

Unformatted version /Pre-copyediting

D. Ferri, 'The Role Of Disability Studies in the Advancement of EU Law Scholarship', in Rossana Deplano, Giulia Gentile, Luigi Lonardo, Tobias Nowak (eds), *Interdisciplinary Research Methods in EU Law: A Handbook* (Edward Elgar, 2023 forthcoming)

## **THE ROLE OF DISABILITY STUDIES IN THE ADVANCEMENT OF EU LAW SCHOLARSHIP**

Delia Ferri\*

22.09.2023

### **<a> INTRODUCTION**

Disability has progressively become a stand-alone (yet complex and stratified) strand of European Union (EU) law.<sup>1</sup> It is well-known that the initial driver for the development of EU disability law was the entry into force of the Treaty of Amsterdam in 1999, which conferred onto the EU the competence to enact legislation to combat discrimination on the ground, *inter alia*, of disability, and prompted the adoption of the Employment Equality Directive.<sup>2</sup> The second, and the most important, driver for the expansion of EU disability law has been the conclusion, by the EU, of the UN Convention on the Rights of Persons with Disabilities (CRPD), which occurred in 2010.<sup>3</sup> As noted elsewhere, '[t]he need to comply with the wide-ranging obligations provided for in the CRPD gave rise to an immediate and visible shift in the EU's approach to disability.'<sup>4</sup> In particular, it urged the EU to adopt more comprehensive policy actions, and, as will be discussed further in this chapter, supported the embracing of a social-contextual understanding of disability, i.e. the view of disability as stemming from the interaction between the individual's impairment and external barriers.<sup>5</sup>

The consolidation of EU disability law and policy has been a topic of growing debate among scholars,<sup>6</sup> with legal contributions mostly revolving around key legislative

---

\* Professor of Law at Maynooth University School of Law and Criminology and Co-Director of the Maynooth University Assisting Living and Learning (ALL) Institute. This chapter is part of a larger research project entitled 'Protecting the Right to Culture of Persons with Disabilities and Enhancing Cultural Diversity through European Union Law: Exploring New Paths – DANCING' which commenced in September 2020 (<https://ercdancing.maynoothuniversity.ie/>). This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (Grant Agreement No 864182).

<sup>1</sup> A Broderick and D Ferri, 'Conclusion' in D Ferri and A Broderick (eds), *Research Handbook on EU Disability Law* (Edward Elgar, 2020).

<sup>2</sup> Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

<sup>3</sup> Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35.

<sup>4</sup> D Ferri and A Broderick, 'Introduction' in D Ferri and A Broderick (eds), *Research Handbook on EU Disability Law* (Edward Elgar, 2020) 1-10.

<sup>5</sup> D Ferri and S Favalli, 'Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints' (2016) 22 *European Public Law*.

<sup>6</sup> *Inter alia* LB Waddington, *From Rome to Nice in a Wheelchair: The Development of a European Disability Policy* (Europa Law Publishing, 2005); D Mabbett, 'The Development of Rights-Based Social Policy in the European Union: The Example of Disability Rights' (2005) 43 *Journal of Common Market Studies* 97-120; M

developments,<sup>7</sup> and Court of Justice of the European Union (CJEU) case law on disability.<sup>8</sup> This chapter contends that most of this legal scholarship has been, to varying degrees, influenced by the copious and inherently interdisciplinary disability studies scholarship. In particular, it argues that the analysis of the concept of disability in EU law has been informed by the body of multifaceted theoretical work that reflected on disability as a social phenomenon.<sup>9</sup> In that connection, it posits that the ‘social model’, associated especially with Michael Oliver<sup>10</sup> and, more generally, the debate over the models of disability have (either explicitly or implicitly) supported critical appraisals of CJEU decisions. It also suggests that, for the most part, the CRPD articulation of the concept of disability, in itself shaped by the ‘social model’, has amplified the impact of disability studies on EU law. Overall, the chapter argues that the contribution that disability studies can provide to EU law is that of offering theoretical frameworks which allow for categorising, appraising and criticising the EU action on disability.

This chapter does not address the contentious issue of disability terminology and the dichotomy between the term ‘disabled people’, associated with the ‘social model’, and the CRPD wording ‘persons with disabilities’. It does acknowledge that Anglo-Saxon literature tends to refer to a ‘disabled person’, evoking the role of societal and environmental barriers in disabling the individual. However, several legal scholars prefer to use the so-called ‘people-first language’, referring simply to a ‘person with a disability’. The latter language aligns with the CRPD terminology and reflects the view that disability is just one of an individual’s many characteristics, rather than their only defining feature. This language also embeds the prevalent human rights discourse on disability. In that connection, this chapter deliberately uses person-first language in line with the CRPD, recognising ‘an individual’s abilities by placing the person, as a subject, before a disabling identifier.’<sup>11</sup>

Further to these introductory remarks, this chapter is divided into five sections. The second section gives an overview of the models of disability, providing a snapshot of the complex debates occurring in contemporary disability studies. Then the chapter moves on to discuss the impact of disability studies on the CRPD and its normative content. The fourth section suggests that Oliver’s articulation of the social model of disability has buttressed discursive reviews of the EU policy agenda. The following section focuses on how the debate

---

Priestley, ‘In Search of European Disability Policy: Between National and Global’ (2007) 1 *Alter European Journal of Disability Research* 61-74; A Waldschmidt, ‘Disability Policy of the European Union: The Supranational Level’ (2009) 3 *Alter European Journal of Disability Research* 8, 11; D Ferri and A Broderick (eds), *Research Handbook on EU Disability Law* (Edward Elgar, 2020).

