

Monika Domańska

astamz@sn.pl

Institute of Law Studies Polish Academy of Sciences

ORCID ID: <https://orcid.org/0000-0002-3790-2548>

People with Disabilities as a Vulnerable Group. The Concept of Protection of the Rights of Vulnerable Groups¹

Abstract: The social model of disability, which focuses on determining the reasons for disabilities not connected with the individual as such, but pointing at the social barriers that limit the individual in the environment where he/she lives, is consistent with the assumptions of the UN Convention on the Rights of Persons with Disabilities and is a coherent and complementary element of the concept of individual vulnerability attributed to people who are marginalised in a given society. Since the EU is a party to the aforementioned Convention, while the provisions of the ECHR should introduce the minimum standard of protection of fundamental rights in the EU, it should be determined whether the legislative standard set by the Convention has been implemented in a binding manner at the level of EU law and ECHR.

Keywords: vulnerable groups, social model of disability, discrimination, marginalisation

In line with the opinion expressed in the Communication from the European Commission dated 15 November 2010, one in six people in the EU is disabled², the degree of disability ranging from mild to severe, which means that around 80 million Europeans are often prevented from taking part fully in society and the economy because of environmental and attitudinal barriers. The rate of poverty of people with disabilities is 70% higher than the average, one of the reasons being limited access to employment. Over a third of people aged over 75 have disabilities that restrict them to some extent, and over 20% are considerably restricted. Furthermore, these

1 This paper was prepared as part of research grant funded by the National Science Centre and awarded by decision DEC-2013/09/B/HS5/04526.

2 For reasons of clarity it should be stated that the terms 'disabled people' and 'people with disabilities' will be used interchangeably. All persons characterised by physical or psychological disability are – for the purposes of analyses carried out in this article – treated as members of a single social group: that of people with disabilities.

numbers are set to rise as the EU's population ages³. Just these facts alone can be considered sufficient to draw the conclusion that disability is a feature of many people living in the EU, which at the same time causes their social marginalisation. The marginalisation of disabled people is also caused by prejudices, which are deeply rooted in each society and which are based on common stereotypes⁴. Stereotypes, in turn, convey a negative message, because they comprise unjustified simplifications or generalisations, while the image they create is incomplete, because they ascribe certain (usually negative) features regardless of whether all the elements of the image form a coherent whole⁵. A stereotypical approach has far-reaching negative consequences for those who want to exercise their rights despite the prejudices in their environments. The issue is important inasmuch as it may lead to a structural problem if the stereotype is used by state authorities. Beyond any doubt, if state authorities – including the administration of justice⁶ – follow stereotypes, this may lead to substantive and factual errors. This manifests as practices that work to the disadvantage of certain people. These practices can be overt or covert actions or omissions to act and create structural or institutional discrimination⁷. Discrimination is a deeper manifestation of status loss on the continuum of stereotyping. The key component of this process is the use of dichotomous categories: male/female, white/black; healthy/disabled. Because of the fact that individuals do not live in isolation, but in a society filled with a network of various kinds of relationships, links, and dependencies, no individual is separate from systems of difference which serve to position people in various, often inequitable ways⁸. It is imaginable that some will be more regularly at the former and others most frequently at the latter end of the spectrum. By virtue of their position in a social hierarchy, members of marginalized groups are unlikely to be viewed as contributors to important collective social goals.

3 1. Introduction, 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. COM(2010) 636 final. Brussels, 15.11.2010.

4 I. Solanke, *Discrimination as Stigma. A Theory of Anti-discrimination Law*, Hart Publishing 2017, p. 9.

5 S. Buchowska, *Stereotypy oparte na płci a dyskryminacja kobiet – aspekty prawnomiędzynarodowe* [in:] Z. Niedbała [ed.] *Prawo wobec dyskryminacji w życiu społecznym, gospodarczym i politycznym*, Warsaw 2011, p. 26; broadly about the formation of stereotypes M. Dębicki, *Wokół stereotypów narodowych i niektórych zjawisk pokrewnych. Nowe formy starych dylematów* [in:] R. Dopierała, K. Kaźmierska [eds.] *Tożsamość, nowoczesność, stereotypy*, Krakow 2012, pp. 327-338.

6 *Równe traktowanie uczestników postępowań. Przewodnik dla sędziów i prokuratorów* [eds.] D. Pudzianowska, J. Jaruga, Warsaw 2016.

