundamental rights instrument whose dynamic nature has been shown by extensive European Committee of Human Rights (ECSR) jurisprudence. Looking at its wide range of conclusions and decisions regarding Article 15 of the ESC, the most relevant ones will be analyzed in relation to the issue of discrimination and persons with disabilities.

The 1996 Revised European Social Charter enhanced the position of the disabled, rewording Article 15 to emphasize the importance of the right to independence, social integration and participation in the life of the community: going from an approach based on the right to rehabilitation measures to a social inclusion perspective.

It is of outmost importance to extensively analyze recent ECSR jurisprudence, as its legal basis contains the ESCR doctrine developed over the years through their conclusions in relation to national reports on this issue.

The *International Association Autisme-Europe (IAAE) v. France*[55] case adopted by the ECSR concluded that the national authorities had violated Article 15 of the ESC for not securing children and adults with autism a right to education provided to all other

[55] Collective Complaint no. 13/2002, decision on the merits of 7 November 2003.

children. The ECSR observed that, even though disability was not explicitly listed as a prohibited ground of discrimination under Article E, it fell within the category of 'other status'. It also stated that Article E does not prohibit neither direct nor indirect discrimination, which could arise from failure to account for all relevant differences, or to take steps to ensure that the rights guaranteed in the Charter are genuinely accessible to all[56]. Although, the ECSR, amidst the separation of funding for establishments specializing in the education and care of disabled children from the mainstream education budget, did not consider that it amounted to discrimination, it did consider that France had failed to achieve sufficient progress in promoting the education of persons with autism.

This case was important because it showed how the requirement of non-discrimination could lead to the realization of socio-economic rights such as the right to education by identifying the categories, which, because of a particular vulnerability, such as those on grounds of disability, deserved special and adequate attention.

The *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*[57] case is also worth mentioning, since it deals with persons with disabilities and their lack of inclusion in society. The ECSR determined that Article 17.2 (the right of children and young persons to social, legal, and economic protection) had been violated because children with intellectual disabilities residing in special housing did not have an effective right to education, and most importantly, it established that there had been a violation of the said article in conjunction with Article E since children with mental disabilities were discriminated against when compared to unhandicapped children, regarding education[58]. Hence, the ECSR ruled that the national authorities had failed to meet the criterion of accessibility and adaptability (to special needs).

This landmark decision stressed the importance of correctly implementing socially-inclusive measures, especially with regards to persons with disabilities, having the principle of non-discrimination in mind. Such decisions highlight the need to develop changes in disability policies away from welfare and exclusion, and more towards inclusion and choice.

Lastly, it is of outmost importance to analyze the most recent ECSR decision rendered related to the principle of non-discrimination and persons with disabilities, which confirms and reinforces those decisions issued more than 10 years before[59]. The *Action*

56 See paragraph 52 of decision of 7 November 2003.

57 Collective Complaint No. 41/2007, decision on the merits of 3 June 2008.

58 See paragraphs 49-54 of the Collective Complaint No. 41/2007, decision on the merits of 3 June 2008.

59 Also being relevant the ECSR Conclusions of 2008 and 2012 regarding France and Article 15.1 of the ESC which stressed that the situation in France was not in conformity with Article 15 of the Charter because it had not been established that persons with autism were guaranteed effective equal access to (mainstream and special) education.

Européenne des Handicapés (AEH) v. France[60] case highlights important issues related to the broadened implications of the right of persons with disabilities to vocational training, rehabilitation and social integration[61] concerning a breach of the principle of non-discrimination. As the ECSR establishes in its preliminary remarks, Article 15 reflects a clear shift in values within Europe with regard to persons with disabilities, given way to approaches focused on inclusion and setting a reminder that the underlying vision of Article 15 is one of equal citizenship for persons with disabilities, especially their rights to independence and social integration.