<sup>7</sup> Eg LB Waddington, ‘Future Prospects for EU Equality Law. Lessons to be Learnt from the Proposed Equal Treatment Directive’ (2011) 36 *European Law Review* 163-184; D Ferri, ‘The European Accessibility Act and the Shadow of the “Social Market Economy”’ (2020) 45 *European Law Review* 660-680.

<sup>8</sup> LB Waddington, ‘The Influence of the UN Convention on the Rights of Persons with Disabilities on EU Anti-Discrimination Law’ in U Belavusau and K Henrard (eds), *About EU Anti-Discrimination Law beyond Gender* (Hart Publishing, 2018) 339; LB Waddington and A Lawson, ‘The Unfinished Story of EU Disability Non-Discrimination Law’ in A Bogg, C Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Edward Elgar, 2016) 474.

<sup>9</sup> M Oliver and C Barnes, *The New Politics of Disablement* (Palgrave Macmillan, 2012).

<sup>10</sup> M Oliver, *Social Work with Disabled People* (Macmillan Education, 1983). See also C Tregaskis, ‘Social Model Theory: The Story So Far’ (2002) 17 *Disability & Society* 457-470.

<sup>11</sup> M Sabatello, ‘Cultivating Inclusivity in Precision Medicine Research: Disability, Diversity, and Cultural Competence’ (2019) 10 *Journal of Community Genetics* 363.

over the models of disability has influenced analysis of CJEU case law. The concluding section presents some final remarks, and posits that references to authors like Michael Oliver have so far enhanced, and will continue, in the future, to bolster the transformative role of EU disability law.

#### <a> DISABILITY STUDIES AS INHERENTLY INTERDISCIPLINARY FIELD

In Western culture, disability was long conceived of as an individual deficit that derives from a disease or health condition impairing physiological or cognitive functioning.<sup>12</sup> Industrial capitalism and liberal utilitarianism supported the engendering of discriminatory policies and practices.<sup>13</sup> The so called ‘medical model’ of disability, associated with segregation and institutionalisation, started to be challenged at the end of the 1960s by disability activists, principally in the United States<sup>14</sup> and in the United Kingdom.<sup>15</sup>

In the mid-1970s, the British Union of Physically Impaired Against Segregation (UPIAS) put forward the idea that society disables people with impairments and distinguished the ‘impairment’ itself from the social ‘situation’ of people with impairments,<sup>16</sup> the latter giving rise to a ‘disability’. Vic Finkelstein, one of the founders of UPIAS, highlighted that disability is ‘the outcome of an oppressive relationship between people with impairments and the rest of society.’<sup>17</sup> On the basis of the UPIAS manifesto, in his book *Social Work with Disabled People* and in much of his subsequent work, Michael Oliver further elaborated, on the basis of Marxist theories, a conception of disability as a societal construction and expounded the ‘social model of disability’.<sup>18</sup> In 1990, in the volume *The Politics of Disablement*, Oliver, drawing on the work of Antonio Gramsci, provides a fully-fledged theoretical analysis of the social creation of disability focusing on the disadvantage caused by social, economic and environmental barriers to participation in society.<sup>19</sup>

Oliver’s initial articulation of the ‘social model of disability’ has generated a wide and multi-faceted debate, with an array of scholarship elaborating on the role of a disabling environment, repositioning the role of disability policy and creating room for empowering

---

<sup>12</sup> C Drum, ‘Models and Approaches to Disability’ in C Drum, G Krahn and H Bersani, *Disability and Public Health* (American Public Health Association/American Association on Intellectual and Developmental Disabilities, 2009).

<sup>13</sup> C Barnes and G Mercer, *Disability* (Polity Press, 2003).

<sup>14</sup> F Pelka, *What We Have Done: An Oral History of the Disability Rights Movement* (University of Massachusetts Press, 2012); JI Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment* (University of California Press, 1998); I Zola, *Missing Pieces: A Chronicle of Living with a Disability* (Temple University Press, 1982). For an historical account LJ Davis, *Enabling Acts: The Hidden Story of How the Americans with Disabilities Act Gave the Largest US Minority Its Rights* (Beacon Press, 2015).

<sup>15</sup> For an account see H Meekosha and A Jakubowicz, ‘Disability, Political Activism, and Identity Making: A Critical Feminist Perspective on the Rise of Disability Movements in Australia, the USA and the UK’ (1999) 19 *Disability Studies Quarterly* 393–404; See also A Sheldon et al., ‘Disability Rights and Wrongs?’ (2007) 22 *Disability & Society* 209–234.

<sup>16</sup> Union of Physically Impaired Against Segregation (UPIAS), *Fundamental Principles of Disability* (The Disability Alliance, 1976) 4.

<sup>17</sup> V Finkelstein, *Attitudes and Disabled People: Issues for Discussion* (World Rehabilitation Fund, 1980) 47.

<sup>18</sup> Oliver (n 10); M Oliver, *Understanding Disability: from Theory to Practice* (Macmillan Education, 1996).

