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**The Notion of “Person with Disability” in Hungary
with Special Regard to Employment**

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**The notion of “person with disability” in Hungary
with special regard to employment²**

Abstract: The paper aims to analyze the terminology and concepts regarding disability and people with disabilities in employment. The focus is the Hungarian legal framework, which implements the UN Convention on the Rights of Persons with Disabilities and the Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation. The analysis also reflects on the evolving models of disability and how they are represented by Hungarian legislation.

Introduction

One billion people, or 15% of the world’s population experience some form of disability and one-fifth of the estimated global affected, between 110 million and 190 million people, experience severe disabilities.³ Moreover, the employment rates of people with and without disabilities⁴ show a significant gap. In the late 2000s, on average across the OECD, the employment rate of people with disabilities was just above 40 percent, compared with 75 percent for people without disabilities.⁵ In Hungary, the 2016 microcensus found that the employment-to-population ratio for persons with disabilities was 16 percent, while the ratio for the whole society was 46 percent,⁶ moreover one-fifth of people with disabilities reported discrimination in employment.⁷ These statistics show that an employment gap exists between people with and without disabilities, and people with disabilities face numerous obstacles, including discrimination, while seeking employment.

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² Supported by the ÚNKP-19-3 New National Excellence Program of the Ministry for Innovation and Technology.

³ *Understanding Poverty: Disability Inclusion*, THE WORLD BANK (Oct. 2, 2019), <https://www.worldbank.org/en/topic/disability>.

⁴ When looking at employment for people with disabilities, economists typically look at the employment-to-population ratio, instead of the unemployment rate, because the unemployment rate includes in its figure people with disabilities who do not want to get a job. <https://money.cnn.com/2018/01/26/news/economy/jobs-people-with-disabilities/index.html>

⁵ OECD, *Sickness, Disability and Work: Breaking the Barriers* (2010), https://read.oecd-ilibrary.org/social-issues-migration-health/sickness-disability-and-work-breaking-the-barriers_9789264088856-en#page53.

⁶ KÖZPONTI STATISZTIKAI HIVATAL, MIKROCENZUS 2016, 9 (2018) (HUNGARIAN CENTRAL STATISTICAL OFFICE’S MICROCENSUS 2016).

⁷ Id at 27.

The obstacles that such persons face in this regard are often related not to only environmental barriers, but also negative attitudes or opinions, deeply rooted stigma and stereotypes, lack of interest of governments, employers and the general population. People with disabilities are often seen as unfit for working life, incapable of carrying out tasks, as required in the open labor market, or better off in protected environments such as sheltered workshops. These factors have led them being excluded from society. Consequently, gaining access to employment, having a realistic chance to getting and having a job, have an important role in their social integration, as the inclusion of people with disabilities in the world of work initiates the process of social integration.

In order to increase the employment of people with disabilities in the labor market, it is necessary to examine the definitions of disability and people with disabilities used by Hungarian laws, as they determine the set of people entitled to protection in employment. As Hungary has ratified the UN Convention on the Rights of Persons with Disabilities (hereinafter: CRPD) in 2007 and joined the European Union in 2004, this paper considers standards and guidelines coming from the CRPD and the European Union.

This paper aims to discuss various ways of defining disability, to show the different emphasis in the definitions of disability and how these impact the inclusion of people with disabilities in the workforce. The starting point is a brief overview of the models of disability, which is followed by an analysis of the definition of people with disabilities in the employment setting.

1. Models of disability: A brief overview

The paper acknowledges that there is no other notion which has gone through such a development than the notion of disability.⁸ There are multiple models that are distinguished in the literature⁹, but the followings introduce only the main models to characterize the nature of disability: the medical model, the social model, and the human rights model. While making such clear distinctions between the models is controversial,¹⁰ it is necessary to understand the

⁸ See GYÖRGY KÖNCZEI [ET AL.], *A FOGYATÉKOSSÁGTUDOMÁNY A MINDENNAPI ÉLETBEN*, 2015.

⁹ For example: the economic model, the minority group model, the universalist model, the Nordic relational model, the capabilities model. Theresia Degener, *Disability in a Human Rights Context*, 5 *Laws* 18 (2016)

¹⁰ For example, Tom Shakespeare expresses the opinion that in the British disability studies the medical model has just come to a central element in verifying the social model, in particular disability equality training has advocated replacing 'medical model' with 'social model' responses to disability. TOM SHAKESPEARE, *DISABILITY RIGHTS AND WRONGS* 15 (2006). Moreover, Michael Oliver emphasizes that "there is no such thing as the medical model of disability, there is instead, an individual model of disability of which medicalization is

main models to characterize the nature of disability, which signifies a paradigm shift in disability studies.

A. The medical model of disability

The medical model is primarily deficit-focused by considering a person's disability as a problem which has to be cured. Essentially, the medical model sees the disability as the functional or psychological losses stemming from the impairment itself, a defect located within the individual who is impaired.¹¹ This way the medical model describes the disability as a health issue of the individual and accordingly, it treats the disability as a medical concern. As disability was seen as unchangeable damage, people were isolated from society and they could not fully participate in it.¹² This early attitude was surrounded by superstitions about disabilities and during that time doctors did not have the effective equipment and treatments to improve the life of these people. In conclusion, the medical model of disability has a dangerous impact on human rights because it encourages segregated facilities for people with disabilities, such as sheltered workshops and according to this model the impairment can even hinder their legal capacity.¹³ Moreover, the medical model of disability is associated with formal equality, which offers the same rights, conditions, and opportunities to everyone, this way it also produces unequal results.¹⁴

B. The social model of disability

In contrast, the social model believes that disability is injustice produced by society itself, which results in the exclusion of people with disabilities. From the social model perspective, the socially produced injustice can only be eliminated through radical social change. The social model focuses on society's role in constructing disability and its responsibility to eliminate disability-based exclusion. This way the social model of disability locates the problem in societal factors external to the individuals. Michael Oliver developed

one significant component.” MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 31 (1996). The social model of disability and human rights model are sometimes used synonymously. Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT'L L. & COM. 247 (2004).

¹¹ MIKE OLIVER, *THE INDIVIDUAL AND SOCIAL MODELS OF DISABILITY*, 1990.

¹² Nikolett Hadi, *A fogyatékosággal élő személyek alapjogai*, 4 KÖZJOGI SZEMLE 44 (2012).

¹³ Thereia Degener, *A New Human Rights Model of Disability*, in *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES A COMMENTARY* 42 (Valentina Della Fina, Rachele Cera & Giuseppe Palmisano ed., 2017).

¹⁴ Theresa Degener, *Disability in a Human Rights Context*, 5 LAWS 18 (2016).

the construction of the social model by analyzing discriminatory and oppressive structures of society.¹⁵ It distinguishes between disability as a social phenomenon and the personal problem of the individual, and interprets disability as a social status.