7 I. Solanke, *Discrimination as Stigma. A Theory of Anti-discrimination Law*, Hart Publishing 2017, p. 33.

8 B. Gough, M. McFadden, *Critical Social Psychology – An Introduction*, Basingstoke, Palgrave 2001, p. 13.

On the other hand, less privileged groups feel an obvious pressure to conform to norms which they do not fully accept. This is the process resulting in the formation of the so-called vulnerable groups, whose rights are – as a rule – limited and stratified by the social majority controlling the decision-making processes in the society.

The concept of individual ‘vulnerability’ as a social feature was defined as ‘universal, inevitable, enduring aspect of the human condition’⁹. From this point of view, vulnerability should be perceived as a feature forming part of the human nature (as a part of human identity), as a result of which feature individuals are constantly exposed to potential (intended or unintended) harm connected with the risk of the changing circumstances (due to the constantly evolving character of societies), or with the adopted assumption that such individuals have to be subordinated to other individuals. From this perspective, also the vulnerability of a certain group should be seen as a dynamic concept, ascribed to – but also permeating into – the notion of minority groups¹⁰. When we attempt to capture the essence of the definition of a ‘vulnerable group’ in the language of human rights, we should consider that such a group is made up of individuals who particularly frequently experience unequal treatment or need to introduce special instruments for their protection in society. Nevertheless, it has to be emphasised that even though social vulnerability concerns, first and foremost, an individual as such, the notion should not be reserved for the outcome of an assessment of the individual’s situation only. It seems possible that a different thesis can be adopted, namely that individuals with a common feature or established identity can be classified, within a single group, as vulnerable individuals. By the same token, vulnerability is an inherent part of a given social situation and consequently can be ascribed to a whole group of people distinguished by it¹¹.

Disability is an issue that is associated mainly with medical problems, rather than legal ones¹². For a relatively long time, international law did not attempt to protect disabled people, in contrast to the protection accorded to other vulnerable groups,

9 M.A. Fineman, The vulnerable subject: Anchoring equality in the human condition, ‘Yale Journal of Law & Feminism’ 2008, no. 20, p. 8.

10 L. Peroni, A. Timmer, Vulnerable groups: The promise of an emerging concept in European Human Rights Convention Law, ‘International Journal of Constitutional Law’ 2013, no. 4, p. 1060.

11 *Ibidem*, p. 1068.

12 M. Rioux, Towards a Concept of Equality of Well-Being: Overcoming the Social and Legal Construction of Inequality, *Can. J.L. & Juris.* 1994, no 7, p. 127; K. Kurowski, Niepełnosprawność i osoba niepełnosprawna – od medycznego do społecznego modelu niepełnosprawności (w:) Najważniejsze wyzwania po ratyfikacji przez Polskę Konwencji ONZ o Prawach Osób Niepełnosprawnych. Biuletyn Rzecznika Praw Obywatelskich 2012, no 10, p. 8.

such as children¹³ or women¹⁴. There is no doubt that it was only the last decade that saw a development of disabled people' rights protection, including a unified approach to the social definition of disability at both international and national level. It is the UN Convention on the Rights of Persons with Disabilities (which the EU has ratified¹⁵) which is the most important measure of the fight against segregation and exclusion of disabled people, while at the same time promoting the social, not the medical, model of disability. This model assumes that it is the social space where barriers preventing disabled people from participating efficiently exist¹⁶. The causes of disability are not linked with the individual as such, but rather with the environment where the individual lives, which restrains him/her and where social, economic, and architectonic barriers are identified.

The Convention affects directly the way EU law is applied and interpreted. As a rule, if the Convention includes a guarantee which is not regulated in EU legislation, it assumes the function of an instrument filling a legal lacuna. In the process of interpreting EU law, the Convention becomes an interpretative benchmark¹⁷. The study of legal instruments at the level of EU law and the European Convention on Human Rights¹⁸ does not lead to an unequivocal conclusion that these two

