

THE RIGHTS OF THE DISABLED AND INTERACTION BETWEEN THE EUROPEAN UNION LAW AND EUROPEAN CONVENTION ON HUMAN RIGHTS SYSTEM¹

Engelli Hakları ve Avrupa Birliği Hukuku ile Avrupa İnsan Hakları Sözleşmesi Sistemi Arasındaki Etkileşim

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Abstract

The rights of the disabled is an important part of human rights law. In this framework, the European Union (EU) Law focuses on the issue and there are judgments from the Court of Justice of the European Union (CJEU) to analyse. The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is the central legal instrument to take into consideration with regard to the rights of the disabled especially in terms of the EU being party to the Convention.

In parallel, although there are no specific provisions in the European Convention on Human Rights (ECHR) and protocols on the rights of the disabled, there are judgments of the European Court of Human Rights (ECtHR) to concentrate upon. Since, it is also necessary to make an emphasis on the interaction between the EU Law and ECHR system by specific references of EU Law, the study concentrates mainly upon this aspect.

At the end of the study, the importance of the protection of the rights of the disabled is determined. The EU, as a legal entity, being party to the UNCRPD together with the ECtHR addressing the issue in many judgments are only two justifications for this factual conclusion. Since the UNCRPD is central for the protection of rights of the disabled, a specific court to address interdisciplinary aspects of disability is suggested in this respect.

Keywords: Human rights, Disability, Disabled, European Union, European Convention on Human Rights, European Court of Human Rights, Court of Justice of the European Union

Özet

Engelli hakları, insan hakları hukukunun önemli bir parçasıdır. Bu çerçevede, Avrupa Birliği (AB) konu üzerine odaklanmakta ve Avrupa Birliği Adalet Divanı (ABAD)'nın konu hakkında analiz edilmesi gereken kararları bulunmaktadır. Birleşmiş Milletler Engellilerin Haklarına İlişkin Sözleşme (BMEHS), özellikle AB'nin taraf olmasıyla, engelli hakları açısından ele alınması merkezi hukuki kaynak niteliğini taşımaktadır.

Paralel olarak, Avrupa İnsan Hakları Sözleşmesi (AİHS) ve protokollerinde engelli hakları ile ilgili özel hükümler bulunmasa da, ele alınması gereken Avrupa İnsan Hakları Mahkemesi kararları bulunmaktadır. Ayrıca, AB Hukuku'ndaki spesifik atıflar sebebiyle de, AB Hukuku ile Avrupa İnsan Hakları Sözleşmesi sistemi arasındaki etkileşime vurgu yapılması gerekli olduğundan, çalışma temel olarak bu boyut ile ilgilenmektedir.

Çalışmanın sonunda, engelli haklarının korunmasının önemi tespit edilmektedir. AB'nin, bir tüzel kişilik olarak BMEHS'ne taraf olması ve AİHM'nin birçok kararında konuyu ele alması, bu gerçek sonucun sadece iki gereğesidir. BMEHS engellilerin haklarının korunması için merkezi olduğundan, engelliliğin disiplinlerarası yönlerini ele alan özel bir mahkemenin kurulması bu anlamda önerilmektedir.

Anahtar Kelimeler: İnsan hakları, Engellilik, Engelli, Avrupa Birliği, Avrupa İnsan Hakları Sözleşmesi, Avrupa İnsan Hakları Mahkemesi, Avrupa Birliği Adalet Divanı

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I. The Concept of Disability and Medical and Social Approaches to Disability

A. The Concept of Disability

The disabled may be described as persons having a disability. Therefore, it is a need to concentrate upon the term disability to understand what is intended to reflect the concept the disabled. The definition of disability is dependent on the perspective it is viewed as the perceptions on the disabled may change according to different societies, cultures, etc³. Although approaches may be different in interpreting the term disability in this context, it is important to grasp the meaning of the term with regard to relevant legal provisions, since, legal provisions are the basis for claims by the disabled in legal orders.

It should be always remembered that different perceptions in societies may effect the definition of the term in the relevant legislation. Albeit this is the issue, there are “common denominators” to describe the term among international community to a certain extent. In this framework, there are different interpretations of the concept of the disabled even with regard to international law. The interpretation in international law may be attributed a certain degree of priority since it reflects to a certain degree a “common understanding” on the concept. The supranational law as present in the EU is another further essential aspect to be emphasized in this study as below.

The most problematic issue may be identified as the situation when states are not parties to important international law instruments. Concerning the UNCRPD⁴, which may be marked as the international agreement of utmost importance regarding the rights of the disabled, the US, for instance, is still not a party to.

When recent international law instruments are taken into consideration, pursuant to the stipulation of 1980 World Health Organization, disability is introduced as “*any restriction or lack of ability (resulting from an impairment) to perform an activity in the manner or within the range considered normal for a human being*”⁵. So, when there is a disability, does it mean “abnormal conditions” for a human being? In this respect, “normal” in the definition may be considered as a very vague expression to define disability and it may be put forward that concrete criteria is needed to deal with the term. This criteria

³ Bickenbach, J.; “*Disability, Culture and the UN Convention*”, *Disability and Rehabilitation*, 31:14, 2009, p. 1112.

⁴ For the text of the United Nations Convention on the Rights of Persons with Disabilities, see <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (Date of Access: 23rd February, 2018)

⁵ International Classification of Impairments, Disabilities and Handicaps, WHO, 1980, p. 28. For the text of the document see http://apps.who.int/iris/bitstream/10665/41003/1/9241541261_eng.pdf (Date of access: 23rd February, 2018).

need not include all the possibilities in it; at least a “long-term” expression is being remembered in terms of the relevant criteria. In this respect, it may be suggested that it is not useful to define the term in a perspective including temporary illness as well.

According to Article 1/1 of 1983 International Labour Organization Vocational Rehabilitation and Employment (Disabled Persons) Convention, there is a definition for the disabled. The definition is as *“an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical, sensory, intellectual or mental impairment”*⁶. The definition is on the emphasis of employment and the term *“substantially”* needs specific elaboration, since, it marks an important criteria to decide whether the relevant person is to be defined as a disabled or not. Since the variations of disability are highlighted as physical, sensory, intellectual or mental, there is a more concrete criteria reflecting the severeness and types of disability. It may be contended that all types of disability referred in the definition needs priorly medical examination; but, is it enough to depend on only the medical categorization? This issue is to be discussed below especially in terms of the “Social Model”.

In the Preamble of the UNCRPD, it is emphasized that *“Disability is an evolving concept and disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”*. So, according to the approach in this sentence, a disability is to be conceptualised together with social factors. Is it possible to call a person as disabled only with the report of a medical examination or is there a need to view the interaction with social factors?

The elaboration on the answer of this question may be completed starting from the measures to cope with disability. For instance, a “reasonable accomodation” measure may be taken as an instance for the people unable to work at that workplace unless there is the presence of these facilities. If a “reasonable accomodation” is ensured, this step may equalize the conditions with other employees who do not need “reasonable accomodation”. If this facility is the only need for that disabled to work with the other employees, than, when that facility is provided, there remains no difference between the disabled and other employees. In this context, the term may be interpreted to inevitably include the social respect as well.

⁶ For the text of the International Labour Organization Vocational Rehabilitation and Employment (Disabled Persons) Convention see <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/r-iii1ba.htm> (Date of access: 23rd February, 2018)

According to UNCRPD Article 1/II *“Persons with disabilities”* are described to *“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”*. Although there is no specific definition of disability in this respect, in this explanation of the primary important international agreement on the rights of the disabled, *“long term”* wording seems fundamental to underline.

The expression in the provision does not limit the scope of the disabled only as defined; there is a space for others to be called as disabled, since, the provision uses the term *“include”*, hence, impliedly the wording of not limited to. The importance of social factors are expressly reflected in the definition, since, the concept includes the consequences in social life. In the EU system, since the EU is a party to the UNCRPD - being the first international agreement on human rights to which the EU is a party to - the explanation on the disabled is valid for the EU system.

When these three perspectives are contrasted, it may be concluded that the approach of the World Health Organization is rather based on a medical way of thinking since it refers only to performance of an activity. On the other hand, the concept should be including more than this perspective as outlined below. In this context, the approach of the International Labour Organization is much more functional; assessing the situation from only the perspective of employment. This feature may be put forward as a new interpretation regarding the concept, since, the approach takes into consideration the social aspect. In terms of the UNCRPD, it may be contended that the perspective clearly adopts the social approach since the criteria is determined to include the *“full and effective participation in society on an equal basis with others”*.

It is also worth mentioning that the *“Organization of American States”* is the first regional body to adopt an international agreement on the rights of the disabled. Pursuant to the Preamble of the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities⁷, *“States parties to this Convention reaffirming that persons with disabilities have the same “human rights” and fundamental freedoms as other persons; and that these rights, which include freedom from discrimination based on disability, flow from the inherent dignity and equality of each person”*. In this respect, *“dignity”* and *“equality”* as the *“axis”* of *“human rights”* are highlighted in their relation to the rights of the disabled which is important to cite.

⁷ For the text of the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities see <http://www.oas.org/juridico/english/treaties/a-65.html> (Date of access: 23rd February, 2018)

According to Article 1 of the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, a disability is defined as *“a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment”*. In this framework, the disability may be a “temporary” hindrance and this approach may lead to serious negative consequences, since, there may be many persons having “temporary” hindrances. There is also a specific emphasis on the reason of disability; it is highlighted that a disability may be caused by “economic and social environment”. So, there may be not always a medical aspect to name a person as having disability. This aspect may be criticised as taking the definition for the disability far from being necessary to a very general scope.