The aim of the social model is to actively seek to overcome the handicaps of people with disabilities. Accordingly, legislation following the social model seeks to address the problem of social exclusion of disability primarily through the introduction and development of anti-discrimination law.¹⁶ The social model of disability can be linked to the substantive model of equality, which encompasses positive programs to ameliorate disadvantage and entails positive rights as opposed to negative rights.¹⁷

In conclusion the social model's perspective is able to reorient the way of thinking about disability and to identify social structures which have to be changed. However, Adam M. Samaha draws attention to the point that the social model is doing the above by not providing a normative framework to use.¹⁸

C. The human rights model of disability

At the end of the 20th century, the Americans with Disabilities Act (hereinafter ADA) played an inspirational role in the creation of the human rights model. The passage of the ADA as the world's first comprehensive disability anti-discrimination law as well as the political mobilization of the American disability rights movement have had a tremendous impact on countries across the globe.¹⁹ Apart from the above it is important to distinguish ADA from the human rights model, because ADA represents the civil rights perspective, which mainly concentrates on the civil rights providing equal opportunities, focusing on individual experience and remedies.²⁰

The creation of the human rights model is attributed to Theresia Degener and Gerard Quinn, as in their background study²¹ for the UN Convention on the Rights of Persons with

¹⁵ MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT* (1990).

¹⁶ MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT* 44 (1990).

¹⁷ Theresia Degener, *Disability in a Human Rights Context*, 5 *Laws* 18 (2016).

¹⁸ Adam M. Samaha, *What good is the social model of disability?*, 74 *UNIV. CHICAGO LAW REV.* 1251–1308 (2007).

¹⁹ Katharina Heyer, *Rights or Quotas? The ADA as a Model for Disability Rights*, in *Handbook of Employment Discrimination Research* 238 (Laura Beth Nielsen & Robert L. Nelson ed., 2008).

²⁰ Gerard Quinn & Eilionoir Flynn, *Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability*, 60 *AM. J. COMP. L.* 24 (2012).

²¹ Gerard Quinn & Theresia Degener, *The current use and future potential of United Nations human rights instruments in the context of disability*, United Nations New York and Geneva (2002).

Disabilities (hereinafter CRPD) the term “human rights model” appeared for the first time. The CRPD, adopted in 2006, seeks to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.²²

The biggest achievement of the human rights model can be summarized by the following phrases: catalogue of human rights of people with disabilities, the concept of human dignity, the human rights based approach and the concept of inclusive equality. They all help to place people with disabilities in the center and to include them as valuable members of society.

The essence of the human rights model is that people with disabilities have the same rights as other members of society, this way this model concentrates on providing fundamental rights to people with disabilities. The approach of the CRPD is to set moral principles and values in the context of disability.²³ Basically, the CRPD does not only provide a catalogue of international human rights for people with disabilities, but also encompasses both sets of human rights: civil and political as well as economic, social and cultural rights. In order to bring the different sets of human rights closer to each other, the CRPD uses “the non-discrimination ideal as a prism with which to refract social rights and then to connect them instrumentally, to achieve the kind of outcomes for people with disabilities, normally associated with "civil rights" (choice, freedom, tailored support and accountable mechanisms).”²⁴

In favor of clarifying the models, it is necessary to point out that in parallel to the human rights model the Committee also applies a human rights based approach to disability.²⁵ While the human rights model focuses on the concept of disability, the human rights based approach focuses on persons with disabilities, acknowledging them as full rights-holders.²⁶ The human rights based approach of the CRPD basically insists on two parts. On one hand, people with disabilities are entitled to enjoy all human rights like others while on the other hand, it should happen in a multilateral, legally-binding international instrument. For example, Article 5 on equality and non-discrimination of the CRPD in relation with support

²² Article 1 of the CRPD.

²³ Theresia Degener, *Disability in a Human Rights Context*, 5 *Laws* 18, 4 (2016).

²⁴ Gerard Quinn & Eilionoir Flynn, *Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability*, 60 *AM. J. COMP. L.* 23 (2012).

²⁵ MARINE ULDRY & THERESIA DEGENER, TOWARDS INCLUSIVE EQUALITY: 10 YEARS COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES 24 (2018), https://tbinetnet.ohchr.org/Treaties/CRPD/Shared%20Documents/1_Global/INT_CRPD_INF_21_28325_E.pdf.

²⁶ General Comment No. 5 (CRPD/C/GC/5), paragraph 2.

services is one of the articles which has to be interpreted in line with the human rights based approach. In addition to the effect how human rights change the way of thinking of the oppressed and discriminated people, it is important to create mechanisms for reanalyzing and renaming “problems” as “violations”, and, as such, something that need not and should not be tolerated.²⁷ The human rights based approach provides exactly that.

After a brief introduction of the social model and the human rights model it is important to examine the relationship between them. It is obvious that the CRPD signifies the paradigm shift from the medical model to social model, but as stated by Theresia Degener, the CRPD goes beyond the social model of disability and codifies the human rights of people with disabilities creating a roadmap in disability policy. For this reason she considers the human rights model as a progress from the social model.²⁸ Anna Lawson and Angharad E. Beckett use a different way to capture the relationship between the social model and the human rights model in their work. They consider the human rights model as a model of disability policy, whereas the social model is a model of disability. These models complement each other and they operate in contexts which are not framed by the other.²⁹

The social model of disability definitely had an enormous impact on shaping the CRPD, it basically gave the foundation of the human rights model. Nonetheless, during the negotiations of the CRPD the social model of disability was mentioned many times, the CRPD Committee have rarely make any reference to it. The nomenclature is updated with the terms of the human rights model. Regarding the above, the human rights model represents the concept which replaces the medical and charity approaches in the legislation and policies concerning persons with disabilities by overemphasizing impairment, medical treatment and social care, and promotes human rights for disabled people instead.

2. The Hungarian legal framework

²⁷ Christopher Jochnick, *Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights* 21 HUMAN RIGHTS QUARTERLY 56, 59 (1999).

²⁸ Theresia Degener, *Disability in a Human Rights Context*, 5 LAYS 18, 3 (2016).

²⁹ See Anna Lawson & Angharad E. Beckett, *The social and human rights models of disability: towards a complementarity thesis*, 0 INT. J. HUM. RIGHTS 1–32 (2020).

In Hungary, during the era of Kádár,³⁰ people with disabilities were not considered to be part of “the socialist human ideal”, as they were not able to build a “country of iron and steel”. For this reason the most effective way of “socialist care” was to place them in historical, empty castles in bad shape, preferably away from cities and other people, isolated in large institutions.³¹ The disability policy in the era of Kádár is characterized by the paternalist, caring-hiding practice,³² which is still present in Hungary according to the Report of the CRPD Committee on Inquiry concerning Hungary under article 6 of the Optional Protocol to the Convention.³³ Furthermore, before the 1970s, people with disabilities were considered as state costs rather than value.