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- 13 UN Convention on the Rights of the Child was adopted by the United Nations General Assembly on 20 November 1989 and ratified by Poland on 30 April 1991 (Polish official journal *Dz. U.* 1991, No. 120, item 526).
 - 14 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), was adopted by the United Nations General Assembly on 18 December 1979 and ratified by Poland on 30 July 1980 (Polish official journal *Dz. U.* 1982, No. 10, item 71).
 - 15 The Convention was done in New York and adopted by the United Nations General Assembly on 13 December 2006. It entered into force on 3 May 2008 (the 'Convention'). On behalf of the EC, the Convention was signed on 30 March 2007, subject to its possible conclusion at a later date. The European Union ratified the Convention, whose text was included in Annex I to Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (OJ UE L 23, 27.1.2010, p. 35). The ratification instrument was deposited on 23 December 2010. It should be stressed that this is the first case when the EU became a party to an international human rights treaty.
 - 16 The social model of disability is the opposite to the medical (individualised) model. The latter assumes a medical approach to the problem of disability, linking an individual's diseases with his/her problems with functioning in the society. This model functions in the US legal system. Cf.: M. Rioux, Towards a concept of equality of well-being: Overcoming the social and legal construction of inequality, 'Canadian Journal Law & Jurisprudence' 1994, no. 7, p. 127.
 - 17 More broadly, L. Waddington, The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A story of exclusive and shared competences, 'Maastricht Journal of European and Comparative Law' 2011, vol. 18, no. 4, p. 431 ff.
 - 18 Convention for the Protection of Human Rights and Fundamental Freedoms, done in Rome on 4 November 1950, as amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol no. 2 (Polish official journal *Dz. U.* 1993, No. 61, item 284 as amended), the 'ECHR'. The body adjudicating on the basis of ECHR provisions is the European Court of Human Rights, the 'ECtHR'.

legal regimes have adopted and efficiently promote the social model of disability. Even though the European Convention on Human Rights plays an important role in strengthening the rights of people with disabilities, Articles 3, 5, 8 or 14 ECHR being among the ones of key importance, the concept of vulnerable groups as ones that require special protection due to the system of distribution of goods in a given society, resulting in a privileged position of a selected part of the population and an unfavourable situation of other members of the population, is a concept which is only beginning to gain importance¹⁹. Nevertheless, classification of people with disabilities as a particularly vulnerable group shows a certain evolution in ECtHR case law. Determining the existing vulnerability of such people enables the Court not only to strengthen the idea of equality as such, but also to broaden their rights through application of the doctrine of positive obligations of the state²⁰. In this context, the Court attaches great weight to detainees with mental health conditions. Such people are considered as ‘particularly vulnerable detainees’²¹, or as ‘more vulnerable than the average detainee’²², or as detainees ‘in a particularly vulnerable situation’²³. Similar attention is given to other persons with mental conditions, the Court finding that ‘persons of unsound mind’ within the meaning of Article 5(1) ECHR are vulnerable persons. In the judgment in *Alajos Kiss v. Hungary* the Court held that individuals suffering from mental health conditions are a ‘particularly vulnerable group’ due to the discrimination they suffer from other members of the society²⁴. In this judgment the Court emphasised clearly that if restriction of fundamental rights applies to a particularly vulnerable social group, which had in the past suffered considerable discrimination, such as mentally disabled people, then the state’s margin of appreciation is substantially narrower and there must be very weighty reasons for

19 A publication which merits approval in the context of problems of vulnerable groups in ECtHR case law is Y.A. Tamimi, The protection of vulnerable groups and individuals by the European Court of Human Rights, <http://njb.nl/Uploads/2015/9/Thesis-The-protection-of-vulnerable-groups-and-individuals-by-the-European-Court-of-Human-Rights.pdf> (access 11.10.2017). The author analyses 557 cases examined by the ECtHR, in all of which the word ‘vulnerability’ or related words (the analysis covers case law until 2013, inclusive of that year). The conclusion is that the concept of vulnerability of individuals and social groups appears with increasing frequency in ECtHR case law and in 2013 it applied already to 8% of all cases examined by the Court, compared to 2% in 2007.

20 A. Timmer, A Quiet Revolution: Vulnerability in the European Court of Human Rights’ [in:] M. Fineman, A. Grear [eds.] *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Ashgate 2013, p. 147 ff.

21 For instance, ECtHR judgment of 17 June 2012, case *Munjaz v. the United Kingdom*, application no. 2913/06; of 24 November 2009, case *Halilovic v. Bosnia and Herzegovina*, application no. 23968/05.

22 For instance, ECtHR judgment of 10 January 2013, case *Claes v. Belgium*, application no. 43418/09; of 18 December 2007, case *Dybeku v. Albania*, application no. 41153/06.