In essence, through this case, the ECSR recognizes France's efforts and progress in rationalizing its policies for the schooling of children and adolescents with autism, but nonetheless understands that said work has been insufficient and in breach of Article 15.1 of the Revised ESC with regards to (1) the right of children and adolescents with autism to be educated primarily in mainstream schools, (2) right of young persons with autism to vocational training, (3) the work done in specialized institutions, that care for children and adolescents with autism, not being predominantly educational in nature. It also considers certain measures taken by the national authorities as directly and indirectly discriminatory, as established by Article E of the Revised ESC, mainly due to the fact that families have no other choice but to leave France in order to educate and effectively allow their children with autism to be integrated in society through specialized schools in Belgium[62], and because of the limited funds in France's social budget for the education of children and adolescents with autism[63].

There are a couple of relevant aspects from this ECSR decision, from a social model based on human rights' perspectives, which need to be addressed. First and foremost, States are obliged to provide for a continuous and adequate service of assistance in mainstream schools throughout the mandatory school life of people with autism, in order to allow them to attend such schools, otherwise this drives away such persons from mainstream schools. Secondly, States' obligation to take the necessary measures to provide persons with autism guidance and education, ultimately means that there is an obligation to ensure that specialized institutions caring for autistic children or adolescents give edu-

60 Collective Complaint No. 81/2012, decision on the merits of September 11 2013.

61 See paragraphs 63 and 64 of the explanatory report on the revised ESC describing the new scope of Article 15: *"The protection of the disabled afforded by this Article has been extended as compared to that afforded by Article 15 of the Charter [of 1961], as it no longer applies only to vocational rehabilitation but to the right of persons with disabilities to independent social integration, personal autonomy and participation in the life of the community in general […] Under this provision Parties must aim to develop a coherent policy for persons with disabilities. The provision takes a modern approach to how the protection of the disabled shall be carried out […]".*

62 See paragraphs 135 and 136 of the Decision on the merits of September 11 2013.

63 See paragraph 144 of the Decision on the merits of September 11 2013.

cation priority over other functions and activities based on medical and welfare models. Thirdly, the obligation of adopting positive measures to provide persons with autism with education is only effectively carried out when national Action Plans are put into practice and implemented within a reasonable time. Fourthly, States' obligations require financial and organizational measures to implement international and regional standards within specialized institutions active in their territory. And lastly, and most importantly for the bigger scope of discrimination of persons with disabilities:

> *"indirect discrimination occurs also when an apparently neutral provision or practice—like public budget restrictions in social policy matters—ends up in putting the persons in question at a particular disadvantage, as they are more likely to be dependent on community care, funded through the State budget, in order to live independently and in dignity. Public budget restrictions cannot therefore be equally applied to the field of autism and disability, since this would result in a difference in treatment indirectly based on disability"*[64]

The European Committee for Social Rights' role has always meant to be a sort of counterpart of the European Court of Human Rights in the field of economic, social and cultural rights, as an international body of control regarding the manner in which States understand the respect of human rights. The binding interpretation of its decisions for the respective States has allowed for a more socially-inclusive implementation of the European Social Charter and all other mandatory conventions, regional instruments and international instruments concerning the principle of non-discrimination on grounds of disability.

IV. FINAL REMARKS: NEW CHALLENGES AND POSSIBLE SOLUTIONS FOR DISCRIMINATORY DISABILITY-RELATED ISSUES

It is surprising that, despite there being more than 80 million people with disabilities in Europe,[65] and although chances are that every human being will suffer some temporary or permanent impairment at some point in life, equality and inclusion for people with disabilities are rarely seen as priorities. People with disabilities are often excluded from society in a variety of ways, ranging from more visible forms (such as segregated education and denial of employment opportunities) to more subtle forms (such as imposition of physical, psychological and social barriers); the result is always the same: social exclusion of persons with disabilities.

64 G. Palmisano, "The Protection of People with Autism in the Framework of the Council of Europe and the European Union", *Protecting the Rights of People with Autism in the Fields of Education and Employment*, Springer Open Access, 2015, p. 21.

65 J. Clifford, "The UN Disability Convention and its Impact on European Equality Law", *The Equal Rights Review*, Vol. 6, 2011, pp. 11-25.