<sup>19</sup> M Oliver, *The Politics of Disablement* (Red Globe Press London, 1990).

political discourses,<sup>20</sup> and most recently reconstituting persons with disabilities as holders of rights.<sup>21</sup> In that connection Priestley suggests that ‘[i]n truth it is but one type of social model’ and that some scholars focus on the importance of culture alongside political economy, others want to reconcile social model approaches with personal experience and identity.<sup>22</sup> Thomas argues that the social model should be reframed as the ‘social relational model of disability’.<sup>23</sup> While remaining undoubtedly the most influential paradigm to understand disability, the ‘social model’ (in all its nuances) has also attracted several criticisms<sup>24</sup> and quests for re-elaborations.<sup>25</sup> Some scholars posit that, while the social model has been a powerful subversive tool, it ‘proposes an untenable separation between body and culture, impairment and disability.’<sup>26</sup> Other critical accounts claim that the social model fails to adequately theorise experiences of impairment.<sup>27</sup> Tom Shakespeare suggests that ‘[w]hile environments and services can and should be adapted wherever possible, there remains disadvantage associated with having many impairments which no amount of environmental change could entirely eliminate’. In that Shakespeare posits that ‘the simplicity which is the hallmark of the social model is also its fatal flaw’ and highlights that the ‘social model’s benefits as a slogan and political ideology are its drawbacks as an academic account of disability’.<sup>28</sup> Further, Shakespeare notes that the social model was elaborated by a ‘small group of activists, the majority of whom had spinal injury or other physical impairments and were white heterosexual men’, hence reflecting a limited experience of disability.<sup>29</sup> In a similar vein, feminist scholars indicate the need to further focus on personal experiences of disability, and how they are influenced by the type of impairment, identity, as well as power relationships and roles.<sup>30</sup>

---

<sup>20</sup> C Barnes, G Mercer and T Shakespeare, *Exploring Disability: A Sociological Introduction* (Polity Press, 1999); C Beckett and E Wrighton, “‘What Matters to Me is Not What You’re Talking About’: Maintaining the Social Model of Disability in “Public and Private” Negotiations’ (2000) 15 *Disability & Society* 991, 999.

<sup>21</sup> Among others see L Series, ‘Disability and Human Rights’ in N Watson and S Vehmas (eds), *The Routledge Handbook of Disability Studies* (2nd edn, Routledge, 2019) and literature cited in it. See also M Berghs et al., ‘Do Disabled People Need a Stronger Social Model: A Social Model of Human Rights?’ (2019) 34 *Disability & Society* 1034-1039.

<sup>22</sup> M Priestley, ‘Constructions and Creations: Idealism, Materialism and Disability Theory’ (1998) 13 *Disability & Society* 75–94.

<sup>23</sup> C Thomas, *Sociologies of Disability and Illness: Contested Ideas in Disability Studies and Medical Sociology* (Palgrave Macmillan, 2007).

<sup>24</sup> Among many others, see G Dewsbury et al., ‘The Anti-Social Model of Disability’ (2004) 19 *Disability & Society* 145-158; CA Riddle, ‘Why We do Not Need a “Stronger” Social Model of Disability’ (2020) 35 *Disability & Society* 1509.

<sup>25</sup> JM Levitt, ‘Exploring How the Social Model of Disability Can be Re-Invigorated: In Response to Mike Oliver’ (2017) 32 *Disability & Society* 589.

<sup>26</sup> B Hughes and K Paterson, ‘The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment’ (1997) 12 *Disability & Society* 325-340. See also L Crow, ‘Including All Our Lives: Renewing the Social Model of Disability’ in J Morris (ed), *Encounters with Strangers: Feminism and Disability* (Women’s Press, 1996).

<sup>27</sup> For a critical account see J Owens, ‘Exploring the Critiques of the Social Model of Disability: The Transformative Possibility of Arendt’s Notion of Power’ (2015) 37 *Sociology of Health & Illness* 385-403.

<sup>28</sup> T Shakespeare, ‘The Social Model of Disability’ in LJ Davis (ed), *The Disability Studies Reader* (Routledge, 2013).

<sup>29</sup> Ibid. See also T Shakespeare, ‘Social Models of Disability and Other Life Strategies’ (2004) 6 *Scandinavian Journal of Disability Research* 8-21.

<sup>30</sup> E Kittay et al. (eds), ‘Special Issue on Feminism and Disability I.’ (2001) 16 *Hypatia* 1–173.

Over the years, the ongoing debate on the models of disability<sup>31</sup> has consolidated into a distinct field of research, namely disability studies.<sup>32</sup> Baglieri *et al.* emphasise the origin of ‘the activism of people with disabilities to highlight its conception as a field strongly rooted in its commitment to social and political transformation’.<sup>33</sup> Meekosha indicates that ‘[d]isability studies has developed as part of a political project, where the recognition of the discursive power of the old order to disable people with impairments leads to an alternative world view and analytical pathway.’<sup>34</sup> Watson, Roulstone and Thomas, in the first edition of the *Routledge Handbook of Disability Studies*, highlighted how disability studies had grown into a separate area of research remaining closely tied with disabled people’s movements.<sup>35</sup> When in 2020, Watson and Vehmas published the second edition of the *Routledge Handbook of Disability Studies* they indicated that disability studies has firmly ‘established itself across the academy.’<sup>36</sup> Goodley highlights that by the late-twentieth-century disability studies ‘have entered a host of training and educational contexts, social policies, legislative discourses and professional practices’, and ‘have dallied with many theoretical ideas.’<sup>37</sup> Meekosha and Shuttleworth argue that disability studies ‘boasts a discrete body of knowledge and research’, as well as specialist journals devoted to the subject, such as *Disability Studies Quarterly* and *Disability and Society*.<sup>38</sup> Several scholars also situated disability studies within the broader field of the humanities, and discussed it in a broader cultural understanding of disability.<sup>39</sup>