So, there are different terms to take into consideration in terms of disability. An illness is evidently a medical term; a consequence to be diagnosed by a medical examination. What about impairment? This term may be highlighted as much more related with a temporary handicap. The differentiation of terms is important to focus on since the condition of being in disability has many consequences in especially legal terms.

To cope with the matter of specifics of disability, a specific court to ensure implementation of legal provisions concerning the rights of the disabled may be suggested. This court may be established as a “unique” court dealing with only the claims relevant to disability. As further discussed in this study, there are different regional systems dealing with disability as regional courts focusing on human rights issues like the ECHR system. Albeit this situation, this jurisdictional situation of the relevant courts may be claimed as not enough for adequate protection of the rights of the disabled due to the “sui generis” feature of this issue. In this respect, dealing with disability may be underlined as an interdisciplinary matter to be concentrated upon. The concept is composed of many aspects having psychological, psychiatric, social and legal dimensions.

It may be put forward that there would not be that much comprehensive UN international law instrument, UNCRPD, if there were not a need to regulate this “sui generis” field as a justification for evidence for a separate court. There is no separate judiciary mechanism to claim violations in terms of the UNCRPD within the UN. Especially, after the adoption of the UNCRPD, a global perspective may be underlined to be present in this framework. A global court, the “Court of Rights on Disability” just as the International Criminal Court may be a good step to start with to ensure rights of the disabled in the international spectrum.

There is the Committee on the Rights of Persons with Disabilities⁸ within the UN System established according to Article 34 of the UNCRPD. When this provision is examined, it is observed that there is not a requirement for an expert appointed as a member to the Committee to be a jurist. Since the legal source for checking the compatibility concerning relevant rights is an international agreement, a court representing a judiciary mechanism composed of jurists may be introduced as essential in this respect. The experts may be consulted on any matter relevant to the interdisciplinary characteristic of an issue by the court. Although there are remarkable views of the Committee on the Rights of Persons with Disabilities, assessment of these views are considered outside the scope of the study, since, the study concentrates mainly on the interrelation between the EU and ECHR system.

On the other hand, the initiatives to establish a judiciary mechanism under the UN system may be put forward as a disadvantage when a possible handicap in terms of bureaucracy within the system is considered. Also, in addition to the sophisticated feature of the issues to deal with in terms of disability, each regional system dealing as a “non-core” matter may be highlighted as a non-suitable arena to take into all relevant interdisciplinary approaches.

B. The Medical Model and Social Model for Disability

The “Medical Model” is defined as observing disability as a feature of the person, directly caused by disease, trauma or other health condition that requires medical care provided in the form of individual treatment by professionals. The disability, on this model, needs a medical or other treatment or intervention to correct the problem relevant to an individual. On the other hand, the “Social Model” takes disability into consideration as a socially created problem and not an attribute of an individual. The disability needs a political response, since, the problem is created by unaccommodating physical environment brought about by attitudes and features of social environment⁹.

The “Social Model” is a rather recent interpretation for determination of the concept of the rights of the disabled. The disability emerges from specific social and economic structures rather than being a product of bodily pathology¹⁰. If there is a medical situation to be cured, when it is cured, the

⁸ For detailed information on the Committee on Persons with Disabilities, see <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (Date of access: 23rd February, 2018)

⁹ WHO, “Towards a Common Language for Functioning, Disability and Health”, For the text of the document see www.who.int/classifications/icf/icfbeginnersguide.pdf Geneva, 2002 (Date of access: 23rd February, 2018)

¹⁰ Anastasioui, D.; Kaufmann J. M.; “*The Social Model of Disability: Dichotomy between Impairment and Disability*”, *Journal of Medicine and Philosophy*, 38, 2013, p. 442.

disease ends. In the case of a disability, as may be observed in the definitions of the disability, there is a process and the disease does not end in a short time. The critical term in the definition of disability may be put forward as the wording that refers or implies the process in this respect; it is truly rather a process in which there are personal, social and economic consequences.

In accordance with the “Social Model”, casual social conditions constrain individual’s abilities¹¹. The disability is a term which refers to a society that discriminates, disadvantages and excludes people with impairment¹². The “Social Model” concentrates upon less on the functional impairments of the disabled and in accordance with the “Social Model”, a disability is itself a social construct. Therefore, the problem does not emerge from the person concerned, rather, it is the disabling environment, the attitudes of others together with institutional structures that need to be changed. The “Social Model” is based on the perspective of the “inherent equality” of all people and recognizes society’s responsibility to support the freedom and equality of all individuals¹³.

On the other hand, the “Social Model” is criticised in terms of being not enough to ensure that all people have human rights in practice. In this framework, it is emphasized that although the “Social Model” improves the rights of the disabled when compared to the “Medical Model”, it is not successful in ensuring all the disabled to exercise their human rights¹⁴. One of the other criticisms against the “Social Model” is that since, it exclusively focuses on the first-generation rights, it is prevented from putting forward second-generation rights¹⁵.

Why is this categorization important? What is meant by first generation rights and second generation rights? It is reported that this categorization is based on historical emergence and evolution of “rights” reflecting the past and development of human rights in this regard¹⁶. In the UNCRPD in this regard, within Article 27 “Work and Employment”, there is a reference to “second-generation rights”. Furthermore, it is put forward that the UNCRPD system is marked as a system that is going beyond the “Social Model”¹⁷.

¹¹ Stein, M.A.; “Disability Human Rights”, California Law Review, Vol. 95:75, 2007, p. 85.

¹² Anastasiou, Kauffmann; p. 445.

¹³ Kanter, A.S; “The Globalization of Disability Rights Law”, Syracuse Journal of International Law&Com., Vol. 30:241, 2003, p. 247.

¹⁴ Harpur, P.; “Time to be Heard: How Advocates can Use the Convention on the Rights of Persons with Disabilities to Drive Change?”, Valparaiso University Law Review, 45, 2011, p. 1278.

¹⁵ Stein; p. 92.

¹⁶ Gökpinar, M.; “Bir Kavram Olarak İnsan Hakları ve Çeşitli Açılardan Sınıflandırılması”, TBB Dergisi, 120, 2015, p. 50.

¹⁷ Harpur; p. 1278.

Although there is also an approach called as the “disability human rights paradigm” which is introduced to have a perspective on the cultivation of individual talents¹⁸, this approach is interpreted as conflicting with the facts of life¹⁹. Prior taking into consideration the individual talent of the disabled, the priority is suggested to be as adapting the disabled to the living conditions outside. The first aim may be underlined as to have equal life standards - including working, education etc. conditions - with the “non-disabled”. When the general conditions are ensured for everyone, then it may be introduced as the stage for dealing with different characteristics of the disabled.

On the comparison between the two approaches, it is put forward that the United Nation’s World Programme of Action Concerning Disabled Persons is the first step - to focus on rights and equality - for the significant shift away from the “Medical Model” to “Social Model”²⁰. It is noteworthy to quote the relevant parts from the important international soft-law instrument of the UN General Assembly of 3 December 1982 in this respect: *“Recognizing that the International Year of Disabled Persons contributed to the acceptance by the community of the right of disabled persons to participate fully in the social life and development of their societies and to enjoy living conditions equal to those of their fellow citizens.....Stressing that the primary responsibility for promoting effective measures for prevention of disability, rehabilitation and the realization of the goals of full participation and equality of disabled persons rests with the individual countries and that in this regard international co-operation is highly desirable and should be directed to assisting and supporting national efforts”*.

It may be concluded that it is inevitable to adopt the perspective of the “Social Model” for the interpretation of disability. It is worth underlining again that a disability is an interdisciplinary concept having legal consequences in many aspects. In this context, elaborating on a disability merely on medical terms is a limited approach. A disability may end only when social approaches are merged with medical perspectives; it should be always remembered that a disabled is a human being.

¹⁸ Stein; p. 106.

¹⁹ Stein; p. 110.

²⁰ Kayess, R. , French, P.; *“Out of Darkness into Light? Introducing the Convention: on the Rights of Persons with Disabilities”*, Human Rights Law Review, 8:1, 2008, p. 15.

II. The Main Framework of Interrelation Between EU Law and ECHR System

A. The Legal Framework and Implementation

Pursuant to Article 6/II of the TEU²¹, the EU shall accede to the ECHR and such accession shall not affect the EU's competences as defined in the Treaties. Although the issue of EU's accession to the ECHR is a long and detailed one outside the ambit of this study, the relationship between the CJEU and the ECtHR requires specific elaboration.

There is another emphasis on the importance of the ECtHR system within the EU Law in Lisbon Treaty. In accordance with Article 6/III of the Treaty on European Union (TEU), it is enshrined that fundamental rights as guaranteed by the ECHR and result from the Constitutional traditions common to Member States are to constitute general principles of the EU Law.

The legal relationship between the EU Charter of Fundamental Rights and ECHR system may be explained in the light of different provisions of the EU Charter of Fundamental Rights. In this context, Article 52/III²² of the EU Charter of Fundamental Rights is important to cite. If relevant rights in the EU Charter of Fundamental Rights are the same in the ECHR, they are to be given the same meaning and content as they have in the ECHR pursuant to this provision. The EU Charter of Fundamental Rights may offer extensive protection than the ECHR; in this respect, the claimants may prefer to put forward their rights as EU rights, rather than rights enshrined in the ECHR²³. According to Article 59/II of the ECHR, "*The EU may accede to the ECHR*"; which is different from the relevant provision in Lisbon Treaty.

It should be highlighted that within the EU Law human rights framework, the ECHR²⁴ system has a special importance; there are many CJEU judgments to support this view. In the CJEU judicature, many references have been made to ECHR provisions where first reference to ECHR is made with the *Rutili* judgment²⁵ of 1975. In this case, references are made to many ECHR

²¹ For the text of the Treaty on European Union see <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=en> (Date of access: 23rd February, 2018)

²² Article 52/3 of the EU Charter of Fundamental Rights: "*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*".