23 For instance, ECtHR judgment of 22 January 2013, case *Lashin v. Russia*, application no. 33117/02.

24 ECtHR judgment of 20 May 2010, case *Alajos Kiss v. Hungary*, application no. 38832/06.

introducing such restrictions. The reason for such an approach is that, such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. The prejudices may also result from legislative stereotyping which prohibits the individualised evaluation of such persons' capacities and needs²⁵.

Yet on the other hand, the concept of vulnerable groups distinguished in ECtHR case law has also come under criticism²⁶. Importantly, the criticism comes from dissenting judgments of ECtHR judges. As an example, we can mention the opinion expressed by judge B. Borre, who clearly disagreed with the role assumed by the ECtHR in case *D.H. and Others v. the Czech Republic*, stressing that evaluating the whole social context in the case was at variance with the Court's duty to analyse the case in the individual context²⁷. He considered that an assessment of the historical background and social evolution could not lead to generalising conclusions for all members of a so-called vulnerable group. A similar criticism of generalising assessments in respect of members of a vulnerable group was delivered by judge A. Sajó in his dissenting opinion in case *M.S.S. v Belgium and Greece*²⁸.

The focus on the social model of disability in EU law was impossible for a long time due to lack of EU competences in the sphere of social policy, which prevented active influence on the situation of disabled people. Currently, it is the Charter of Fundamental Rights²⁹ and Directive 2000/78/EC³⁰ that provide for the basic obligations of Member States in the context of prohibition of discrimination of disabled people and equalising their chances in the society. However, it should be stressed that EU legislation – both primary and secondary (even the instruments of soft law) – does not contain a definition of 'disability'. Who is a person whose health limitations result in a disability has been decided by the Court of Justice in its judgments.

In case C-13/05 *Chacón Navas*,³¹ the CJ held that the concept of 'disability' should be understood as 'a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'. What was particularly important for the CJ was the distinction between disability and sickness, which is another hindrance in

25 ECtHR judgment of 20 May 2010, case *Alajos Kiss v. Hungary*, application no. 38832/06, para. 42.

26 I. Truscan, Considerations of vulnerability: from principles to action in the case law of the European Court of Human Rights, RETFORD 2013, no. 3, p. 75.

27 Dissenting opinion of judge B. Borre on ECtHR judgment of 13 November 2007, in case *D.H. and Others v. the Czech Republic*, application no. 57325.

28 Dissenting opinion of judge A. Sajó on ECtHR judgment of 21 January 2011, in case *M.S.S. v. Belgium and Greece*, application no. 30696/09.

29 Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391).

30 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ EC L 303, 2.12.2000, p. 16).

31 CJEU judgment of 11 July 2006, in case *Sonia Chacón Navas v. Euresť Colectividades SA*, C-13/05.

employment. This was done by adopting the assumption that a disability by definition has a long-term nature, while the notion of sickness (in EU law) assumes that it is a short-term indisposition of an employee.

The definition of disability given in the *Chacón Navas* judgment was criticised by both legal scholars³² and advocates-general. It was stressed that making the assumption that in case of disability there usually is a permanent impairment of the body's facilities (whether physical, mental or psychological) that prevents or considerably limits the participation in social life, including in particular taking up and remaining in employment, is inconsistent with the current paradigm whereby disability is considered an element of social diversity and not a restriction experienced by a certain person. CJ judgment in cases *Jette Ring and Skouboe Wenge*³³ is yet another attempt to engage in reflections about the definition of disability. This judgment is also important because it contains a definition formulated on the basis of a Framework Directive, but after the EU became a party to the Convention. As soon as in the introduction to the reflections, the CJ stressed that 'the primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements'. Consequently, the notion of 'disability' determined for the purposes of applying the Framework Directive, was modified so as to reflect Article 1 of the Convention, which includes among people with disabilities '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'. What the CJ also considered important was that recital (e) of the preamble to the Convention provides that 'is an evolving concept and that disability results from the interaction between people with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'. In the end, the Court held that the concept of disability as used in Directive 2000/78/EC must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and

32 'By embracing the medical model of disability, and focusing on the limitation caused by impairment and the need to prove such limitation, the Court's decision flies in the face of values underlying the Directive and Community disability policy', L. Waddington, Case C-13/05, *Chacón Navas v. Eurest Colectividades SA*, 'Common Market Law Review'. 2007, vol. 44, no. 2, pp. 487-499.