Some of the movements like organizations of the blind and deaf were nationalized. After the regime change (1989-1990), the civil rights movements got more power, as the new regime allowed the NGOs to operate within a legal framework.³⁴ While NGOs have had a big role in social awareness, the impact of the tradition of such a social benefits system is still present. In such a system, the socially deprived person receives benefits, a reduction or disability pension rather than being provided possibilities for employment.³⁵

The most significant step in the Hungarian disability policy was the enactment of the Act XXVI of 1998 on the Rights and Equal opportunities of Persons with Disabilities (hereinafter: Disability Act), which declared the whole set of rights of people with disabilities for the first time in Hungary. Furthermore, the significance of the Disability Act lies in the way that it declared rights for people with disabilities regarding their social status by crossing the traditional dogmatic view of constitutional rights, guaranteeing rights in horizontal relation, like employment.

³⁰ The era of Kádár (1956-1988) is named after János Kádár who was a Hungarian communist leader and the General Secretary of the Hungarian Socialist Workers' Party, presiding over the country from 1956 until his retirement in 1988.

³¹ Lajos Hegedűs, *Velünk élő történelem, avagy egyérvényesítő polgári jogi mozgalom mindennapjai* in *A FOGYATÉKOSSÁGÜGY HAZAI ÉS NEMZETKÖZI TÖRTÉNETE* 138 (Margit Kurunczi, Dorottya Judik & Emese Pajor ed., 2009).

³² Viktor Kiss, *A teljesség politikája: fogyatékosdiskurzusok és a normalitás ideológiái Magyarországon* in *A NEMZETKÖZI ÉS HAZAI FOGYATÉKOSPOLITIKA* 21. SZÁZADI KÖRKÉPE 11 (Ildikó Laki ed., 2013).

³³ Report of the CRPD Committee on Inquiry concerning Hungary under article 6 of the Optional Protocol to the Convention
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fHUN%2fIR%2f1&Lang=en.

³⁴ Valéria Hegedűs, *A megváltozott munkaképesség megjelenése az Európai Unióban, a jogi szabályozások tükrében* in *A NEMZETKÖZI ÉS HAZAI FOGYATÉKOSPOLITIKA* 21. SZÁZADI KÖRKÉPE 117 (Ildikó Laki ed., 2013).

³⁵ Nóra Jakab, *Kihívások és feszültségek a munkajogban. Fogyatékosággal élő emberek foglalkoztatása* in *AZ ESÉLYEGYENLŐSÉGTŐL A TAIGETOSZIG? - FOGYATÉKOSSÁGTUDOMÁNYI EREDMÉNYEK A „MÁSİK OLDAL” MEGÉRTÉSÉHEZ* 140 (György Könczei ed., 2016).

The Disability Act's goal is to guarantee the rights of persons with disabilities, and thus to promote their equal opportunities, independent living and active involvement in social life by changing the attitude of society.³⁶ The Disability Act mainly reflects the social and the human rights model of disability, but in the chapter on disability benefit it still follows the medical model. Nonetheless, the Disability Act was a pioneer in its time, though for the reasons above, now it is considered as a Janus-faced Act.³⁷

Another step forward was obviously the ratification of the CRPD in 2007, which binds Hungary to fulfill the obligations of the CRPD. In addition to the CRPD, Hungary, as a member of the European Union, is obligated to implement the Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation (hereinafter: Employment Equality Directive) as well. For this reason, this paper includes the analysis of the CRPD, the Employment Equality Directive and the Hungarian laws as well.

A. The CRPD

It already became clear during the negotiations of the CRPD that the idea of introducing a definition of disability or people with disabilities is not an easy task. The delegates underlined different concepts, but they agreed that any definition of disability should reflect the social model of disability.³⁸ For this reason, in order to pursue the wide coverage of the CRPD, the aim was to provide guidelines for the systematic determination of disability. Consequently, the CRPD defines neither the word "disability" nor the term "persons with disability" in Article 2 on Definitions, but includes seemingly a definition of people with disabilities under Article 1: "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."³⁹ Next to this definition there are other provisions in the CRPD and in the case law of the Committee, which clarify the meaning of disability and people with disabilities. It

³⁶ Article 1 of the Hungarian Disability Act.

³⁷ István Hoffman, *A fogyatékosfogalmi és megközelítési a magyar szociális ellátások körében* in AZ ESÉLYEGYENLŐSÉGTŐL A TAIGETOSZIG? - FOGYATÉKOSSÁGTUDOMÁNYI EREDMÉNYEK A „MÁSİK OLDAL” MEGÉRTÉSÉHEZ 163 (György Könczei ed., 2016).

³⁸ Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities New York, 16-27 June 2003, https://www.un.org/esa/socdev/enable/rights/a_58_118_e.htm.

³⁹ Article 1 of the CRPD.

is necessary to highlight that the CRPD's goal is not only to eliminate employment discrimination, but it also has a broad material scope, which reflects on the concept of disability.

First of all, the Preamble paragraph (e) of the CRPD acknowledges that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal or environmental barriers that hinder their full and effective participation in society on an equal basis with others.” It is necessary to note that paragraph (e) does not refer to the International Classification of Functioning, Disability and Health, as it follows the medical model of disability.⁴⁰ Moreover, Preamble paragraph (i) recognizes the diversity of persons with disabilities, and paragraph (j) admits the need for the protection of the human rights of all persons with disabilities, including those who require more intensive support.

Last but not least, “full and effective participation” is also included in the concept of disability, as it is part of the description of people with disabilities in paragraph e) and Article 1 of the CRPD. It also appears among the general principles of the CRPD, which are connected to every provision in the following way: “full and effective participation and inclusion in society”.⁴¹ In addition, Article 27 of the CRPD affirms that the labor market and work environment should be open, inclusive and accessible to persons with disabilities.

By analyzing the provisions above, it is visible that the CRPD operates with a social-contextual understanding of disability, as the concept of disability is based on the interactional relationship between “impairment” and “various barriers”, which, in combination, hinder a person's “effective participation in society on an equal basis with others”.⁴² The CRPD acknowledges the interactional nature of the concept of disability, as even scars, asymptomatic HIV, or any sign without physical limitations can make strangers think of impairments. This way this concept of disability “entitles a broad range of people who are vulnerable to discrimination on grounds of disability to protection.”⁴³

In the light of the Preamble paragraph (i) under the term “people with disability” the CRPD acknowledges the diversity of this group of people. In General Comment No. 6, on equality and non-discrimination, the Committee reiterates its position from Communication

⁴⁰ Rachele Cera, *Preamble* in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES A COMMENTARY 85 (Valentina Della Fina, Rachele Cera & Giuseppe Palmisano ed., 2017).

⁴¹ Article 3 Paragraph c) of the CRPD.

⁴² LISA WADDINGTON & ANDREA BRODERICK, COMBATting DISABILITY DISCRIMINATION AND REALIZING EQUALITY A COMPARISON OF THE UN CRPD AND EU EQUALITY AND NON-DISCRIMINATION LAW 37 (2018), https://ec.europa.eu/info/sites/info/files/combattling_disability_discrimination.pdf.

⁴³ *Id.* at 38.