²³ Douglas-Scott, S.; "*The European Union and Human Rights after the Treaty of Lisbon*", Human Rights Law Review, 11:4, 2011, p. 658.

²⁴ For the text of the European Convention on Human Rights see http://www.echr.coe.int/Documents/Convention_ENG.pdf (Date of access: 23rd February, 2018)

²⁵ The Court of Justice of the European Union *Rutili* C-36/75 (1975). For the text of the judgment see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61975CJ0036&from=EN> (Date of access: 23rd February, 2018)

provisions and public policy exception in the context of “free movement of workers” is emphasized to be limited up to the scope determined by the ECHR. In the judgment, although the claimant is a citizen of an EU Member State, political and trade union activities have been basis for determination in terms of “likely to disturb public policy”²⁶.

One of the exceptions in the implementation of internal market policies is interpreted to concern not only the legislative provisions, but also the individual decisions taken in application of provisions²⁷. It is submitted that the concept of public policy may be used for derogating from the fundamental principles of equality of treatment and “freedom of movement for workers”. It is underlined that the interpretation of the scope should be determined strictly and not framed unilaterally by each Member State without being subject to control by the institutions of the EU²⁸. A Member State can not in the case of a national of another Member State covered by the provisions of the Treaty, impose prohibitions on residence which are territorially limited. The exception is the circumstances where such prohibitions may be imposed on its own nationals²⁹. This aspect is certainly due to the non-discrimination principle in the implementation of internal market policies stipulated in the context of TFEU.

The CJEU in *Elliniki* judgment³⁰ of 1991 emphasizes that fundamental rights are inseparable part of “general principles of law”. In the same parallel, references are made to Constitutional traditions of Member States, international agreements and special importance of ECHR is highlighted. In the judgment, the CJEU puts forward that it has not a power to examine the compatibility of ECHR with national rules which do not fall within the scope of EU Law. Such rules are within the scope of EU Law that the CJEU should provide all the criteria of interpretation to determine whether these rules are compatible with the fundamental rights deriving particularly from the ECHR³¹.

One of the CJEU judgments in this framework is *Cornwall* case³² of 1996, where a reference is made to the ECtHR interpretation of the term transsexual³³

²⁶ The Court of Justice of the European Union *Rutili* C-36/75 (1975), para. 6.

²⁷ The Court of Justice of the European Union *Rutili* C-36/75 (1975), para. 21.

²⁸ The Court of Justice of the European Union *Rutili* C-36/75 (1975), para. 27.

²⁹ The Court of Justice of the European Union *Rutili* C-36/75 (1975), para. 50.

³⁰ The Court of Justice of the European Union *Elliniki* C-260/89 (1991). For the text of the judgment see http://eur-lex.europa.eu/resource.html?uri=cellar:05574ebb-3d4e-4dd6-b9f1-322b5aac8c7f.0002.06/DOC_1&format=PDF (Date of access: 23rd February, 2018)

³¹ The Court of Justice of the European Union *Elliniki* C-260/89 (1991), Para. 42.

³² The Court of Justice of the European Union *Cornwall* C-13/94 (1996). For the text of the judgment see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994CJ0013&from=EN> (Date of access: 23rd February, 2018)

³³ The Court of Justice of the European Union *Cornwall* C-13/94 (1996), para. 16.

and is concluded that dismissal of a transsexual for a reason related to gender assignment is impossible³⁴. In the CJEU *Kadi* judgment³⁵, it is highlighted that the ECHR is of special significance in terms of international instruments for the protection of human rights from which the CJEU draws inspiration³⁶. A reference is made to the principle of effective judicial protection as stipulated in Articles 6 and 13 of the ECHR³⁷ together with a reference to Article 1 Protocol 1 of the ECHR. In this regard, it is highlighted that the procedures should afford the person or entity concerned a reasonable opportunity of putting the case to the competent authorities³⁸.

In the CJEU judgment of *Bauer*³⁹ of 1997, a reference is made to the ECHR on the “freedom of expression”. It is stated that maintenance of press diversity may constitute an overriding requirement justifying a restriction on “free movement of goods” which helps to safeguard “freedom of expression”⁴⁰.

In the CJEU judgment *Eugen*⁴¹ of 2003, it is emphasized that where a national situation falls within the scope of EU Law, the CJEU must provide the national courts with all the criteria of interpretation which derive in particular from the ECHR⁴². It is highlighted that right to life or prohibition of torture and inhuman or degrading treatment or punishment are absolute rights. On the other hand, the freedom of expression and freedom of assembly guaranteed by the ECHR are reported to be not absolute where to be viewed in relation to the social purpose⁴³. In this respect, there is no other stipulation like exists with respect to the freedom of expression regulated in Article 10/II of the

³⁴ The Court of Justice of the European Union *Cornwall* C-13/94 (1996), para. 24.

³⁵ The Court of Justice of the European Union Joined Cases C-402/05 and *Kadi* C-415/05 (2008). For the text of the judgment see <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30dd30076c87d7a04f8d8bedfdeee03f75e2.e34KaxiL-c3qMb40Rch0SaxyNb390?text=&docid=67611&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=360555> (Date of access: 23rd February, 2018)

³⁶ The Court of Justice of the European Union Joined Cases C-402/05 and *Kadi* C-415/05 (2008), para 5.

³⁷ The Court of Justice of the European Union Joined Cases C-402/05 and *Kadi* C-415/05 (2008), para 8.

³⁸ The Court of Justice of the European Union Joined Cases C-402/05 and *Kadi* C-415/05 (2008), para 9.

³⁹ The Court of Justice of the European Union *Bauer* C-368/95 (1997). For the text of the judgment see <http://curia.europa.eu/juris/showPdf.jsf?docid=43677&doclang=EN> (Date of access: 23rd February, 2018)

⁴⁰ The Court of Justice of the European Union *Bauer* C-368/95 (1997), para 18.

⁴¹ The Court of Justice of the European Union *Eugen* C-112/00 (2003). For the text of the judgment see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62000CJ0112&from=EN> (Date of access: 23rd February, 2018)

⁴² The Court of Justice of the European Union *Eugen* C-112/00 (2003), para 75.

⁴³ The Court of Justice of the European Union *Eugen* C-112/00 (2003), para 80.

ECHR in terms of exceptions⁴⁴.

This approach is totally in conformity with the text of relevant ECHR articles. It is useful to underline that in terms of prohibition of torture, Article 3 of the ECHR only has the provision of “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*” which marks it as an absolute right. According to the judgment, the EU Law is to be interpreted in the context of ECHR and it should not be forgotten that the judgment is prior to the adoption of the EU Charter of Fundamental Rights as primary source of EU Law.

In *Omega* judgment⁴⁵ of 2004, it is again reiterated that the CJEU is affected from the common Constitutional traditions in Member States. It is decided that the CJEU draws inspiration from the guidelines supplied by international treaties for the protection of human rights and ECHR is marked as having special significance⁴⁶. In this respect, it is observed that like in *Bauer* judgment, internal market policies vs. human rights is again the central issue on which the CJEU concentrates upon.

In the period prior to acceptance of the EU Charter of Fundamental Rights, it is underlined that expansion of the EU Law leads to the development of supervision of the CJEU⁴⁷. After having recognised the binding effect of the EU Charter of Fundamental Rights, it is underlined that supervision field of the CJEU against Member States is to be expanded⁴⁸.

In the CJEU judgment of *Berlusconi*⁴⁹ of 2005, it is emphasized that the CJEU draws inspiration from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or

⁴⁴ ECHR Article 10/2: “*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*”.

⁴⁵ The Court of Justice of the European Union *Omega* C-36/02 (2004). For the text of the judgment see <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49221&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=361434> (Date of access: 23rd February, 2018)

⁴⁶ The Court of Justice of the European Union *Omega* C-36/02 (2004), para. 33.

⁴⁷ Karakaş, I.; Avrupa Birliği Hukukunda Anayasal İlkeler, Yenilik Basımevi, İstanbul, 2003, p. 69.

⁴⁸ Karakaş, I.; p. 70.

⁴⁹ The Court of Justice of the European Union C-387/02 *Berlusconi*, C-391/02 and C-403/02 (2005). For the text of the judgment see <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=59275&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=361884> (Date of access:)

to which they are signatories⁵⁰. The same is emphasized in the CJEU judgment of *Parliament*⁵¹ of 2006.

It is expressed in the CJEU judgment *the Queen*⁵² of 2008, that the EU institutions are bound by agreements concluded by the EU and that those agreements have primacy over secondary EU legislation⁵³. It is highlighted that the CJEU may examine the validity of the EU Law in the light of an international agreement only where nature and broad logic of the international agreement does not preclude this at first. Secondly, the international agreement's provisions should appear as regards their content to be "unconditional" and "sufficiently precise"⁵⁴.

It seems that "unconditional" and "sufficiently precise" criteria for the "direct effect" of EU Law is applied similarly for international agreements in this respect. The judgment is akin to *Soysal* judgment⁵⁵ in respect of confirming that the superiority of international agreements concluded by the EU accepted as above the EU secondary law. Therefore, such provisions must, so far as is possible, be interpreted in a manner that is consistent with those international agreements⁵⁶.

In the CJEU judgment of *PPU*⁵⁷ of 2010, the CJEU held that Article 7 of the EU Charter of Fundamental Rights contains rights corresponding to those guaranteed by Article 8/I of the ECHR. In this respect, Article 7 of the EU Charter of Fundamental Rights is to be given the same meaning and scope as Article 8/I of the ECHR as interpreted by the case-law of the ECtHR⁵⁸.