People with disabilities are confronted with a multitude of challenges in their daily lives, as well as multiple forms of discrimination, affecting their access to basic rights and services and their full enjoyment and inclusion in society. Over the past decade, special attention has been given to their rights, culminating in the adoption of several legal instruments and programs of action at EU, CoE, and international levels that slowly shift from the welfare perspective to a more social one.

The international framework for equality and disability rights adds up to the adoption and subsequent entry into force of the UN Convention on the Rights of Persons with Disabilities. This international legal instrument adapts existing fundamental rights to the situations faced by persons with disabilities, in order to ensure that they have full enjoyment thereof and also contains a definition of disability which marks a fundamental change of approach, making it an instrument of reference for the protection of the rights of persons with disabilities.

At a CoE level, we have several instruments and initiatives that have focused on the rights of persons with disabilities, especially regarding their right to equal treatment and equal opportunities, as well as their right to social inclusion. These various instruments include the European Convention on Human Rights and its Protocol 12 (under which disability is a prohibited ground of discrimination), and the revised European Social Charter (Article 15 and E which affirm the right of persons with disabilities to independence, social integration and participation in the life of the community). Additionally, 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* was adopted by the Committee of Ministers in April 2006 alluding to a set of principles and actions that Member States are invited to apply in their policies, legislation and practices to protect persons with disabilities and to promote their inclusion in society.

At EU level, there have also been initiatives in the field of disability rights, in particular through the 2010-2020 strategy for people with disabilities, the ratification of the UNCRPD in 2008, and the secondary legislation and *soft law* instruments, whose aim is to protect the handicapped in all facets of their everyday life.

Furthermore, the judicial guarantee at both EU and CoE levels in protecting the rights of persons with disabilities from discriminatory treatment and social exclusion has been progressing through the interpretations of the Court of Justice of the European Union, the European Court of Human Rights and the European Committee on Social Rights, which has shown increased relevance in the past few years; some authors[66] consider it a better placed body to develop jurisprudence on the rights of persons with disabilities towards social inclusion.

[66] O. DE SCHUTTER, "The Prohibition of Discrimination…" *cit.*, p. 74.

Combating discrimination is much more than establishing prohibitions, for it requires genuine active, and socially-inclusive policies to reinforce the aim of achieving total integration for this vulnerable group.

In the present paper, I have tried to identify, describe and evaluate the current status and recent European developments of the principle of non-discrimination on the grounds of disability. Further discussion should consider the possibilities and balance of EU and CoE policies, designed to guarantee the entirety of the rights of persons with disabilities, while advancing active and socially-inclusive policies and well-designed agendas.

TITLE

LA INCLUSIÓN SOCIAL DE LAS PERSONAS CON DISCAPACIDAD COMO UNA CUESTIÓN DE DERECHOS HUMANOS: DESARROLLOS Y RETOS EN EUROPA

SUMMARY

PALABRAS CLAVE

Personas con discapacidad; Inclusión social; Principio de no discriminación; Derecho de la Unión Europea; Consejo de Europa.

RESUMEN

Este trabajo explora el tratamiento de las personas con discapacidad en relación con el principio de la no discriminación, al adoptar la perspectiva que considera que la inclusión social de las personas con discapacidad es una cuestión de derechos humanos. Esta discriminación, a menudo como consecuencia de estigmas sociales, sitúa a las personas con discapacidad en una situación de desventaja, impidiendo su participación plena en ámbitos como el empleo, el acceso a la asistencia social o a bienes y servicios. En este trabajo se analizan los pasos clave para lograr una estrategia hacia igualdad efectiva para los discapacitados que se han establecido a través de la legislación antidiscriminatoria y las aclaraciones del poder judicial, en el seno de la UE y del Consejo de Europa. Este artículo también hace hincapié en la necesidad de alcanzar un equilibrio razonable entre las necesidades de la sociedad y de la economía, por un lado, y la promoción de medidas eficaces contra el trato diferenciado por razón de la discapacidad y la inclusión integral de un grupo tan vulnerable, por el otro.

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