No.10/2013 S.C. v. Brazil (CRPD/C/12/D/10/2013) according to which the human rights based model of disability requires to take into account the diversity of persons with disabilities as “disability is one of several layers of identity.”⁴⁴

The diverse nature of disability is strengthened by not providing a non-exhaustive list of categories of impairment by the CRPD. This way it is possible to decide case by case what to consider disability. For example, in the case of Mr. X v Tanzania, the Committee considered albinism as a disability. The Committee did not only take all the significant characteristics and symptoms of albinism into account but it also recalled the most serious health implication of albinism, which is vulnerability to skin cancer, “which remains a life threatening condition for most persons with albinism.” The Committee clarified that the interpretation of the human rights-based model of disability requires the diversity of persons with disabilities to be taken into account together with the interaction between individuals with impairments and attitudinal or environmental barriers.”⁴⁵

Moreover, according to the Committee’s interpretation the CRPD protects at least people with long-term disabilities, but States may include other types of people with disabilities.⁴⁶ In the case of S.C. v. Brazil (CRPD/C/12/D/10/2013), the Committee found that the employer’s policy of demoting employees having a knee injury after three months of medical leave was discriminatory on the basis of disability. The question was how to define a long-term impairment. The Committee stated that it is necessary to view the impairment in interaction with its barriers. According to this reasoning, the knee injury did in fact hinder the employee’s full and effective participation in society on an equal basis with others. In this case the Committee considered that the difference between illness and disability is a difference of degree and not a difference of kind. A health impairment which initially is conceived of as an illness can develop into an impairment in the context of disability as a consequence of its duration or its chronicity.⁴⁷

CRPD indicates clearly that persons with disabilities are right-holders and those rights are indivisible and inalienable, even if somebody needs more support and is unable to practice certain rights. In order to get this conclusion, preamble paragraph (e) mentioned above must be read with paragraph (j), which is aimed to make certain that there are no exceptions from

⁴⁴ General Comment No. 6 (CRPD/C/GC/6), paragraph 9.

⁴⁵ X v Tanzania (2017) CRPD/C/18/D/22/2014, paragraph 7.6.

⁴⁶ FROM EXCLUSION TO EQUALITY REALIZING THE RIGHTS OF PERSONS WITH DISABILITIES HANDBOOK FOR PARLIAMENTARIANS ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS OPTIONAL PROTOCOL DISABILITIES HANDBOOK FOR PARLIAMENTARIANS, United Nations, 13 (2007), <http://archive.ipu.org/PDF/publications/disabilities-e.pdf>.

⁴⁷ S.C. v. Brazil (CRPD/C/12/D/10/2013).

ensuring that people requiring more intensive support are not denied access and the full and effective enjoyment of all human rights.⁴⁸

While CRPD uses the principle of “full and effective participation” without referring to “inclusion” in the concept of disability, Article 27 on work and employment refers to the principle of inclusion. There is no definition of “full and effective participation” or “inclusion” provided by the CRPD or the Committee, but both are part of one of the general principles. According to the Danish Human Rights Institute, participation promotes “a society where persons with disabilities play an active role as partners in all aspects of life and are entitled and enabled to live a life in mainstream settings.”⁴⁹ With respect to the meaning of “full and effective”, it may be argued that the expression highlights the conceptual difference between integration and inclusion. Unlike inclusion, integration relates to an assimilationist model, that emphasizes a formal approach to participation and places the burden on persons with disabilities to adapt to society. In addition, the reference to the concept of inclusion highlights the paradigm shift from a medical model of disability to a human rights model.⁵⁰

In connection with the definition of disability used in various laws the CRPD Committee was tight-lipped, it rather highlighted the importance of ensuring consistency with the human rights model. The CRPD Committee did not identify specific guidelines for the definition of disability used in national laws in accordance with the human rights model, it stated only the followings in its concluding observations: neither derogatory terminology⁵¹ or maintenance of a paternalistic approach to persons with disabilities underpinned by the medical and charity models of disability⁵² is aligned with the human rights model. It may be argued that next to the specific guidelines mentioned above, the definition of disability used in all laws and policies should be in line with the whole concept of the human right model.

The concept of disability provided by CRPD shows a dynamic approach which gives the possibility for different interpretations accommodating the recent socio-economic settings.

⁴⁸ Rachele Cera, *Preamble* in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES A COMMENTARY 85 (Valentina Della Fina, Rachele Cera & Giuseppe Palmisano ed., 2017).

⁴⁹ Sarah Arduin, *Article 3: General Principles* in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES A COMMENTARY 98 (Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou ed., 2018).

⁵⁰ *Id.* at 98.

⁵¹ Concluding observations on the initial report of the United Arab Emirates, paragraph 7 CRPD/C/ARE/CO/1 (3 October 2016), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhspZQ2sppBOANJSxHHwrsEJZ4a%2BF%2BFWsbDTUGUYZeFghBZozoBf0FbDFMU6tzX3CaoEoWWa9un1ajOd5y69IEF9GQWhMusUBKI38ONxcTG17>.

⁵² Concluding observations on the initial report of Slovenia, paragraph 4 CRPD/C/SVN/CO/1 (16 April 2018), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsiV%2Bq2wB82cxwrVotBOWJsoWAUSWNqykKMEtURxvZOCNkBX8rxIf9hTyugdQKLO5L6%2FS0srzEUsGcntqOX4Avdq8G5T0e%2BINO1%2FAWIH8BHG>.

By not providing an exact definition it precludes the return to the medical model of. On the other hand, this open-ended definition does not facilitate the implementation of the human rights model of disability.

B. The Employment Equality Directive

First of all, according to the European Commission, people with disabilities are vulnerable groups whose members experience a higher risk of poverty and social exclusion than the general population and often face difficulties that can lead to further social exclusion, such as low levels of education and unemployment or underemployment.⁵³ The protection of the fundamental rights of vulnerable groups requires increased attention, as they can easily become victims of discrimination as a result of their vulnerable situation and they are threatened by stigmatization and legal deprivation.⁵⁴

The Employment Equality Directive is the most determinative EU instrument for addressing discrimination against people with disabilities. It acknowledges the importance of employment and occupation in “guaranteeing equal opportunities for all and contributing strongly to the full participation of citizens in economic, cultural and social life.”⁵⁵ Consequently, its purpose is “to lay down a general framework for combating every form of discrimination on the grounds of, among others, disability in the field of employment and occupation.”⁵⁶ Moreover, it also has the objective of creating within the European Union a level playing field regarding equality in employment and occupation with a mind of putting into effect the principle of equal treatment.⁵⁷

As for the notion of disability, it does not define it. This has led to several preliminary references to the Court of Justice of the European Union (hereinafter: CJEU) in which national courts have asked for guidance on how to interpret the concept of disability. Before ratifying the CRPD, in the case of *Chacón Navas*,⁵⁸ CJEU defined the concept of disability in the following way: disability is “a limitation which results, in particular, from physical, mental or psychological impairments and which hinders the participation of the person

⁵³ Definition of vulnerable group, <https://www.eqavet.eu/eu-quality-assurance/glossary/vulnerable-group>.