⁵⁰ The Court of Justice of the European Union C-387/02 *Berlusconi*, C-391/02 and C-403/02 (2005), para. 67.

⁵¹ The Court of Justice of the European Union *Parliament* C-540/03 (2006), para. 35. For the text of the judgment see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62003CJ0540&from=EN> (Date of access:)

⁵² The Court of Justice of the European Union *The Queen* C-308/06 (2008). For the text of the judgment see <http://curia.europa.eu/juris/document/document.jsf?text=&docid=68315&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=362180> (Date of access:)

⁵³ The Court of Justice of the European Union *The Queen* C-308/06 (2008), para 42.

⁵⁴ The Court of Justice of the European Union *The Queen* C-308/06 (2008), para 45.

⁵⁵ The Court of Justice of the European Union *Soysal* C-228/06 (2009). For the text of the judgment see <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62006CJ0228&from=EN> (Date of access:)

⁵⁶ The Court of Justice of the European Union *Soysal* C-228/06 (2009), para. 59.

⁵⁷ The Court of Justice of the European Union C-PPU 400/10 (2010). For the text of the judgment see <http://curia.europa.eu/juris/document/document.jsf?text=&docid=81398&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=362421> (Date of access:)

⁵⁸ The Court of Justice of the European Union C-PPU 400/10 (2010), para 53.

In the CJEU judgment of *DEB*⁵⁹ of 2010, it is established that the principle of effective judicial protection is stipulated in ECHR Articles 6 and 13⁶⁰. In the CJEU judgment *Ilonka*⁶¹ of 2010, it is emphasized that a person's name is a constituent element of his identity of his private life, the protection of which is enshrined in the ECHR Article 8. It is established that even though Article 8 does not refer to it explicitly, a person's name, as a means of personal identification and a link to a family, concerns his/her private and family life⁶².

It should be underlined that the judgment is taken after entry force of Lisbon Treaty and remembered that the EU Charter of Fundamental Rights is part of primary law of the EU with Lisbon Treaty. Although this is the case, the referral to ECHR Article 8 without direct reference to Article 7 "*Respect for Private and Family Life*" of the EU Charter of Fundamental Rights is an important aspect to highlight. It may be considered that since the ECtHR has a vast jurisprudence in the context of interpretation of Article 8, referral to ECHR system may be found admissible in the case.

According to *Akerberg*⁶³ of 2013, it is put forward by the CJEU that fundamental rights recognized by the ECHR constitutes general principles of EU Law. It is underlined that ECHR is not a legal instrument which has been formally incorporated into EU Law⁶⁴. In this respect, as in *Ilonka*, it is observed that the CJEU prefers to make direct reference to the ECHR system even the judgment of the CJEU is taken after the entry force of Lisbon Treaty. The emphasis on ECHR is an important approach to take into consideration which is in full conformity with the perspective in Lisbon Treaty which includes a provision for a requirement concerning EU's accession to the ECHR.

B. Elaborations on the Legal Framework

Since the EU is currently not a party to the ECHR, as marked above, the CJEU has held that the rights enshrined in the ECHR may be considered to have an indirect influence on the scope of fundamental rights within EU Law⁶⁵. All the EU Member States are parties to the ECHR; it may be concluded

⁵⁹ The Court of Justice of the European Union *DEB* C-279/09 (2010). For the text of the judgment see <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83452&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=362540> (Date of access:)

⁶⁰ The Court of Justice of the European Union *The Queen* C-308/06 (2008), para. 29.

⁶¹ The Court of Justice of the European Union *Ilonka* C-208/09 (2010). For the text of the judgment see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0208&from=EN> (Date of access:)

⁶² The Court of Justice of the European Union *Ilonka* 208/09 (2010), para 52.

⁶³ The Court of Justice of the European Union *Akerberg* C-617/10 (2013). For the text of the judgment see <http://curia.europa.eu/juris/document/document.jsf?docid=134202&doclang=EN> (Date of access:)

⁶⁴ The Court of Justice of the European Union *Akerberg* C-617/10 (2013), para. 44.

⁶⁵ Lock, T.; "*The ECJ and the ECtHR: The Future Relationship between the Two European*

that ECHR system penetrates to the internal legal systems in the EU Member States. It is only the EU as a legal entity that can not be claimed against with violations of human rights at the ECtHR prior accession of the EU to the ECHR.

The CJEU making references to the judgments of the ECtHR in its judicature, the protection of the CJEU in terms of human rights is defined as European⁶⁶. There are differences between the provisions of the EU Charter of Fundamental Rights⁶⁷ and ECHR. Furthermore, since the EU Law has a “sui generis” characteristic, it may be contended that there may be different approaches with regard to interpretation of human rights in the judgments of CJEU and ECtHR. Since the ECtHR has a vast workload, applications to the CJEU may be expected to increase⁶⁸.

To maintain the level of protection guaranteed by the ECHR, the CJEU is obliged to interpret the EU Charter of Fundamental Rights in light of Article 52/III of the EU Charter of Fundamental Rights emphasized above. It is put forward that if the ECtHR decides to lower the level of protection below guaranteed by EU Law, the CJEU is to be exempt from interpreting the provisions of the EU Charter of Fundamental Rights⁶⁹. This perspective may be interpreted as undermining the EU Law; since, EU Charter of Fundamental Rights is part of the primary law of the EU with a binding effect⁷⁰. Furthermore, it is stipulated in Article 52/III of the EU Charter of Fundamental Rights that if the EU Law has more extensive protection in terms of the rights corresponding the ones in the ECHR, this protection may be applied.

In terms of the international agreements for human rights protection, the provisions in an international agreement should be followed in the context of EU Law⁷¹. Not only Constitutional traditions of Member States but also international human rights agreements to which Member States party to are to be respected⁷². The ECHR has a special importance in this respect, since, the significance is highlighted specifically in Article 6/II and Article 6/III of the

Courts”, The Law and Practice of International Courts and Tribunals, 8, 2009, pp. 376-377.

⁶⁶ Smismans, S.; “*The European Union’s Fundamental Rights Myth*”, Journal of Common Market Studies, 48:1, 2010, p. 49.

⁶⁷ For the text of European Union Charter of Fundamental Rights see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN> (Date of access: 23rd February, 2018)

⁶⁸ Sionaidh Douglas-Scott; p. 658.

⁶⁹ Lenaerts, K.; “*Exploring the Limits of the EU Charter of Fundamental Rights*”, European Constitutional Law Review 8, 2012, p. 394.

⁷⁰ TEU Article 6/1.

⁷¹ Zsuzsa, W.; “*The General Principles of Law at the Practice of European Court of Justice*”, Juridical Current 12:1, 2009, pp. 65-66.

⁷² Rincon-Eizaga, L.; “*Human Rights in the European Union, Conflict Between the Luxembourg and Strasbourg Courts Regarding Interpretation of Article 8 of the European Convention on Human Rights*”, Revista Colombiana de Derecho Internacional, 11, 2008, pp. 127-128.

TEU. In the same parallel, in Article 216/II of the Treaty on the Functioning of the European Union (TFEU)⁷³, international agreements concluded by the EU - includes UNCRPD - are binding upon EU Member States. In this scope, it should be remembered that there are two separate issues at this point. The Member States of the EU have individually ratified the UNCRPD whereas the EU also a party to the UNCRPD as a non-state entity.

Article 1 of the ECHR makes it compulsory for the states party to ECHR - including the Member States of the EU - to ensure rights and freedoms enshrined in the ECHR. Article 8 “Right to respect for private and family life” in the ECHR may be especially concentrated upon in terms of issues of disability, though there are other provisions of the ECHR to emphasize as Article 2, 3 and 5. In this scope, many judgments of the ECtHR are to highlighted below to assess the interpretation of the rights of the disabled in the ambit of ECHR system.

III. Assessments on the EU Legal Framework and CJEU Judgments on the Rights of the Disabled

The CJEU has delivered important judgments on the issue of the rights of the disabled. Prior analysing these important judgments, it is meaningful to start with a brief introduction of the relevant legal provisions in EU Law about the rights of the disabled.

In this framework, according to Article 2 of the TEU, the EU is founded on human dignity and human rights. These values are valid to be in all EU Member States where non-discrimination and tolerance are to be present. Pursuant to Article 3/III of the TEU, the EU is to fight social exclusion and discrimination.

The legally binding and primary law character of the EU Charter of Fundamental Rights is highlighted in Article 6/I of the TEU which includes provisions on the rights of the disabled. According to Article 10 of TFEU, it is explicitly and specifically established that the EU aims to fight discrimination based on disability. In terms of Article 19/I of the TFEU, the Council may take appropriate action to fight discrimination based on disability.

In parallel, pursuant to Article 1 of the EU Charter of Fundamental Rights, it is underlined that human dignity is inviolable and it must be respected and protected. Under Article 21/I of the EU Charter of Fundamental Rights, any discrimination based on disability is prohibited. There is a specific provision in Article 26 stipulating that the EU is to recognize and respect the rights of

⁷³ For the text of the Treaty on Functioning the European Union see <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN> (Date of access: 23rd February, 2018)

persons with disabilities for them to benefit from measures to ensure their independence, social and occupational integration and participation in life of the community.

As for secondary law of the EU, there are two main directives including rights of the disabled. The first one is the Directive 2000/43/EC on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin⁷⁴. The second directive is the Directive 2000/78/EC on establishing a general framework for equal treatment in employment and occupation⁷⁵. According to this second directive referred frequently in CJEU judgments as below, there is no specific definition of disability.