While the leading discourse in disability studies is still framed within the concerns of the Global North and is dominated by Anglo-American approaches,<sup>40</sup> writers from continental Europe<sup>41</sup> and the Global South are progressively adding their voices to this expanding field.<sup>42</sup> Since the early 2000s, a few writers have highlighted that ‘debates in disability studies in the Northern Hemisphere have tended to ignore the lived experience of disabled people in much of the Global South.’<sup>43</sup> The quest to encompass post-colonial and global perspectives has supported the emergence of the sub-field of critical disability studies, that aim to ‘capture the

---

<sup>31</sup> A Goldiner, ‘Understanding “Disability” as a Cluster of Disability Models’ (2022) *The Journal of Philosophy of Disability*.

<sup>32</sup> GL Albrecht, KD Seelman and M Bury, ‘The Formation of Disability Studies’ in GL Albrecht, KD Seelman and M Bury (eds), *Handbook of Disability Studies* (SAGE Publications, 2001) 2.

<sup>33</sup> S Baglieri et al., ‘Disability Studies in Education: The Need for a Plurality of Perspectives on Disability’ (2011) 32 *Remedial and Special Education* 267-278.

<sup>34</sup> H Meekosha, ‘Drifting Down the Gulf Stream: Navigating the Cultures of Disability Studies’ (2004) 19 *Disability & Society* 721-733.

<sup>35</sup> N Watson, A Roulstone and C Thomas (eds), *Routledge Handbook of Disability Studies* (Routledge, 2012).

<sup>36</sup> N Watson and S Vehmas (eds), *The Routledge Handbook of Disability Studies* (2nd edn, Routledge, 2019).

<sup>37</sup> D Goodley, ‘Dis/entangling Critical Disability Studies’ (2013) 28 *Disability & Society* 631-644.

<sup>38</sup> H Meekosha and R Shuttleworth, ‘What’s so “Critical” about Critical Disability Studies?’ (2009) 15 *Australian Journal of Human Rights* 47-75.

<sup>39</sup> J Cheu, ‘From One to Many: Reflections on Disability Studies’ (2022) 16 *Journal of Literary & Cultural Disability Studies* 339-343; See also A Waldschmidt, H Berressem, M Ingwersen (eds), *Culture - Theory - Disability: Encounters Between Disability Studies and Cultural Studies* (Verlag, 2017).

<sup>40</sup> On American approaches see *inter alia* GL Albrecht, ‘American Pragmatism, Sociology and the Development of Disability Studies’ in C Barnes, M Oliver and L Barton (eds), *Disability Studies Today* (Polity Press, 2002) 18-37.

<sup>41</sup> See eg A Marra, *Diritto e Disability Studies* (Falzea, 2010).

<sup>42</sup> Meekosha and Shuttleworth (n 38). Notably disability studies also encroach and provide helpful inputs to other disciplines: see eg SJ Ray, J Sibara and S Alaimo, *Disability Studies and the Environmental Humanities: Toward an Eco-Crip Theory* (University of Nebraska Press, 2017).

<sup>43</sup> H Meekosha, ‘Decolonising Disability: Thinking and Acting Globally’ (2011) 26 *Disability & Society* 667-682.

contemporary complexities associated with disability' in contemporary contexts and to encompass voices from the Global South.<sup>44</sup> Goodley suggests that '[t]he word 'critical' denotes a sense of self-appraisal; re-assessing where we have come from, where we are at and where we might be going.'<sup>45</sup> He also argues that while critical disability studies scholars start with an analysis of disability, they become interconnected with the politics of class, gender, sexuality, race and ethnicity.<sup>46</sup> Meekosha and Shuttleworth posit that critical disability studies 'represents a distancing from those who have co-opted disability studies for simply normalising ends.'<sup>47</sup> According to Vehmas and Watson, the influence of critical disability studies 'and its challenge to the assumption that disability is a uniform condition have enabled the emergence of new ideas on disability' and foster an intersectional approach.<sup>48</sup>

This new wave of disability studies has, however, recently been criticised by Michael Oliver, who claims (in particular with reference to British scholars) that the academic community has been unable to confront austerity policies, and medicalised views of disability are regaining ground.<sup>49</sup> He argues that:

the radical theoretical basis grounded in Marxism was eroded and all but disappeared. In its place came a ragbag of perspectives including postmodernism, poststructuralism and critical realism, and more recently ableism and crip theory. Academics also failed to confront all of the misleading propaganda the government was putting out about what was really happening to disabled people as a result of their cuts.<sup>50</sup>

All in all, disability studies is a lively academic discipline that includes multi-layered debates on the concept of disability, challenges the idea of disability as an individual medical problem, and addresses claims of social justice. In doing so, it is continuously evolving through self-reflective practices, deconstructing theories of disability, exploring counter-hegemonic narratives, and contesting ideologies.

## <a> THE CRPD: SPURRING THE INFLUENCE OF DISABILITY STUDIES THROUGH HUMAN RIGHTS

As noted by Traustadóttir, '[d]isability studies scholars have been instrumental in developing this new understanding of disability which has provided a foundation for legal development

---

<sup>44</sup> D Goodley, K Liddiard and K Runswick-Cole, 'Feeling Disability: Theories of Affect and Critical Disability Studies' (2018) 33 *Disability & Society* 197-217.