⁵⁴ Barnabás Hajas, Ágnes Lux, Máté Szabó & Katalin Szajbély, *A problémák, az eszközök és a lehetőségek* in PAJZSUK A TÖRVÉNY. RÁSZORULÓ CSOPORTOK AZ OMBUDSMANI JOGVÉDELEMBEN 10 (Barnabás Hajas & Máté Szabó ed, 2013).

⁵⁵ Preamble (9) of the Employment Equality Directive.

⁵⁶ Preamble (6), Article 1 of the Employment Equality Directive.

⁵⁷ Preamble (37) Article 1 of the Employment Equality Directive.

⁵⁸ Case C-13/05 *Chacón Navas v. Eures Colectividades SA*, ECLI:EU:C:2006:456.

concerned in professional life.”⁵⁹ It also stated that in order to limit the capacity to participate in professional life, disability must last for a long time.”⁶⁰ Moreover, it clarified that for the purposes of the Employment Equality Directive, the concept of disability cannot be treated the same way as “sickness”.⁶¹ The definition used in the case of Chacón Navas focused on the impairment which hinders participation in professional life, rather than the reaction of society to the impairment.

After the ratification of the CRPD by the EU, CJEU took the CRPD⁶² and the purpose of Employment Equality Directive⁶³ into account in defining disability. CJEU stated that the concept of disability includes “a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one.”⁶⁴

It is visible that the CRPD brought a big change in the concept of disability in EU law. The EU concept also reflects the social-contextual approach to disability and recognizes that unlike the medical model of disability, disability results from an interaction between “limitations resulting from impairments” and “various barriers”. Nonetheless, as the socially created barriers got acknowledged as an element of the definition of disability, the EU concept of disability is still not fully in line with the CRPD, as CJEU’s concept of disability refers to the interaction between “limitations resulting from impairments” and “various barriers” instead of referring to the interaction between “impairments” and “various barriers”.

In the judgement of HK Danmark,⁶⁵ CJEU provided some guidelines to interpret the notion of disability. In line with the aim of the Employment Equality Directive, which is to implement equal treatment, the Employment Equality Directive does not differentiate on the origin of disability. It covers disabilities that are congenital, result from accident or caused by

⁵⁹ Case C-13/05 Chacón Navas v. Eurest Colectividades SA, ECLI:EU:C:2006:456. 43.

⁶⁰ Case C-13/05 Chacón Navas v. Eurest Colectividades SA, ECLI:EU:C:2006:456. 45.

⁶¹ Case C-13/05 Chacón Navas v. Eurest Colectividades SA, ECLI:EU:C:2006:456. 44.

⁶² Under Article 216(2) TFEU, international agreements concluded by the EU are part of EU law and are binding on its institutions, and prevail over acts of the EU.

⁶³ The Article 1 of Employment Equality Directive states that the purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

⁶⁴ HK Danmark, EU:C:2013:222, 37-41; Z., C-363/12, EU:C:2014:159, 76; and Glatzel, C-356/12, EU:C:2014:350, 45.

⁶⁵ HK Danmark, EU:C:2013:222.

illness.⁶⁶ In addition, an illness can be covered by the Employment Equality Directive only if it entails a limitation.⁶⁷ CJEU interpreted the reference point in a manner which is compatible with the objective of the Employment Equality Directive, which aims in particular to enable a person with a disability to have access to or participate in employment. This way the reference point is not only the impossibility of exercising a professional activity, but also the hindrance to the exercise of such an activity.⁶⁸

In cases connected to obesity⁶⁹ the CJEU stated that the medical condition of obesity complies with the notion of disability defined in the judgement of *HK Danmark* and gave some examples of relevant limitations applicable in that context. This way “the obesity of the worker hinders their full and effective participation in professional life on an equal basis with other workers on account of reduced mobility or the onset of medical conditions preventing them from carrying out their work or causing discomfort when carrying out their professional activity.”⁷⁰ Considering limitations the CJEU pointed out only physical limitations directly caused by obesity, as a medical condition. Although, in the case of *Kaltoft*, a dismissed employee, who was able to do his job, faced a barrier in the form of negative attitudes and prejudices on the part of the employer rather than physical limitations. It is evident that the CJEU has not considered the possibility of false assumptions and the prejudice of others about an individual’s ability. It seems that due to this interpretation the CJEU excludes such individuals from the protection of the Employment Equality Directive, who are disabled only by the negative attitudes and prejudices of others.

The Court elaborated on the concept of a “long-term” limitation from impairment in the *Daouidi* case.⁷¹ In this case, Mr *Daouidi* was ostensibly dismissed on disciplinary grounds, but the true reason for the dismissal was his temporary inability to work for an indeterminate

⁶⁶ *HK Danmark*, EU:C:2013:222, 40.

⁶⁷ *HK Danmark*, EU:C:2013:222, 42.

⁶⁸ Regarding the reference point see also Case C-363/12 *Z v. A Government department, The Board of management of a community school*, ECLI:EU:C:2014:159. Even if this case is related to adoption and maternity leave laws, it shows the problematic aspect of this interpretation. This case was about a woman who didn’t have a uterus and was unable to become pregnant. By arranging a surrogate mother she became a mother, but her employer refused a period of paid leave equivalent to maternity or adoption leave, on the grounds that she qualified for neither, and the law did not provide for paid leave following the birth of a child through surrogacy. In line with the objective of the Employment Equality Directive CJEU found that unlikely under CRPD, Ms *Z* did not have a disability under the Employment Equality Directive, as Ms. *Z*’s impairment didn’t impact on her ability to work. Thus, with this narrow interpretation CJEU excludes people with disabilities who would be entitled to employment-related benefits.

⁶⁹ Case C-354/13 FOA acting on behalf of *Karsten Kaltoft v. Kommunernes Landsforening*, ECLI:EU:C:2014:2463.

⁷⁰ Case C-354/13 FOA acting on behalf of *Karsten Kaltoft v. Kommunernes Landsforening*, ECLI:EU:C:2014:2463, 60.

⁷¹ Case C-395/15 *Mohamed Daouidi v. Bootes Plus SL and Others*, ECLI:EU:C:2016:917.

period of time as a result of an accident that he had suffered at work. CJEU has decreed two guidelines to the national courts in assessing the concept of “long-term”. First, it noted that a “long-term” limitation of a person’s capacity may obtain, at the time of the allegedly discriminatory act, “if the incapacity of the person concerned does not display a clearly defined prognosis as regards to short-term progress or [...] the fact that that incapacity is likely to be significantly prolonged before the person has recovered”.⁷² According to this, it seems all limitations are regarded long-term which are not considered as short-term at the time of the discriminatory act. This leads to excluding short-term limitations which have turned out long-term.