When the Directive 2000/78/EC is analysed, it is observed that there is an emphasis on the disabled in terms of employment. In Article five of the Directive, it is pointed out that “accomodation means” should be ensured to maintain “equal treatment” by the employer on the issue of rights of the disabled. In Parallel to Article six, different practices are possible when there are age differences. Furthermore, Article eleven is on the necessity for the EU Member States to take measures in internal law to protect workers on dismissal by an employer due to a complaint related with “equal treatment” or legal procedure. It is underlined that the 2000/78/EC Directive establishes a minimum “non-discrimination” norm in the labour market to be enforced through an individual complaint process⁷⁶. In this context, it is put forward that the key concept in the Directive is the “duty to accomodate” which may affect the elimination of the multitude of relatively minor-barriers⁷⁷.

In terms of international legal instruments, the UNCRPD is the essential international agreement to underline to which the EU is also a party to on the issue of disability. The EU institutions may be claimed as responsible if violation of the provisions occur in this respect within the ambit of the EU Law. There is a reservation of the EU relevant to the Directive 2000/78/EC⁷⁸; pursuant to Article 3/IV of the Directive 2000/78/EC, the EU Member States may enter reservations. The reservation put forward by the EU is to include employment in the armed forces as the issue where there is the right to exclude non-discrimination on the grounds of disability.

⁷⁴ For the text of the Directive 2000/43/EC see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML> (Date of access: 23rd February, 2018)

⁷⁵ For the text of the Directive 2000/78/EC see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML> (Date of access: 23rd February, 2018)

⁷⁶ Hasking, D.L.; “*Great Expectations: Protection From Discrimination Because of Disability in Community Law*”, *European Law Review*, 31:5, 2006, p. 667.

⁷⁷ Hasking; p. 688.

⁷⁸ See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter4&clang=_en#EndDec for reservations (Date of Access:).

There is an important strategy within the EU that is effective up to 2020 on the main theme of this study that is disability which is the European Disability Strategy of 2010-2020 (Strategy)⁷⁹. According to this Strategy, one out of six people in Europe has disability and for the people with disability, the rate of poverty is 70% higher than the average partly due to the limited access to employment. Furthermore, full economic and social participation of people with disabilities is essential if the Strategy is to succeed in obtaining smart, sustainable and inclusive growth.

At this stage of the study, it is meaningful to proceed with the judgments of the CJEU to comprehend the implementation of the legal provisions on the issue of the rights of the disabled. The judgments referred are the ones that are most important to grasp the perspective of the CJEU. In this respect, in 2006 *Chacon Navas* judgment of the CJEU⁸⁰ which is the first essential case to be taken into consideration, it is stressed that the disability concept is to be understood as referring to a limitation. It is a limitation which results in particular from physical, mental or psychological impairments which hinders participation of the person concerned in professional life⁸¹. In the judgment, the concept is differentiated from the concept of “sickness” which is referred to as a term that is explicitly used in the Directive 2000/78/EC⁸². The perspective in the judgment is close to the understanding in Article 1/II of the UNCRPD about the explanation disability⁸³.

It is underlined in the judgment that since in the Directive 2000/78/EC there is importance which the EU legislature attaches to measures for adapting the workplace, it envisages situations in which participation in professional life is hindered over a long period of time. In this respect, in order for the limitation to fall within the concept of disability, it should be probable that it is to last for a long time⁸⁴. The definition of disability developed by the case is based on the “Medical Model”⁸⁵.

⁷⁹ For the text of the Strategy see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0636&from=EN> (Date of access: 23rd February, 2018)

⁸⁰ The Court of Justice of the European Union *Chacon Navas* C-13/05 (2006), para. 43. For the text of the judgment see <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=56459&-pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2016992> (Date of access: 23rd February, 2018)

⁸¹ The Court of Justice of the European Union *Chacon Navas* C-13/05 (2006), para. 43.

⁸² The Court of Justice of the European Union *Chacon Navas* C-13/05 (2006), para. 44.

⁸³ Article 1/Para 2: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which an interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

⁸⁴ The Court of Justice of the European Union *Chacon Navas* C-13/05 (2006), para. 45.

⁸⁵ Disability and Non-Discrimination Law in the European Union, European Commission, Luxembourg, 2009, p. 16.

Regarding 2008 *Coleman* judgment of the CJEU⁸⁶, there is the issue of whether the protection on disability under the Directive 2000/78/EC is concerned with the disability of the employee himself/herself. It is underlined that the Directive 2000/78/EC is not to be interpreted to include only direct discrimination on grounds of disability and relating exclusively to the disabled⁸⁷.

It is emphasized in the judgment that although the person who is subject to direct discrimination on grounds of disability is not herself disabled, it is the disability which is the ground for the less favourable treatment which is claimed to have been suffered⁸⁸. It is put forward that limiting the application of the Directive 2000/78/EC only to people who are themselves disabled is not right. This is to deprive that Directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee⁸⁹.

2013 *Ring* judgment of CJEU⁹⁰, which concerns implementation after the the EU being a party to the UNCRPD, clarifies the concept of disability. In the judgment, Article 216/II of TFEU is taken into consideration to mark the status of international agreements concluded by the EU. In this respect, it is emphasized that since these agreements are binding on EU institutions, they are to prevail over acts of the EU⁹¹.

Following this meaningful approach, it is stressed that Directive 2000/78/EC must as far as possible be interpreted in light of the UNCRPD⁹². It is highlighted that a disability does not necessarily imply complete exclusion from professional life⁹³ and the state of health of a person who is fit to work only part-time is considered to be taken in scope of the concept of disability⁹⁴.

In 2014 *Z* judgment of the CJEU⁹⁵, a commissioning mother who has had

⁸⁶ The Court of Justice of the European Union *Coleman* C-303/06 (2008). For the text of the judgment see <http://curia.europa.eu/juris/document/document.jsf?text=&docid=67793&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2017947> (Date of access: 23rd February, 2018)

⁸⁷ The Court of Justice of the European Union *Coleman* C-303/06 (2008), para. 43.

⁸⁸ The Court of Justice of the European Union *Coleman* C-303/06 (2008), para. 50.

⁸⁹ The Court of Justice of the European Union *Coleman* C-303/06 (2008), para. 51.

⁹⁰ The Court of Justice of the European Union *Ring* C-335/11 (2013). For the text of the judgment see <http://curia.europa.eu/juris/document/document.jsf?text=&docid=136161&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2021377> (Date of access: 23rd February, 2018)

⁹¹ The Court of Justice of the European Union *Ring* C-335/11 (2013), para. 28.

⁹² The Court of Justice of the European Union *Ring* C-335/11 (2013), para. 32.

⁹³ The Court of Justice of the European Union *Ring* C-335/11 (2013), para. 43.

⁹⁴ The Court of Justice of the European Union *Ring* C-335/11 (2013), para. 44.

⁹⁵ The Court of Justice of the European Union *Z* C-363/12 (2014). For the text of the judgment see <http://curia.europa.eu/juris/document/document.jsf?text=&docid=149388&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2023563> (Date of access:

a baby through a surrogacy arrangement claims to be discriminated on the basis of rights not afforded to her if she were a woman giving birth to a baby. In this framework, the CJEU rules that this woman can not be by definition be subject to less favourable treatment related her pregnancy on the basis that she has not been pregnant with that baby⁹⁶.

In the judgment, having a rare condition as having no uterus is accepted as constituting a limitation which results in particular from physical, mental or psychological impairments or having a long-term characteristics⁹⁷. The concept of disability within the meaning of the Directive 2000/78/EC in interaction with various barriers may be an obstacle that person's full and effective participation in professional life on an equal basis with other workers⁹⁸. It is accepted that the inability to have a child by conventional means does not in itself, in principle to be concluded as a disability in the framework of the Directive⁹⁹.

In 2014 *Kaltoft* judgment of the CJEU¹⁰⁰, it is concluded by the Court that obesity does not constitute a disability in itself within the meaning of the Directive 2000/78/EC on the ground that, by its nature, it does not necessarily entail presence of a limitation¹⁰¹. On the other hand, it is stressed in the judgment that obesity of the worker is to be considered within the concept of disability in the understanding of the Directive 2000/78/EC. It is deemed as a long-term limitation which results in particular from physical, mental or psychological impairments. These impairments are put forward to be in interaction with various obstacles which may hinder the full and effective participation of that person in professional life on an equal basis with other workers¹⁰².

When all these cases on the rights of the disabled are considered, some common points regarding the perspective of the CJEU may be concluded. In this respect, the central source after the EU's being party to the UNCRPD is this important Convention. This feature may be observed in the above *Z* and *Kaltoft* judgments of the CJEU which highlights elements of explanation of disability in the UNCRPD. In this regard, the "Social Model" of disability is

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⁹⁶ The Court of Justice of the European Union *Z* C-363/12 (2014), para. 57.

⁹⁷ The Court of Justice of the European Union *Z* C-363/12 (2014), para. 78-79.

⁹⁸ The Court of Justice of the European Union *Z* C-363/12 (2014), para. 80.

⁹⁹ The Court of Justice of the European Union *Z* C-363/12 (2014), para. 81.

¹⁰⁰ The Court of Justice of the European Union *Kaltoft* C-354/13 (2014). For the text of the judgment see <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160935&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2024188> (Date of access: 23rd February, 2018)

¹⁰¹ The Court of Justice of the European Union *Kaltoft* C- 354/13 (2014), para. 58.

¹⁰² Court of Justice of the European Union *Kaltoft* C- 354/13 (2014), para. 59.

prominently featurable in comparatively recent CJEU judgments. It is notable that the Directive 2000/78/EC is taken to be interpreted in light of the UNCRPD as put forward by *Ring*. It is to be remembered that in the CJEU's *Ring* judgment, the UNCRPD is placed in a higher position than EU secondary law in relation to TFEU Article 216/II. Even prior the EU's being party to the UNCRPD, long-period of inability is an important remark that is put forward by the CJEU in *Chacon Navas* on disability.