33 CJEU judgment of 11 April 2013 in joined cases *Jette Ring v. Dansk almennyttigt Boligselskab, Lone Skouboe Werge v. Dansk Arbejdsgiverforening*, acting on behalf of *Pro Display A/S, in liquidation*, C-335/11 and C-337/11.

the limitation is a long-term one. The CJ confirmed the view that a disability should be understood as a result of an interaction between individuals with disabilities and the barriers created by the society was also confirmed in another judgment, in case C-363/12³⁴.

The final confirmation of the social character of the European model of disability made it possible to determine whether EU law assumed the functioning of the concept of a vulnerable group made up of persons with disabilities. A question asked in this way should be answered in the affirmative, while the reflections should move in the direction of consumer law. In this context, a reference should be made to the contents of Directive 2005/29/EC³⁵ on unfair commercial practices, which lists examples of such commercial practices, clarifying that they are contrary to the requirements of professional diligence and distort the economic behaviours of an average customer or an average member of a consumer group, if a commercial practice is addressed to a specific group of consumers (Article 5(2)). Article 5(3) of the Directive provides that 'commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. In turn, two other directives, i.e. Directive 2001/95/EC³⁶ and Directive 2011/83/EU³⁷, make references to the concept of vulnerable groups in their preambles. Even though these legal instruments do not expressly mention disabled people as a vulnerable group, the clear differentiation – resulting from their contents – between average consumers and particularly vulnerable consumers, including an emphasis on those with physical or mental disability, allows us to conclude that this is a group that requires adopting a higher standard of protection. In line with the guidelines from the European Commission³⁸ consumers' susceptibility to risks has a multi-dimensional character and such is also the influence of the personal characteristics on the likelihood of being a consumer susceptible to risks. For this reason, the EC recommends referring

34 CJEU judgment of 18 March 2014, in case *Z v A Government Department and The Board of management of a community school*, C-363/12.

35 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ UE L 149, 11.6.2005, p. 22), e.g. Article 5; recital 19 of the preamble.

36 Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (OJ UE L 11, 15.1.2002, p. 4).

37 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (OJ UE L 304, 22.11.2011, p. 64), e.g. recital 34 of the preamble.

38 European Commission, Staff Working Document, Guidance on the Implementation of Directive 2005/29/EC on unfair commercial practices, SEC (2009) 1666, p. 53-54.

disability (psychological or physical) to both sensory impairments and limited mobility and other forms of infirmity.

The EU instruments mentioned above treat 'vulnerable consumers' as a static group, which is inconsistent not only with the assumption that all consumers may prove to be vulnerable and in need of special protection when they are parties to transactions with experts³⁹. Thus, lack of identification of such special situations (vulnerable situations) makes it impossible to develop – also in the context of disabled people – the right standard of protection. Moreover, the static and medical concept of disability adopted in the directives, which is applied to disabled vulnerable consumers, cannot be changed by applying the relevant provisions of the Convention on the Rights of Persons with Disabilities, as individuals cannot invoke the direct effects of its provisions⁴⁰. Therefore, one should conclude that disabled consumers may experience a lack of adequate protection of their legal status due to the gap that exists between the state of their identity, which differs from that of the rest of the society, and the external legal environment, which gap cannot – as the law stands now – be bridged by the concept of individual vulnerability, developed by (typical of) EU law. The formation of a desired standard might help in the coexistence of the purpose of protection of particularly vulnerable consumer groups and the purposes guaranteeing an efficient functioning of the internal market in the EU.

Concluding the above reflections, one should state that neither EU law nor ECtHR case law meets the requirements necessary to accord protection to disabled persons as a vulnerable group. Even though the issues relating to the situation of disabled people are an important area of human rights law and ECtHR case law does distinguish the needs of this group of people, stressing the importance of 'inherent difficulties' in everyday life, rather than indicating positive solutions having the nature of positive obligations of the state, may only intensify the group's marginalisation. At the level of EU law, the concept of a vulnerable group whose members are disabled people remains linked with the role played by these people on the internal market. Nevertheless, lack of binding definitions of both 'vulnerable group' and 'disabled people' does not help in determining – at the level of case law – to what extent the enhanced standard of protection for these people should be introduced.

39 I. Barral-Vinals, Freedom of contract, unequal bargaining power and consumer law on unconscionability [in:] M. Kenny, J. Devenney, L. O'Mahony [eds.] *Unconscionability in European Private Financial Transactions*, Cambridge 2010, pp. 46-61.

40 CJEU judgment of 18 March 2014, in case *Z v. A Government Department and The Board of management of a community school*, C-363/12, para. 90.

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