Second, it is necessary to base the decision on all of the objective evidence relating to a person’s condition, established on the basis of current medical and scientific knowledge and data.⁷³ Nonetheless, CJEU’s intention with this statement, to show the way to establish appropriate evidence on the expected duration of the limitation of a person’s capacity, may lead to many problems. First, it refers to the “impairment” rather than the impact of environmental factors and their contribution to causing the disability. Moreover, in a few cases of the psychological impairments or mental health problems it would be difficult even to provide an exact diagnosis, much less the predictable length of the impairment. It seems CJEU did not consider that medical professionals may have different opinions in a significant number of cases.⁷⁴

In an earlier case, the case of Coleman,⁷⁵ the CJEU extended the protection of the European Equality Directive on people associated with people with disabilities in connection with the prohibition of direct discrimination and the prohibition of harassment. In parallel with the purpose and the objective of the European Employment Directive, the CJEU stated that excluding Article 5 on Reasonable accommodation and Article 7 (2) on Positive action, the scope of subject of the Employment Equality Directive must not be interpreted strictly with regard to the grounds of having disability. Consequently, when an employer treats their employees, who are not themselves disabled but are related to the disability of their child whose care is provided primarily by them, less favorably than other employees, or the

⁷² Case C-395/15 Mohamed Daouidi v. Bootes Plus SL and Others, ECLI:EU:C:2016:917, 56.

⁷³ Case C-395/15 Mohamed Daouidi v. Bootes Plus SL and Others, ECLI:EU:C:2016:917, 57.

⁷⁴ LISA WADDINGTON & ANDREA BRODERICK, COMBATTING DISABILITY DISCRIMINATION AND REALIZING EQUALITY A COMPARISON OF THE UN CRPD AND EU EQUALITY AND NON-DISCRIMINATION LAW 62 (2018), https://ec.europa.eu/info/sites/info/files/combating_disability_discrimination.pdf.

⁷⁵ Case C-303/06 S. Coleman v. Attridge Law and Steve Law, ECLI:EU:C:2008:415.

employer conducts harassment against the same employees, such treatment is contrary to the prohibition of direct discrimination or the prohibition of harassment.

In conclusion, the concept of disability in the European Equality Directive is narrower than in the CRPD. First of all, an individual can be considered a person with disability only if the limitation resulting from impairment hinders them in exercising professional life. Second, in order to be considered a person with disability, it is necessary to have an impairment and a limitation caused by that impairment. The CJEU has not really taken the element of “socially created barriers” into consideration in the case law. However, there are many impairments without physical limitations pointed out in the case law, such as visible scars or injuries, asymptomatic HIV,⁷⁶ in case of which people can have great difficulties in having access to or participating in employment.

C. The Hungarian laws

It is necessary to point out that the Hungarian legal framework contains more definitions of disability with respect to the area in which this group of people are to be protected even in one act.⁷⁷ The Act I of 2012 on the Labor Code (hereinafter: Hungarian Labor Code) regulates the employment of incapacitated employees, employees whose legal capacity has been partially limited having regard to employment, people with reduced ability to work, employees who are receiving rehabilitation treatment or rehabilitation benefits, employees having suffered a degree of health impairment of at least 50 percent and last, but not least people with disabilities, to whom it provides different rights and benefits like reasonable accommodation or protection against dismissal.⁷⁸ All these categories are related to people with disabilities, and it shows the diversity of people with disabilities and the

⁷⁶ LISA WADDINGTON & ANDREA BRODERICK, *COMBATTING DISABILITY DISCRIMINATION AND REALIZING EQUALITY A COMPARISON OF THE UN CRPD AND EU EQUALITY AND NON-DISCRIMINATION LAW 58* (2018), https://ec.europa.eu/info/sites/info/files/combating_disability_discrimination.pdf.

⁷⁷ István Hoffman, *A fogyatékoságfogalmai és megközelítései a magyar szociális ellátások körében* in *AZ ESÉLYEGYENLŐSÉGTŐL A TAIGETOSZIG? - FOGYATÉKOSSÁGTUDOMÁNYI EREDMÉNYEK A „MÁSİK OLDAL” MEGÉRTÉSÉHEZ* (György Könczei ed., 2016).

⁷⁸ Regarding people with disabilities the Hungarian Labor Code requires appropriate steps to ensure reasonable accommodation (Section 51 (5) of the Hungarian Labor Code) and it provides extra leave not only for the employee with disabilities but also for the employee having a child with disabilities. (Section 118 (2) and 120 of the Hungarian Labor Code) Moreover, it also provides extra leave (Section 120 of the Hungarian Labor Code) and protection against dismissal (Section 66 (7) of the Hungarian Labor Code) for the employee who is receiving rehabilitation treatment. Employees having suffered a degree of health impairment of at least 50 percent may not be transferred to work at another location without their consent (Section 53 (3) d) of the Hungarian Labor Code). Finally, in case of the employment of incapacitated employees, the Hungarian Labor Code contains special regulations (Section 212 of the Hungarian Labor Code).

complexity of employment law, which operates with definitions from different fields: for example, the term of employee with altered ability to work comes from the employment and social policy, the term of people with disabilities is from disability studies and the term of incapacitated employee comes from civil law. For this reason, it is important to clarify these notions, which can be overlapping and confusing, and to define who is entitled to those rights and benefits. First, the paper analyzes the notion of “people with disabilities”, then it focuses on the other related notions in employment.

Regarding the notion of “people with disabilities”, the Act XCII of 2007 on the promulgation of the Convention on the Rights of Persons with Disabilities and its Optional Protocol, which contains the text of the CRPD in Hungarian, states that persons with disabilities are those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.⁷⁹ For the first look it seems the same but there is a word missing, the verb “include”. According to the CRPD the term of disability is an evolving concept, this way it does not contain an exact definition. The Hungarian translation does not provide the same flexible concept as the CRPD does.

After having submitted the first Hungarian report on the status of people with disabilities, the CRPD Committee drew attention to the need of an inclusive definition of disability and people with disabilities, which is based on the human rights-based approach and encompasses all people with disabilities, including those with psychosocial disabilities.⁸⁰ In 2013 the Hungarian legislative finally amended the legal definition of people with disabilities in the Hungarian Disability Act based on the recommendations of the CRPD Committee and it determined the term of “disabled person” for its purposes⁸¹ the following way: any person having long-term or permanent sensory, communicative, physical, mental, intellectual or psychosocial impairments, or any combination thereof, which may, in conjunction with other environmental, social and other significant barriers, hinder their full and effective participation in society on an equal basis with others.⁸²

⁷⁹ Article 1 of the Promulgation Act.

⁸⁰ Concluding observations on the initial periodic report of Hungary, CRPD/C/HUN/CO/1 (17-28 September 2012), <https://digitallibrary.un.org/record/736932?ln=en>.

⁸¹ Section 1 of The Hungarian Disability Act states that the aim of the act is to define the rights of disabled people and the instruments for the exercise of these rights, further to regulate the complex rehabilitation to be provided for disabled people, and as a result of all these, to ensure equality of opportunity, independent living and active participation in the life of society for disabled people.

⁸² Section 4 of the Hungarian Disability Act.