IV. Assessment of the ECtHR Judgments on the Rights of the Disabled

Although there are no specific provisions on the rights of the disabled either in the ECHR or Protocols, there are many judgments of the ECtHR linking the issue to relevant legal provisions. The perspective of ECtHR is important to highlight to assess the interpretation of ECHR and Protocols in terms of the rights of the disabled and draw conclusions for EU Law on the issue of disability.

In this respect, there are some important judgments of the ECtHR on mental disability to concentrate upon to reflect the perspective of the ECtHR on problematic issues relevant to the rights of the disabled. The mental disability judgments are focused on especially in the study since it may have serious consequences in terms of deprivation of even legal capacity of the disabled. In this context, in *X and Y*¹⁰³ judgment of the ECtHR, a sexual attack against a mentally disabled and minor individual is considered in scope of the concept of private life and private life is interpreted as consisting physical and moral integrity of a person.

In *Pretty*¹⁰⁴ judgment of the ECtHR, it is established that private life is interpreted to include physical and psychological integrity of a person together with social identity of an individual. It is underlined that there is the right to establish and develop relationship with other persons and external world. It is concluded that although rejection of a treatment may lead to a death, application of a medical treatment without the consent of the ill-person who has mental capacity may be assessed as an intervention to the physical integrity. It is remarkable in this judgment that even rejection of the relevant treatment may lead to death, the will of the disabled is underlined as an essential condition to be ensured.

¹⁰³ European Court of Human Rights 8978/80 *X and Y v. The Netherlands* (1985). For the text of the judgment see [https://hudoc.echr.coe.int/eng#{"itemid":\["001-57603"\]}](https://hudoc.echr.coe.int/eng#{) (Date of access: 23rd February, 2018)

¹⁰⁴ European Court of Human Rights 2346/02 *Pretty v. UK* (2002). For the text of the judgment see [https://hudoc.echr.coe.int/eng#{"itemid":\["001-60448"\]}](https://hudoc.echr.coe.int/eng#{) (Date of access: 23rd February, 2018)

In *Shtukaturov*¹⁰⁵ judgment of the ECtHR, where the applicant suffers from a mental disorder and obtains status of a disabled person¹⁰⁶, the applicant inherits a flat and a house from his grandmother¹⁰⁷. Afterwards, the applicant's mother lodges an application for deprivation of the applicant of legal capacity¹⁰⁸. The Court declares that in deciding whether an individual should be detained as a person of unsound mind, national authorities are to be recognised as having a certain margin of appreciation¹⁰⁹. It is also emphasized by the Court that measures should not affect the very essence of the applicant's right to a fair trial under Article 6 of the ECHR¹¹⁰. In the judgment, the Court rules that any interference with an individual's right to respect for private life is to constitute a breach of Article 8. The exceptional criteria is underlined as being "in accordance with the law", pursues a "legitimate aim" and is "necessary in a democratic society" in the framework that it is "proportionate to the aim"¹¹¹.

In the judgment, there is the guardian who opposes any attempts to discontinue the incapacitation for an indefinite period¹¹². The Court also takes into consideration the non-involvement of the applicant in the decision-making process at the court¹¹³. The Court additionally holds that relevant medical report does not explain kind of actions of which the applicant is incapable of understanding and controlling together with the situation that the incidence of applicant's illness is unclear¹¹⁴. The Court concludes that interference with applicant's private life is "disproportionate to the legitimate aim pursued" and a breach of Article 8 of the ECHR is determined¹¹⁵.

In *Alajos Kiss* judgment of the ECtHR, the applicant puts forward disability on the basis of manic depression and contradicts to exclusion for the "right to vote". The Court rules that an indiscriminate removal of voting rights without an individualised judicial evolution only based on a mental disability necessitating partial guardianship is not appropriate. It concludes that this issue can not be considered in harmony with the legitimate grounds for

¹⁰⁵ European Court of Human Rights 44009/05 *Case of Shtukaturov v. Russia* (2008). For the text of the judgments see [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-85611\"\]}](https://hudoc.echr.coe.int/eng#{\) (Date of access: 23rd February, 2018)

¹⁰⁶ European Court of Human Rights 44009/05 *Case of Shtukaturov v. Russia* (2008), para. 7.

¹⁰⁷ European Court of Human Rights 44009/05 *Case of Shtukaturov v. Russia* (2008), para. 8.

¹⁰⁸ European Court of Human Rights 44009/05 *Case of Shtukaturov v. Russia* (2008), para. 10.

¹⁰⁹ European Court of Human Rights 44009/05 *Case of Shtukaturov v. Russia* (2008), para. 67.

¹¹⁰ European Court of Human Rights 44009/05 *Case of Shtukaturov v. Russia* (2008), para. 68.

¹¹¹ European Court of Human Rights 44009/05 *Case of Shtukaturov v. Russia* (2008), para. 85.

¹¹² European Court of Human Rights 44009/05 *Case of Shtukaturov v. Russia* (2008), para. 90.

¹¹³ European Court of Human Rights 44009/05 *Case of Shtukaturov v. Russia* (2008), para. 91.

¹¹⁴ European Court of Human Rights 44009/05 *Case of Shtukaturov v. Russia* (2008), para. 93.

¹¹⁵ European Court of Human Rights 44009/05 *Case of Shtukaturov v. Russia* (2008), para. 96.

restricting the right to vote¹¹⁶.

In terms of *Kiyutin* judgment of the ECtHR, the applicant's HIV positive medical record is taken for denial of residence permit. The Court considers that a distinction is to be made with respect to the individual's health status, including conditions as HIV infection to be covered in scope of a disability or other status under Article 14 of the ECHR¹¹⁷. Although Russia is not party to the UNCRPD, there are references to articles of the Convention. These articles are mainly Article 5 "Equality and Non-Discrimination" and Article 18 "Liberty of Movement and Nationality"¹¹⁸ of the Convention.

The Court rules that if a restriction of fundamental rights applies to a particularly vulnerable group that has suffered considerable discrimination, the State's "margin of appreciation" is substantially narrower and it must have very weighty reasons for restrictions¹¹⁹. The ECtHR concludes that although "protection of public health" is a "legitimate aim", the Government is unable to prove objective grounds for the refusal of the residence permit¹²⁰. The Court confirms that it recognises physical disabilities and various health impairments falling within the scope of Article 14¹²¹.

In *Sykora*¹²² judgment of the ECtHR, the Court outlines three minimum conditions for lawful detention of an individual on the basis of unsoundness of mind under Article 5 Paragraph 1 (e) of the ECHR. In this regard, the Court states that a true mental disorder must be established before a competent authority on the basis of objective medical expertise. Secondly, the Court establishes that a mental disorder must be of a kind or degree warranting compulsory confinement; and validity of continued confinement must depend upon persistence of such a disorder¹²³. Thirdly, the Court reiterates that domestic procedures should provide sufficient guarantees against arbitrariness and deprivations of liberty must be subject to thorough scrutiny by domestic

¹¹⁶ European Court of Human Rights 38832/06 *Case of Alajos Kiss v. Hungary* (2010), para. 44. For the text of the judgment see [https://hudoc.echr.coe.int/eng#{"itemid":\["001-98800"\]}](https://hudoc.echr.coe.int/eng#{) (Date of access: 23rd February, 2018)

¹¹⁷ European Court of Human Rights 2700/10 *Case of Kiyutin v. Russia* (2011), para. 57. For the text of the judgment see [https://hudoc.echr.coe.int/eng#{"itemid":\["001-103904"\]}](https://hudoc.echr.coe.int/eng#{) (Date of access: 23rd February, 2018)

¹¹⁸ European Court of Human Rights 2700/10 *Case of Kiyutin v. Russia* (2011), para. 32.

¹¹⁹ European Court of Human Rights 2700/10 *Case of Kiyutin v. Russia* (2011), para. 63.

¹²⁰ European Court of Human Rights 2700/10 *Case of Kiyutin v. Russia* (2011), para. 72.

¹²¹ European Court of Human Rights 2700/10 *Case of Kiyutin v. Russia* (2011), para. 57.

¹²² European Court of Human Rights 23419/07 *Case of Sykora v. The Czech Republic* (2012). For the text of the judgment see [https://hudoc.echr.coe.int/eng#{"itemid":\["001-114658"\]}](https://hudoc.echr.coe.int/eng#{) (Date of access: 23rd February, 2018)

¹²³ European Court of Human Rights 23419/07 *Case of Sykora v. The Czech Republic* (2012), para. 62.

authorities¹²⁴. It is concluded by the Court that even after applicant's detention becomes voluntary under domestic law, it is not lawful as it is not accompanied by sufficient guarantees against arbitrariness¹²⁵. At the end, a violation of Article 5/1 of the ECHR is determined in this scope¹²⁶. The Court establishes that removal of applicant's legal capacity constitutes an interference with private life in scope of Article 8 of the ECHR¹²⁷ as well. It is submitted by the Court that even Article 8 does not contain explicit procedural requirements, measures of interference must be fair and such as to ensure compatibility of the interests safeguarded by Article 8¹²⁸.

It is also underlined by the Court that any deprivation or limitation of legal capacity must be based on sufficiently reliable and conclusive evidence¹²⁹. The Court concludes that procedure on the basis of which deprives the applicant of legal capacity is with serious deficiencies and evidence on which the decision is based is not sufficiently reliable and conclusive¹³⁰. The interference with the applicant's private life is determined as "disproportionate to the legitimate aim pursued" and that there is a violation of Article 8 of the ECHR¹³¹.