<sup>45</sup> Goodley (n 37).

<sup>46</sup> D Goodley, *Disability Studies: An Interdisciplinary Introduction* (Sage, 2016). See also D Goodley et al., 'Provocations for Critical Disability Studies' (2019) 34 *Disability & Society* 972-997.

<sup>47</sup> Meekosha and Shuttleworth (n 38).

<sup>48</sup> S Vehmas and N Watson, 'Moral Wrongs, Disadvantages, and Disability: A Critique of Critical Disability Studies' (2014) 29 *Disability & Society* 638-650.

<sup>49</sup> M Oliver, 'Activism and the Academy: Losing the Ideological and Material Battles' (2019) 34 *Disability & Society* 1028-1033.

<sup>50</sup> *Ibid.*

worldwide.<sup>51</sup> In fact, the debate around the social model of disability has propelled the global development of disability rights, culminating in the adoption of the CRPD. This Convention is based on the key principles of dignity, autonomy, non-discrimination and equality, accessibility and participation.<sup>52</sup> It encompasses civil and political as well as economic, social and cultural rights, which must be afforded to persons with disabilities on an equal basis with others. The CRPD obliges States Parties to address barriers, socio-economic disadvantages, and to fight discrimination, all of which hinder the participation of people with disabilities in society. Scholars have consistently highlighted that the CRPD indicates ‘with considerable detail, how the rights it proposes to protect are to be implemented and guaranteed’,<sup>53</sup> and ‘sets out explicitly the many steps that States must take to create an enabling environment so that persons with disabilities can enjoy authentic equality in society.’<sup>54</sup> In that regard, O’Cinneide argues that the CRPD requires States Parties to create the social conditions necessary for individuals with disabilities to enjoy all human rights and equal dignity.<sup>55</sup>

The CRPD does not provide a prescriptive definition of disability but includes a broad conceptualisation in Article 1 (which is devoted to laying out the purpose of the Convention). Notably, in this provision, the CRPD constitutes disability as resulting ‘from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.’ In this respect, some scholars submit that the CRPD embraces the social model of disability and they refer to Oliver’s seminal works.<sup>56</sup> Waddington states that the CRPD ‘is the highest legal manifestation and confirmation of the social model of disability on the international stage.’<sup>57</sup> In my earlier works, I have also referred to the CRPD as embedding the social model.<sup>58</sup> Kaoukillis and Ikehara argue that Article 1(2) CRPD provides ‘a description, rather than a definition, of the persons whose human rights the CRPD aims to protect’ which is ‘underpinned by a social

---

<sup>51</sup> R Traustadóttir, ‘Disability Studies, the Social Model and Legal Developments’ in OM Arnadóttir and G Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Brill, 2009).

<sup>52</sup> Among many others, see R Kayess and P French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8 *Human Rights Law Review* 1-34; P Harpur, ‘Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities’ (2012) 27 *Disability & Society* 1; A Kanter, ‘The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities’ (2007) 34 *Syracuse Journal of International Law and Commerce* 287; and G De Beco, *Disability in International Human Rights Law* (Oxford University Press, 2021).

<sup>53</sup> F Mégret, ‘The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?’ (2008) 30 *Human Rights Quarterly* 510.

<sup>54</sup> ML Perlin, “‘The Ladder of the Law has No Top and No Bottom’”: How Therapeutic Jurisprudence Can Give Life to International Human Rights’ (2014) 37 *International Journal of Law and Psychiatry* 535.

<sup>55</sup> C O’Cinneide, ‘Extracting Protection for the Rights of Persons with Disabilities from Human Rights Frameworks: Established Limits and New Possibilities’ in Arnadóttir and Quinn (n 51) 163-198.

<sup>56</sup> See eg F Seatzu, ‘Empowering Persons with Disabilities: Socio-Economic Rights as a Pathway to Personal Autonomy and Independence’ (2020) 18 *Northwestern Journal of Human Rights* 136-157; A Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities. Realizing the Right to Equal Recognition before the Law* (Cambridge University Press, 2017) 72; V Blaker Strand, ‘Norway’s Ratification of the UN Convention on the Rights of Persons with Disabilities: Highlighting Current Discourses in the Field of Human Rights in Norway’ (2014) 32 *Nordic Journal of Human Rights* 75-83.

<sup>57</sup> LB Waddington, ‘The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences’ (2011) 18 *Maastricht Journal of European and Comparative Law* 431, 436.

<sup>58</sup> See eg D Ferri, ‘Legal Scholarship and Disability in Italy. Recent Developments and New Perspectives’ (2014) 5 *European Yearbook of Disability Law*.

model of disability.<sup>59</sup> Similarly, among others, Varney claims that the CRPD ‘relies on a predominantly social model of disability’ and ‘shifts the focus away from the medical condition of individuals, casting light on social barriers that may affect participation for people with disabilities.’<sup>60</sup> De Burca, citing Lawson, suggests that the CRPD provisions ‘are premised on a holistic “social model” (which views the disadvantages arising from disability as contingent and removable social barriers) instead of the narrower and traditional “medical model” of disability [...].’<sup>61</sup>

Slightly differently from other scholars, Kayess and French, in their seminal article ‘*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*’,<sup>62</sup> while discussing extensively the social model as ‘intellectual antecedent’ and referring, *inter alia*, to Oliver’s work, argue that the CRPD cannot be construed strictly in accordance with the social model.<sup>63</sup> In a similar vein, Broderick,<sup>64</sup> Broderick and myself,<sup>65</sup> but also Waddington, in most recent works,<sup>66</sup> as well as Waddington and Broderick<sup>67</sup> refer to the CRPD as embracing a social-contextual model of disability which is a refined version of the social model that focuses on the interaction between the impairment and external barriers, rather than solely on external barriers.