First of all, the definition of people with disabilities and the terminology used in the Hungarian Disability Act has a significant role, as it has a direct effect on other relevant measures, disability policies and action plans. For example, the Act IV of 1991 uses the same definition as the Hungarian Disability Act does. Unlike the CRPD, this definition does not contain the verb “include,” which gives the impression that the list is exhaustive, which makes the wording exclusionary, which is also contrary to the human rights model of disability. Second, the Decision of the National Assembly 15/2015. (IV. 7.) on the National Disability Program (hereinafter: Hungarian Disability Program) has the same terminology as the Hungarian Disability Act and it uses the term “disabled person” instead of “person with disability”. This terminology is still not in compliance with the CRPD’s human rights approach, because the Hungarian Disability Act and the Disability Program consider disability as a characteristic that represents the whole personality, rather than just a layer of identity.

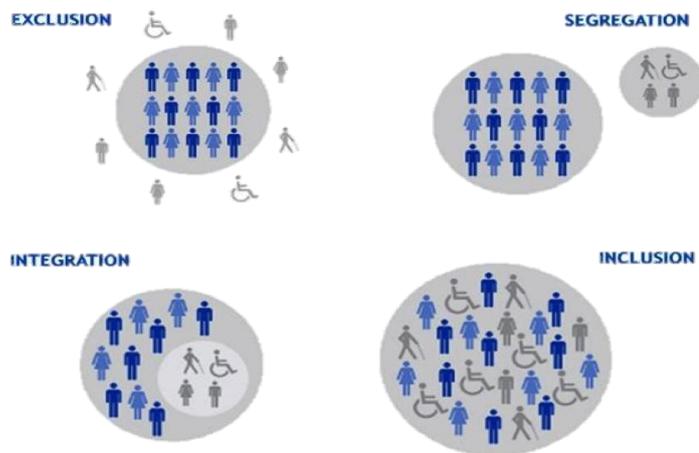
Moreover, there is a general approach in using terminology in the Hungarian Disability Act, and also in the provisions related to employment. Instead of using the terms “inclusion” or “inclusive” it uses the word “integration”.⁸³ Section 15 (1) of the Hungarian Disability Act also uses the same approach and states that “if possible, the disabled person is entitled to integrated employment or, in the absence thereof, to sheltered employment,” which is not in line with the CRPD, as it contains the duty to create an open, inclusive, and accessible labor market where persons with disabilities enjoy the right to work on an equal basis with others.⁸⁴ Moreover, the Disability Program is also in confusion with using the terms “integration” and “inclusion”, as it uses both, however there is a substantial difference between them. Sarah Arduin highlights the different approaches between integration and inclusion in the context of Article 24 on education of the CRPD and it clarifies that integration, unlike inclusion, relates to an assimilationist model that emphasizes a formal approach to participation and places the burden on persons with disabilities to adapt to society.⁸⁵ In parallel with this guideline, in the workplace integration refers to the employment of people with disabilities in mainstream settings, while inclusion entails more. Inclusive

⁸³ National Federation of Associations of Persons with Physical Disabilities Hungary Alternative Report for the Periodic Review on the implementation of UN Convention on the Rights of Persons with Disabilities in Hungary (December 2019), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fHUN%2f41334&Lang=en.

⁸⁴ Article 27 of the CRPD.

⁸⁵ Sarah Arduin, *Article 3: General Principles* in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES A COMMENTARY 99 (Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou ed., 2018).

workplaces aim to include people with disabilities in mainstream settings without sacrificing the support they require. The following illustration shows the difference between integration and inclusion.



In the context of employment, as the paper already mentioned, there are several categories including people with different levels of disabilities. It is common to use the term “people with disabilities” and the term “people with altered ability to work” as synonyms, however these categories does not cover the same group of people.⁸⁶ After the Commissioner for Fundamental Rights (hereinafter: Ombudsman) had pointed out several times that the definitions of the terms above were confusing, consequently people with disabilities had not even appeared in the registrations related to employment,⁸⁷ the legislation amended the Act IV of 1991, and since 2019 it requires an “Employee with disability”⁸⁸ category, making the two terms different in the unemployment registrations. According to the Act IV of 1991, the term of “employee with a disability” means “any person having long-term or permanent sensory, communicative, physical, mental, intellectual or psychosocial impairments, or any combination thereof, which may, in conjunction with other environmental, social and other significant barriers, hinder their full and effective participation in society on an equal basis with others.”⁸⁹ Apparently, for the purpose of making people with disabilities visible in the unemployment registrations, the legislation uses the exact same definition as the Hungarian

⁸⁶ Nóra Jakab, *Kihívások és feszültségek a munkajogban. Fogytékossággal élő emberek foglalkoztatása* in AZ ESÉLYEGYENLŐSÉGTŐL A TAIGETOSZIG? - FOGYATÉKOSSÁGTUDOMÁNYI EREDMÉNYEK A „MÁSİK OLDAL” MEGÉRTÉSÉHEZ 142 (György Könczei ed., 2016).

⁸⁷ Hungarian Ombudsman’s project on work and dignity, 2012.

⁸⁸ In the Official English version of the Act there is „Disabled worker” but in Hungarian the Act uses the more preferable term, „Employee with disability”.

⁸⁹ Section 57/B (4) of the Act IV of 1991 on Job Assistance and Unemployment Benefits.

Disability Act. Nevertheless, the term “employee with disability” has not been used in another act.

Regarding the term of disability, in the case of extra vacation, the Hungarian Labor Code determines the notion of a „disabled child”⁹⁰ referring to the Family Assistance Act (Act LXXXIV of 1998), which contains the definition of a “child who is permanently ill or with a severe disability” the following way: “a child under the age of eighteen who needs constant or increased supervision or care due to an illness or disability” specified in a separate legal act, the Decree of Ministry of Health, Social and Family Affairs 5/2003. (II. 19.) on illness and disabilities entitling to a higher amount of family allowance.⁹¹ Therefore, in the case of extra vacation, the Hungarian Labor Code refers to an act on social benefits, which defines the term of “disabled child” by specific illness or disability in order to easily prove the fact of the child being disabled. This way of understanding disability reflects more on the medical approach.

The term of “person with altered ability to work” is defined in the Act IV of 1991 on Job Assistance and Unemployment Benefits and in the Act CXCI of 2011 on benefits for the people with altered ability to work and on amending certain laws. The acts above had not defined the term of “person with altered ability to work” the same way, however, since 2019 the definition of the term in the Act IV of 1991 reflects more on the definition specified in the Act CXCI of 2011. This way, until 2019 two version of the definition existed. Before the amendment of the Act IV of 1991, the term of “person with altered ability to work” had been defined the following way: “a person who suffers in a physical or mental disorder or whose ability for finding or keeping employment after medical rehabilitation is diminished due to some physical or mental impairment.” Moreover, according to the Act CXCI of 2011, one can be a person with altered ability to work only in the case of having already had work experience and having 60 percent or less extent of state of health.⁹² The extent of state of health is determined in the framework of a complex assessment by the Rehabilitation Authority of the Capital's Government Office on the basis of tables for each organ and disease in the related decree, then adding this data and subtracting the state of health damage obtained from 100 percent.⁹³

⁹⁰ Section 294 (1) c of the Hungarian Labor Code.