In *Bures*¹³² judgment of the ECtHR, where the applicant is a violoncello player being diagnosed as having a psycho-social disability¹³³, the claims are during the applicant's detention in a sobering-up centre within the complete control of its staff. This is determined as a deprivation of liberty within the meaning of Article 5/1 of the ECHR¹³⁴. The Court contends that the crucial as-

¹²⁴ European Court of Human Rights 23419/07 *Case of Sykora v. The Czech Republic* (2012), para. 63.

¹²⁵ European Court of Human Rights 23419/07 *Case of Sykora v. The Czech Republic* (2012), para. 70.

¹²⁶ European Court of Human Rights 23419/07 *Case of Sykora v. The Czech Republic* (2012), para. 71.

¹²⁷ European Court of Human Rights 23419/07 *Case of Sykora v. The Czech Republic* (2012), para. 101.

¹²⁸ European Court of Human Rights 23419/07 *Case of Sykora v. The Czech Republic* (2012), para. 102.

¹²⁹ European Court of Human Rights 23419/07 *Case of Sykora v. The Czech Republic* (2012), para. 103.

¹³⁰ European Court of Human Rights 23419/07 *Case of Sykora v. The Czech Republic* (2012), para. 112.

¹³¹ European Court of Human Rights 23419/07 *Case of Sykora v. The Czech Republic* (2012), para. 113.

¹³² European Court of Human Rights 37679/08 *Case of Bures v. The Czech Republic* (2012). For the text of the judgment see [https://hudoc.echr.coe.int/eng#{"itemid":\["001-113812"\]}](https://hudoc.echr.coe.int/eng#{) (Date of access: 23rd February, 2018)

¹³³ European Court of Human Rights 37679/08 *Case of Bures v. The Czech Republic* (2012), para. 6.

¹³⁴ European Court of Human Rights 37679/08 *Case of Bures v. The Czech Republic* (2012), para. 74.

pect in the case is the use of restraints itself¹³⁵ and concludes that the State must be held directly responsible for the use of restraints on the applicant in the sobering-up centre. The treatment is focused on in light of the negative obligations of the State¹³⁶. According to the Court, ill-treatment must be at a minimum level of severity to be considered in scope of Article 3 of the ECHR¹³⁷. It is established by the Court that checks are to be periodically completed where application of such restraints should be necessary under the relevant circumstances¹³⁸.

It is declared by the Court that both European and national standards are the same in accepting that physical restraints may be used only exceptionally, as a matter of last resort. This requirement obliges application to prevent immediate or imminent harm to patient or others¹³⁹. The Court concludes that even though it is up to the Government to justify the use of restraints on a detained person, it fails to show that use of restraints on the applicant is necessary and proportionate in the circumstances¹⁴⁰. The Court also notes domestic police investigation findings by which it is determined that checks are not performed at regular intervals¹⁴¹. In this framework, the Court establishes that applicant is subjected to “inhuman and degrading treatment” contrary to Article 3 of the ECHR¹⁴².

In *Kadzior*¹⁴³ judgment of the ECtHR, the Court rules that there is a violation of Article 6/1 of the ECHR¹⁴⁴. The Strasbourg Court underlines that the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned. The reason is emphasized as such a procedure to be decisive for the exercise of all the rights and freedoms affected by

¹³⁵ European Court of Human Rights 37679/08 *Case of Bures v. The Czech Republic* (2012), para. 78.

¹³⁶ European Court of Human Rights 37679/08 *Case of Bures v. The Czech Republic* (2012), para. 79.

¹³⁷ European Court of Human Rights 37679/08 *Case of Bures v. The Czech Republic* (2012), para. 84.

¹³⁸ European Court of Human Rights *Case of Bures v. The Czech Republic* (2012), para. 86.

¹³⁹ European Court of Human Rights 37679/08 *Case of Bures v. The Czech Republic* (2012), para. 95.

¹⁴⁰ European Court of Human Rights 37679/08 *Case of Bures v. The Czech Republic* (2012), para. 100.

¹⁴¹ European Court of Human Rights 37679/08 *Case of Bures v. The Czech Republic* (2012), para. 102.

¹⁴² European Court of Human Rights 37679/08 *Case of Bures v. The Czech Republic* (2012), para. 106.

¹⁴³ European Court of Human Rights 45026/07 *Case of Kedzior v. Poland* (2012). For the text of the judgment see [https://hudoc.echr.coe.int/eng#{"itemid":\["001-113722"\]}](https://hudoc.echr.coe.int/eng#{) (Date of access: 23rd February, 2018)

¹⁴⁴ European Court of Human Rights 45026/07 *Case of Kedzior v. Poland* (2012), para. 91.

the declaration of incapacity¹⁴⁵. The applicant is declared to be deprived of a clear, practical and effective opportunity to have access to a court in respect of the request to restore legal capacity¹⁴⁶.

In *D.D.*¹⁴⁷ judgment of the ECtHR, on the claim of violation of Article 8 of the ECHR, the Court assesses that although the applicant is prevented from receiving a telephone call, the Court concludes that the rights of the applicant under Article 8 are not limited more than strictly necessary¹⁴⁸.

In *Lashin*¹⁴⁹ judgment of the ECtHR, the applicant is diagnosed as having schizophrenia and is officially given 2nd degree disability status¹⁵⁰. The Court accepts that in deciding whether legal capacity may be restored, national authorities have a certain “margin of appreciation”¹⁵¹. It is expressed in the judgment that whilst Article 8 of the contains ECHR no explicit procedural requirements, decision-making process involved in measures of interference must be fair to ensure due respect of interests safeguarded by Article 8 of the ECHR¹⁵². The Court concludes in this respect that confirmation of applicant’s incapacity is in contradiction with Article 8 of the ECHR. It is assessed that there is no fresh assessment of the applicant’s mental condition, the applicant is not personally present at Court and it is doubtful whether the applicant’s mental condition required full incapacitation¹⁵³.

In the judgment, the applicant is considered to be under an inability for a considerable period of time to assert his rights under Article 8 of the ECHR and a violation of Article 8 of the ECHR is determined¹⁵⁴. The Court establishes that applicant’s confinement in mental hospital constitutes a deprivation of liberty within meaning of Article 5 of the ECHR¹⁵⁵ and a violation is found with respect to Article 5/1 of the ECHR¹⁵⁶. Since, the Court also finds that the applicant is unable to take proceedings by which lawfulness of the detention

¹⁴⁵ European Court of Human Rights 45026/07 *Case of Kedzior v. Poland* (2012), para. 89.

¹⁴⁶ European Court of Human Rights 45026/07 *Case of Kedzior v. Poland* (2012), para. 90.

¹⁴⁷ European Court of Human Rights 13469/06 *Case of D.D. v.Lithuania* (2012). For the text of the judgment see [https://hudoc.echr.coe.int/eng#{"itemid":\["001-109091"\]}](https://hudoc.echr.coe.int/eng#{) (Date of access: 23rd February, 2018)

¹⁴⁸ European Court of Human Rights 13469/06 *Case of D.D. v.Lithuania* (2012), para. 181.

¹⁴⁹ European Court of Human Rights 33117/02 *Case of Lashin v. Russia* (2013). For the text of the judgment see [https://hudoc.echr.coe.int/eng#{"itemid":\["001-116020"\]}](https://hudoc.echr.coe.int/eng#{) (Date of access: 23rd February, 2018)

¹⁵⁰ European Court of Human Rights 33117/02 *Case of Lashin v. Russia* (2013), para. 7.

¹⁵¹ European Court of Human Rights 33117/02 *Case of Lashin v. Russia* (2013), para. 80.

¹⁵² European Court of Human Rights 33117/02 *Case of Lashin v. Russia* (2013), para. 81.

¹⁵³ European Court of Human Rights 33117/02 *Case of Lashin v. Russia* (2013), para. 93.

¹⁵⁴ European Court of Human Rights 33117/02 *Case of Lashin v. Russia* (2013), para. 97.

¹⁵⁵ European Court of Human Rights 33117/02 *Case of Lashin v. Russia* (2013), para. 108.

¹⁵⁶ European Court of Human Rights 33117/02 *Case of Lashin v. Russia* (2013), para. 120.

is to be decided by a court, there is a violation of Article 5/IV of the ECHR¹⁵⁷.

In *Mihailovs*¹⁵⁸ judgment of the ECtHR, the Court establishes that the applicant has made two claims. The first one is that he is held against his will in an institution with people who are mentally ill for more than ten years and that he can not obtain release. The second one is that he is fully dependent on his wife as his guardian who does not represent his interests and oppose any attempts by him to defend relevant rights¹⁵⁹. The Court concludes that applicant's stay is a violation of Article 5 Paragraph 1 of the ECHR¹⁶⁰. Furthermore, Article 5/IV of the ECHR is determined as violated in terms of applicant's inability to obtain a review of the lawfulness of the placement¹⁶¹.

In *Campeanu*¹⁶² judgment of the ECtHR, where the subject of the case is on severe mental disabilities, there are allegations on neglect of hospital authorities¹⁶³. The Court concludes that first sentence of Article 2/I of the ECHR obliges the State not only to refrain from the unlawful taking of life, but also to take convenient steps to safeguard lives¹⁶⁴. Furthermore, it is established that the State's guarantee in this respect involves reasonable measures to ensure safety of individuals in public places. It is emphasized that the guarantee does not last at this stage and includes other aspects to take into consideration. In this respect, in the event of serious injury or death, it includes having an effective independent judicial system¹⁶⁵.

The Court considers that victim's transfer from one unit to another is realized without proper diagnosis and aftercare and in complete disregard of the actual state of health and most basic medical needs¹⁶⁶. In the case, the Court establishes that there is no guardian appointed and the presumption is as the

¹⁵⁷ European Court of Human Rights 33117/02 *Case of Lashin v. Russia* (2013), para. 122.