Degener authoritatively argues that the CRPD moves beyond the social model embedding the human rights model of disability, which in her elaboration presents distinctive features.<sup>68</sup> While engaging with Oliver’s theories and citing extensively an array of British disability studies scholars, she suggests that the human rights model does not focus merely on social barriers, but places emphasis on the human dignity of persons with disabilities, and values impairments as part of human diversity.<sup>69</sup> She also posits that ‘the human rights model offers room for minority and cultural identification’, thus allowing for action to be taken against intersectional discrimination.<sup>70</sup> Further, along the lines traced by Degener’s theorisation, the UN Committee on the Rights of Persons with Disabilities (CRPD Committee) indicated that

---

<sup>59</sup> E Kaoullis and Y Ikehara, ‘Article 1: Purpose’ in I Bantekas, MA Stein and D Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2018).

<sup>60</sup> E Varney, ‘The UN Convention on the Rights of Persons with Disabilities and English Contract Law: A Tale of Unfinished Bridges?’ (2020) 31 *King’s Law Journal* 444-466.

<sup>61</sup> G de Burca, ‘The European Union in the Negotiation of the UN Disability Convention’ (2010) 35 *European Law Review* 174-196 citing A Lawson, ‘The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?’ 34 *Syracuse Journal of International Law and Commerce* 563.

<sup>62</sup> Kayess and French (n 52).

<sup>63</sup> *Ibid.* 21.

<sup>64</sup> A Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities* (Intersentia, 2015) 77.

<sup>65</sup> A Broderick and D Ferri, *International and European Disability Law and Policy. Text, Cases and Materials* (Cambridge University Press, 2019).

<sup>66</sup> LB Waddington, ‘Saying All the Right Things and Still Getting It Wrong: The Court of Justice’s Definition of Disability and Non-Discrimination Law’ (2015) 22 *Maastricht Journal of European and Comparative Law* 579.

<sup>67</sup> LB Waddington and A Broderick, ‘Combatting Disability Discrimination and Realising Equality: A Comparison of the UN CRPD and EU Equality and Non-Discrimination Law’ (Directorate General for Justice and Consumers, European Commission, 2018) 57–60.

<sup>68</sup> T Degener, ‘A New Human Rights Model of Disability’ in V Della Fina, R Cera and G Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, 2017) 41-60.

<sup>69</sup> *Ibid.* 47. See also T Degener, ‘Disability in a Human Rights Context’ (2016) 5 *Laws* 35.

<sup>70</sup> *Ibid.* 49.



the human rights model of disability recognises that ‘disability is a social construct’,<sup>71</sup> but also conceives of disability as ‘one of several layers of identity’, pivoting around dignity and inclusive equality.<sup>72</sup> References to the human rights model of disability are gaining momentum both in the Concluding Observations of the CRPD Committee<sup>73</sup> and in scholarship. Conte, in a recent volume, affirms that ‘the CRPD reshapes the social model of disability and recognises impairments as part of human diversity’, citing Degener.<sup>74</sup> Other scholars also embrace the view that the CRPD embeds the human rights model of disability.<sup>75</sup> Lawson and Beckett in a recent work theorise on the different functions of the human rights model and the social model.<sup>76</sup> The latter is said to be heuristic in that it ‘provides an ontology of disability’ and ‘defines disability as a form of social oppression.’ The former is prescriptive and ‘provides guidance (and requirements) on policy responses to disability.’ Consequently, they suggest that it ‘can be viewed not as a model of disability but as a model of disability policy.’

On the whole, it is widely accepted that the social model ‘has had an enormous influence in the development of the CRPD.’<sup>77</sup> As Kayess and French suggest, ‘the primary influence has come from this populist conceptualisation of the social model as a disability rights manifesto and its tendency towards a radical social constructionist view of disability, rather than from its contemporary expression as a critical theory of disability.’<sup>78</sup> The CRPD and its interpretation by law scholars have generated further debates that build on disability studies, but anchor the reconstruction of disability as social phenomenon to legal principles and to the fulfilment of human rights. In that connection, the CRPD has acted as a catalyst for the use of disability studies in legal scholarship.

## <a> THE ROLE OF DISABILITY STUDIES IN SHAPING THE ACADEMIC DEBATE ON EU DISABILITY LAW

### <b> The Surge of EU Disability Law

The EU has addressed disability issues since the 1970s, mostly by means of programmes aimed at supporting vocational training and employment and soft law intended to guide Member States’ action.<sup>79</sup> As noted in the introduction, with the entry into force of the Treaty of

---

<sup>71</sup> CRPD Committee, General Comment No. 6 on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6, para 11.

<sup>72</sup> Ibid.

<sup>73</sup> CRPD Committee, Concluding Observations on the Combined Second and Third Periodic Reports of Hungary, 20 May 2022, CRPD/C/HUN/CO/2-3; CRPD Committee, Concluding Observations on the Combined Second and Third Periodic Reports of Mexico, 20 April 2022, CRPD/C/MEX/CO/2-3.

<sup>74</sup> C Conte, *The UN Convention on the Rights of Persons with Disabilities and the European Union. The Impact on Law and Governance* (Bloomsbury Publishing, 2022) 25.