⁹¹ Section 4f) of Act LXXXIV of 1998 on Family Assistance Act.

⁹² Section 2 of the Act CXCI of 2011 on benefits for the people with altered ability to work and on amending certain laws.

⁹³ Decree of Ministry of Human Capacities 7/2012. (II. 14.).

Then the Act IV of 1991 has been amended and it has become more similar to the definition specified in the Act CXCI of 2011: “a person so diagnosed by the Rehabilitation Authority, whose state of health is rated 60 percent or less based on the complex assessment, whose health is considered impaired by at least 40 percent on the basis of the relevant expert diagnosis, whose capacity to work is considered diminished between 50 to 100 percent and a person who is exempted from complex assessment by law, during the term of receiving invalidity allowance.”⁹⁴ The difference between the definitions of the term is obvious. As the definition before the amendment took the ability of the person to find or keep employment into account, it reflected on the social model of disability as well. Despite the fact that the legislature unified the definitions, the notion of person with altered ability to work now reflects more on the medical approach of understanding disability.

In order to support and promote inclusive and open labor market employment of people with disabilities, there is the so called “rehabilitation contribution”. According to Article 23 of Act CXCI of 2011, employers shall be obliged to pay a “rehabilitation contribution” to the state budget if they have more than 25 employees and the proportion of persons who have officially been recognized as having an altered ability to work within the workforce is below 5 percent. In spite of its aim, rehabilitation contribution does not fulfill its promise. Even though this provision promotes the employment of employees with reduced ability to work, this way it may not be in the employer’s interest to employ people with disabilities whose employment may be more expensive and requires accommodation.

Furthermore, it is interesting that the Hungarian Labor Code uses the term “employees receiving rehabilitation treatments” to describe the class who receive protection against dismissal, but truly this term specifies a group of employees with altered ability to work, excluding employees receiving invalidity benefits, the other group of employees with altered ability to work. Regarding employees receiving invalidity benefits, under employment law, they are treated in the same way as people entitled to a retirement pension. It means that termination of employment by the employer does not have to be justified and no person is entitled to severance pay if he or she is considered to be a pensioner at the time of notification of termination.⁹⁵

Next to people with disabilities and employees with altered ability to work, the Hungarian Labor Code regulates the employment of people with intellectual and psychosocial

⁹⁴ Section 58(5) m) of the Act IV of 1991 on Job Assistance and Unemployment Benefits.

⁹⁵ Section 66(9) and 77. § (5) a) of the Hungarian Labor Code.

disabilities as well, in norms related to the employment of the incapacitated people and people whose legal capacity has been partially limited regarding employment. Under the Hungarian Civil Code, legally competent people are entitled to conclude contracts and make other legal statements, while people with limited legal capacity cannot do so on their own accord. The court restricts people's capacity to act and places them in guardianship, if their discretion to conduct their affairs is greatly reduced or absent due to their mental disorder.⁹⁶ The Ombudsman, in its project on work and dignity, pointed out that the legal category of “incapacitated person” is an outdated, difficult-to-define concept that disability studies have already transcended.⁹⁷ The legal category of incapacitated person include various groups of people with disabilities with varying levels of impairment, since different areas of sciences refer to incapacitated employees differently. For example, the terminology of employment policy uses the term “employees with altered ability to work”, while disability studies refer to “people with disabilities”, mostly with an intellectual or psychosocial illness. Due to the heterogenic nature of this legal category, it may include for example someone with severe, cumulative disability, a professor with mental illness, older people with dementia or addicts.⁹⁸

The Hungarian Labor Code contains specific forms of support in the workplace in order to facilitate the employment of the incapacitated, like the requirement of a more detailed job description, occupational safety and health, continuous supervision, the consentaneity of medical examinations, the employee’s ability to handle the functions of the job and no compensation and grievance fees.⁹⁹ These provisions obviously help the employment of the incapacitated and those whose legal capacity has been partially limited regarding employment so much so, that these provisions would be helpful in case of people with disabilities as well. Though, the provision on compensation and grievance fee, which, by contrast, they are entitled to, may discourage employers to hire people with disabilities.

It is visible that the employment law operates with many notions related to people with disability, and the general disarray in terminology related to people with disability over various laws makes navigating the system increasingly difficult.

⁹⁶ Section 2:19 (2) and 2:21 (2) of the Hungarian Civil Code.

⁹⁷ Hungarian Ombudsman’s project on work and dignity 65 (2012).

⁹⁸ These examples are from id. at 65.

⁹⁹ Section 212 of Hungarian Labor Code was established by Subsection (22) of Section 175 of Act CCLII of 2013, effective as of 15 March 2014 due to the Hungarian Constitutional Court decision 39/2011. (V.31), in which it stated that Hungarian legislation failed to create the legal conditions for the employment of incapacitated people.

Conclusions

One of the key questions of national disability policies, like the Hungarian disability policy as well, is how to define disability and how the various legal areas, which use different concepts to define persons with disability or their groups, can be consistent with the human rights model. The best example of this is the field of employment law, which this paper discusses.

By itself defining disability is quite challenging. On one hand, there is no generally accepted meaning of the term, as it is based on an evolving concept due to developing medical science and progressing models from disability studies. Therefore, standards and guidelines coming from the CRPD and the Employment Equality Directive also influence the concept of disability in Hungary. On the other hand, employment law considers the principle of equal treatment and equal opportunity, national employment policy, social security and education policy and include the rules on rehabilitation and safety at work as well, which makes constructing a straightforward definition a complicated endeavor.

Furthermore, the concept of disability varies according to function of laws related to the employment of people with disabilities. When applying the principle of equal treatment, the set of people with disabilities has to include more people. This way the broader definition of people with disabilities should include those with minor or temporary disabilities, people associated with people with disabilities and those who are wrongly assumed or perceived to have a disability, as they all can be affected by disability-based discrimination. In contrast with the above in the case of acknowledging entitlements for social benefits, states need objective criteria to determine how to allocate its resources, which makes the use of the medical model more prominent.

The Hungarian terminology and definitions related to people with disability differ in various laws of employment and sometimes reflect the medical model of disability. The diversity of concepts of disability used in Hungarian laws points out that the human rights model still has shortcomings when it comes to the application of the law. While insightful in theory, in practice recognizing the social origin of disability does not aid providing an objective scale to determine what amount of support an individual should receive. In this regard there is a tension between the desired concept of the human rights model and its applicability. As the Hungarian examples showed, it still remains necessary to use objective criteria in certain situations. Realizing that, it is just as necessary to ensure consistency with

the human rights model, unlike the 2019 amendment of the Act IV of 1991, which reflects a regression to the medical model.

The significance of the human rights model is that it aims to evolve the perception of disability in society. The Hungarian terminology, uniformly across all legislations, should reflect this shift in paradigm. The recent diversity of terminology and concepts has the consequence that laws in connection with people with disabilities lose their effectiveness, this way the paradigm shift, represented by the human rights model, will not happen neither in society, nor in legal thinking.

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