¹⁵⁸ European Court of Human Rights 35939/10 *Case of Mihailovs v. Latvia* (2013). For the text of the judgment see [https://hudoc.echr.coe.int/eng#{"itemid":\["001-116075"\]}](https://hudoc.echr.coe.int/eng#{) (Date of access: 23rd February, 2018)

¹⁵⁹ European Court of Human Rights 35939/10 *Case of Mihailovs v. Latvia* (2013), para. 84.

¹⁶⁰ European Court of Human Rights 35939/10 *Case of Mihailovs v. Latvia* (2013), Conclusion para. 4.

¹⁶¹ European Court of Human Rights 35939/10 *Case of Mihailovs v. Latvia* (2013), Conclusion para. 6.

¹⁶² European Court of Human Rights 47848/08 *Case of Centre for Legal Resources on Behalf of Valentin Campeanu v. Romania* (2014). For the text of the judgment see [https://hudoc.echr.coe.int/eng#{"itemid":\["001-145577"\]}](https://hudoc.echr.coe.int/eng#{) (Date of access: 23rd February, 2018)

¹⁶³ European Court of Human Rights 47848/08 *Case of Centre for Legal Resources on Behalf of Valentin Campeanu v. Romania* (2014), para 104.

¹⁶⁴ European Court of Human Rights 47848/08 *Campeanu v. Romania* (2014), para. 130.

¹⁶⁵ European Court of Human Rights 47848/08 *Campeanu v. Romania* (2014), para. 132.

¹⁶⁶ European Court of Human Rights 47848/08 *Campeanu v. Romania* (2014), para. 137.

victim having full legal capacity¹⁶⁷. The Court rules that there is a violation of Article 13 of the ECHR in conjunction with Article 2 of the ECHR. This violation is relevant to the defendant's breach ensure the legal framework that would enable breaches of allegations relating to "right to life" to be examined by an independent authority¹⁶⁸.

In this framework, in the judgments of the ECtHR, many principles may be grasped concerning the lens of the ECtHR. It is worth underlining that these cases are taken since they may be considered as the most important cases of discussion for the rights of people with mental disabilities which may even lead to deprivation of legal capacity.

When all these judgments of the ECtHR are analysed, many general issues may be underlined with respect to the rights of the disabled. It is observed that as in judgments of *X and Y* together with *Pretty*, private life is immensely underlined as a connected concept to protect the rights of the disabled. Furthermore, in *Pretty*, social identity of the individual is referred to as well which is a judgment of the ECtHR prior the entry into force of the UNCRPD that may be interpreted as an approach of the "Social Model". The UNCRPD is observed as the central international agreement considered by the ECtHR even prior entry into force in another judgment of *Kyutin*. In this context, although Russia was not a party to the UNCRPD when *Kyutin* judgment delivered, the ECtHR referred to relevant articles in the Convention.

As observed in *Shtukurov*, there may be initiatives to deprive persons of their legal capacity especially when they get some amount of money like as an immovable property as a right for inheritance. Especially this kind of problems in practice point out the aspects for which rights of the disabled need to be protected. According to *Shtukurov* judgment, limitations may be deemed legal if they are "in accordance with law", "pursuing legitimate aim", "necessary in democratic society" and "proportionate to the aim pursued". In this context, different criteria is observed in other ECtHR judgments as in *Sykora*. In this judgment, any limitation on legal capacity is linked with a requirement for this limitation to be based on a sufficient, reliable and conclusive evidence. As highlighted in *Bures*, physical restraints may only be used as a matter of last resort for the Strasbourg Court.

Another important aspect in the ECtHR judgments is the responsibility of the relevant States. In *Kyutin*, it is established that the State's "margin of appreciation" is substantially narrower when serious restrictions on the rights of the disabled exist. In *Sykora*, it is concluded that national procedures should

¹⁶⁷ European Court of Human Rights 47848/08 *Campeanu v. Romania* (2014), para. 135.

¹⁶⁸ European Court of Human Rights 47848/08 *Campeanu v. Romania* (2014), para. 153.

include sufficient guarantees against arbitrariness in the limitation of the rights of the disabled together with an efficient scrutiny mechanism to protect. In *Bures*, negative obligation of States to protect the rights of the disabled is underlined. When *Campeanu* judgment is considered, it is observed that the ECHR obliges the State not only to refrain from unlawful taking of life, but also to take necessary steps to safeguard lives. In this regard, positive obligations of the State are also highlighted. As marked in *Sykora* in terms of scrutiny, in *Campeanu*, it is concluded that an effective independent judicial system is necessary for the protection of the rights of the disabled.

It is remarkable to note that the ECtHR finds many violations of different articles of the ECHR including but not limited to Article 5,6 and 8 in its judgments. This perspective may be interpreted to reflect the importance attributed to the rights of the disabled by the ECtHR although no specific provision of the Convention or Protocols are stipulated on the issue.

Conclusion

As outlined in the study, the interaction between the EU Law and ECHR system is essential to focus on to reflect the relevant framework of protection in the field of the rights of the disabled. Regarding human rights law in Europe, it is clearly observed that the EU Law and ECHR systems are intertwined. Besides the Council of Europe system functioning merely on ensuring human rights in Europe prior the foundation of the European Communities, the specific referrals within the EU primary law reveal this situation. The EU has many competences outside the ambit of pure human rights topics as a supranational organisation having a “sui generis” legal system. Therefore, it may be highlighted that an “inspiration” from ECHR system seems indispensable for the EU.

In the EU, besides the primary and secondary law stipulations together with European Disability Strategy of 2010-2020 outlined above draw the framework for the rights of the disabled, the UNCRPD is the central international legal instrument to take into consideration. In this respect, the UNCRPD may be accepted as the “common denominator” for the EU and EU member states that are parties to the ECHR system; since they are all parties to the UNCRPD.

The EU is to take ECHR as “general principles of law” by explicit reference of Article 6/3 of the TEU. As in ECtHR judgment of *Ilonka*, the interpretation in terms of Article 8 of the ECHR is taken into consideration whilst the binding EU Charter of Fundamental Rights in force. Furthermore, according to Article 6/1 of the TEU, the EU is to accede to the ECHR. The accession of the EU to the ECHR is an issue under discussion though it may be highlighted that it marks the importance of the ECHR system in EU Law. Since accession of the EU to

the ECHR is an issue of discussion, a case against the EU, as a legal entity, may not be brought to the ECtHR at this stage. It may be put forward that the vast jurisprudence of the ECtHR is an advantage for the CJEU to take “inspiration” although there is “sui generis” features of EU Law.

The ECHR system is the prominent regional human rights protection system in Europe; on the other hand, there is no specific provision on the rights of the disabled in the ECHR and Protocols. In the ECtHR judgments, mainly articles of the ECHR are concentrated upon - highlighted above - by the ECtHR for the reflection of justification for violations relevant to the rights of the disabled. The main gap within the ECHR system may be put forward as the lack of a specific provision to protect the rights of the disabled. In this regard, It may be submitted that it would be a good step to adopt a provision within the ECHR system for at least to increase consciousness about the importance to protect the rights of the disabled. This provision would necessitate to cover interdisciplinary approach to disability. It is remarkable to observe that the ECtHR is using the standards like “in accordance with law”, “pursuing legitimate aim”, “necessary in democratic society” and “proportionate to the aim pursued” to check compatibility with the ECHR.

After the EU being party to the UNCRPD, the emphasis of this Convention is observed in the judgments of the CJEU as gathered above. It may be also put forward that the “Social Model” of disability is much more reflected in the reasoning of the judgments which is in accordance with the current perspective on the theme of the rights of the disabled in the UNCRPD. On the other hand, relevant to the judgments of the ECtHR, there may be forms of disability which requires interdisciplinary analysis as evident in the forms of mental disability. The ECtHR deals with the cases concerning the rights of the disabled among all other claims of violations of human rights without a specific provision on the issue within the ECHR system.

In this framework, it may be suggested that for the effective functioning of UNCRPD system, a specific court dealing with the claims relevant to the violations may be established. Although there is the Committee on the Rights of Persons with Disabilities within the UN System according to Article 34 of the UNCRPD, it may be put forward that a judiciary mechanism is necessary. When the legal source for checking the compatibility concerning relevant rights is an international agreement, a court representing a judiciary mechanism composed of jurists may be introduced as effective to ensure protection. The experts may be consulted on any matter relevant to the interdisciplinary characteristic of an issue concerned in such a case at the “Court of Rights on Disability”.

At the end of the comparative analysis of judgments of the CJEU and ECtHR on the rights of the disabled, it may be concluded that “Social Model” is much more evident to observe as a perspective which may be interpreted as a step in the right direction. Considering a disability in the sole scope of a medical issue is not observing the “full picture”. As Article 26 of the EU Charter of Fundamental Rights points out, “independence, social and occupational integration and participation in life of the community” should be ensured. This is not only possible with medical treatment. The same perspective is reflected with Article 1/II of the UNCRPD stipulating “full and effective participation in society”.

It may be put forward as an expectation from the CJEU to reflect the priority to be attributed to the UNCRPD more in its relevant judgments. The UNCRPD is marked as being in a superior rank than secondary law as in *Ring* judgment of the CJEU; in this respect, the interpretation of especially Directive 2000/78/EC is to be made in light of the UNCRPD. In the judgments of the ECtHR, it is meaningful to observe the standards to restrict the relevant rights; where restrictions are exceptional in this sense. Especially, mental disability cases should be taken with great care, since, the disabled concerned may be deprived of even from legal capacity.

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