<sup>75</sup> C O’Sullivan and D McNamara, ‘“The ‘Necessity” of Austerity and its Relationship with the UN Convention on the Rights of Persons with Disabilities: A Case Study of Ireland and the United Kingdom’ (2021) 21 *Human Rights Law Review* 157–185.

<sup>76</sup> A Lawson and AE Beckett, ‘The Social and Human Rights Models of Disability: Towards a Complementarity Thesis’ (2021) 25 *The International Journal of Human Rights* 348-379.

<sup>77</sup> Kayess and French (n 52).

<sup>78</sup> Ibid.

<sup>79</sup> C O’Mahony and S Quinlivan, ‘The EU Disability Strategy and the Future of EU Disability Policy’ in D Ferri and A Broderick (eds), *Research Handbook on EU Disability Law* (Edward Elgar, 2020) 12-28.

Amsterdam, and by virtue of Article 13 of the Treaty on the European Community (now Article 19 of the Treaty on the Functioning of the European Union – TFEU), the EU acquired the competence to combat discrimination on the ground, *inter alia*, of disability. Further, the Treaty of Amsterdam provided a Declaration requiring EU institutions to take account of the needs of persons with disabilities in drawing up harmonization measures under the former Article 95 EC (now Article 114 TFEU). The adoption Employment Equality Directive ‘represents the first legislative intervention aimed to address disability discrimination, and can be considered the very first milestone in the development of the EU action on disability as it “opened the door” to further legislative and policy interventions’.<sup>80</sup> The proclamation of the Charter of Fundamental Rights placed further emphasis on the role of the EU in protecting disability rights. The Charter includes, alongside a wide-ranging prohibition of discrimination, Article 26, which states that ‘the Union recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.’

Since the 2000s, disability issues have been mainstreamed across various strands of EU legislation and soft law. A major policy plan - the EU Disability Action Plan<sup>81</sup> - was released in 2003. This aimed to enhance equal opportunities for people with disabilities and to foster their full inclusion in society. This action plan makes explicit reference to the social model and states:

The EU also sees *disability as a social construct*. The EU *social model of disability* stresses the environmental barriers in society which prevent the full participation of people with disabilities in society. These barriers must be removed [...].<sup>82</sup>

Further to the entry into force of the Treaty of Lisbon, in December 2009, Article 19 TFEU remains the main legal basis for the adoption of EU non-discrimination legislation, and the core provision overtly related to persons with disabilities. However, TFEU also includes a cross-cutting clause that requires that, ‘in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on [*inter alia*] disability [...]’, allowing the EU to integrate the equality considerations into all EU actions.<sup>83</sup>

Approximately at the same time as the entry into force of the Treaty of Lisbon, the EU (alongside its Member States) concluded the CRPD, and the Commission further adopted the European Disability Strategy 2010–2020 (EDS)<sup>84</sup> with the express aim of implementing the Convention. The EDS elaborated a comprehensive ten-year long policy framework and envisaged a portfolio of diverse legislative and other instruments to promote the rights of

---

<sup>80</sup> D Ferri, ‘The UN Convention on the Rights of Persons with Disabilities in the EU Legal Framework and the Development of EU Disability Policies after 2020. What is Coming is Better than What is Gone?’ in M Ganner et al. (eds), *The Implementation of the UN Convention on the Rights of Persons with Disabilities in Austria and Germany* (Innsbruck University Press, 2021).

<sup>81</sup> Commission Communication, ‘Equal Opportunities for People with Disabilities: A European Action Plan’, COM (2003) 650 final, 30 October 2003.

<sup>82</sup> *Ibid.* para 2.1. Emphasis added.

<sup>83</sup> Article 10 TFEU.

<sup>84</sup> European Commission, ‘European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe’ COM (2010) 636 final.

persons with disabilities. It cited the broad conceptualization of persons with disabilities included in Article 1(2) CRPD and referred to the social model when requiring the involvement of all stakeholders in the comprehensive ‘screening exercise’ of existing instruments in order to ensure full compliance with the CRPD.

The conclusion of the CRPD has prompted the adoption of disability specific legislation as well as increasing the mainstreaming of disability issues. The Web Accessibility Directive (WAD)<sup>85</sup> and the European Accessibility Act (EAA)<sup>86</sup> probably represent the most significant pieces of disability-specific legislation addressing accessibility needs of persons with disabilities. In several cases, legislation refers to persons with disabilities in line with Article 1(2) CRPD. For example, the EAA explicitly embeds a social-contextual understanding of disability in Article 3.<sup>87</sup>

Further, the CRPD has become a normative standard within CJEU case law and has provoked a substantive change in the Luxembourg Court’s approach to disability, which is now aligned with Article 1(2) CRPD. The Court has not referred overtly to the social model, but has cited the CRPD quite extensively, in particular (although not exclusively) when interpreting the Employment Equality Directive.<sup>88</sup> However, Advocate General Wahl, in his opinion on *Z v A Government Department*, indicated that the CRPD:

[...] *reflects the social model of disability*. It recognises that disability ‘results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.’ According to that understanding, disability arises from a failure of the social environment to adapt to and accommodate the needs of people with impairments. To the extent that the *social model of disability* extends beyond the limits of what in more traditional language may be understood as disability (including, *inter alia*, mental disability), the [CRPD] arguably offers more robust and expansive protection against discrimination than a narrow, individual-centred definition. Indeed, it recognises that disability is ‘as much a social construct as a medical fact.’<sup>89</sup>

The recent ‘Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030’ (Strategy 2021-2030),<sup>90</sup> which lays down the new ten-year long disability policy plan, is informed, to a great extent, by the CRPD. It does not refer to the social model. It rather includes

---

<sup>85</sup> Directive (EU) 2016/2102 of the European Parliament and of the Council on the accessibility of the websites and mobile applications of public sector bodies [2016] OJ L327/1.

<sup>86</sup> Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services [2019] OJ L151/70.

<sup>87</sup> Recital 3 of the EAA Preamble, Article 3 para 1 of the EAA.

<sup>88</sup> D Ferri, ‘The Unorthodox Relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and Secondary Rights in the Court of Justice Case Law on Disability Discrimination’ (2020) 16 *European Constitutional Law Review* 275-305.

<sup>89</sup> Opinion of Mr Advocate General Wahl delivered on 26 September 2013 in *Z v A Government Department and The Board of Management of a Community School* ECLI:EU:C:2013:60, para 85.

<sup>90</sup> Commission Communication, ‘Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030’ COM (2021) 101 final, 21 March 2021.

references to human rights of persons with disabilities and embraces a rights-based approach with the aim of fully aligning with the CRPD principles and values.<sup>91</sup>

### **<b> The Role of Disability Studies in EU Law Scholarship and the Building of EU Disability Law**

Before zooming in on the scholarly debate on CJEU case law on the definition of disability, this section discusses the influence of disability studies upon EU legal scholarship and correlates this to the building of EU disability law.

Contributions related to legal developments in EU law that relate to disability refer to the dichotomy medical/social model of disability.<sup>92</sup> Although not always overtly, they rely on UK disability studies scholarship and often cite the father of the social model, Michael Oliver, when highlighting the progressive move towards the understanding of disability as caused by external barriers.<sup>93</sup> Hosking<sup>94</sup> and other scholars<sup>95</sup> locate evidence of the paradigm shift towards the social model at the 1996 Commission Communication European Community Disability Strategy.<sup>96</sup> Similarly, O'Mahony and Quinlivan posit that '[f]rom the mid-1990s, an awareness of the social model of disability began to appear in some of the policy documents developed by the Commission.'<sup>97</sup> Lawson and Priestley suggest that the European Commission had pledged commitment to the social model of disability as a key driver of EU disability-related law and policies and refer to the EU Disability Action plan as an example.<sup>98</sup> Waddington, who is certainly the most authoritative author in EU disability law, suggests that the Commission, the Council and the European Parliament 'had been showing increasing sensitivity to the social model of disability' and contrasts those attitudes with the CJEU's medical approach in *Chacon Navas* (which will be further discussed in the subsequent section).<sup>99</sup> She cites Oliver among the wealth of literature on the models of disability.<sup>100</sup>

When discussing Article 26 of the Charter of Fundamental Rights, I have argued that, in spite of the slightly outdated language, with reference to integration rather than inclusion, this provision can be considered reflective of the 'social-contextual model of disability', in that it focuses on participation in society and the need to ensure the independence of persons with disabilities within their communities.<sup>101</sup> O'Brien, in connecting Article 26 with Article 1 of the Charter (on dignity), argues that conceiving of indignity as 'created through conditions that de-

---

<sup>91</sup> D Ferri, 'The New Strategy for the Rights of Persons with Disabilities 2021-2030: A Step Forward in Realising the Human Rights Model of Disability' (*EU Law Live*, 5 March 2021).

<sup>92</sup> See eg V Perju, 'Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States' (2011) 44 *Cornell International Law Journal* 279-348.

<sup>93</sup> See eg O'Mahony and Quinlivan (n 79).

<sup>94</sup> DL Hosking, 'Promoting Accessibility for Disabled People Using EU Standardisation Policy' (2017) 42 *European Law Review* 145-165; DL Hosking, 'Staying the Course: The European Disability Strategy 2010-2020' in LB Waddington, G Quinn and E Flynn (eds), *European Yearbook of Disability Law* (Intersentia, 2013).

<sup>95</sup> See eg De Burca (n 61); Broderick and Ferri (n 65).

<sup>96</sup> European Commission, 'A New European Community Disability Strategy' COM (1996) 406.

<sup>97</sup> O'Mahony and Quinlivan (n 79) 12-28.

<sup>98</sup> A Lawson and M Priestley, 'The Social Model of Disability: Question for Law and Legal Scholarship?' in P Blanck and E Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge, 2016).

<sup>99</sup> ECJ, 11 July 2006, Case C-13/05, *Sonia Chacón Navas v Eurest Colectividades* ECLI:EU:C:2006:456.

<sup>100</sup> Waddington (n 7).

<sup>101</sup> Broderick and Ferri (n 65) 310.

autonomise or disempower, and which promote dependence’, could be congruent with the social model of disability.<sup>102</sup>

In commenting on EU equality law and on the Employment Equality Directive, the social model is used variously to highlight the limits of the Directive or its strengths.<sup>103</sup> In 2006, Hosking posited that:

The policy objectives which flow from the *social model of disability* focus on the promotion of the inclusion and full citizenship of disabled people in all aspects of their communities. These objectives are best advanced by the application of a substantive conception of equality. Although EU soft law disability initiatives reflect a substantive model of equality and despite the official adoption of the social model, when the non-discrimination objective was incorporated into Community law by the [Employment Equality Directive] it was made to fit the formal, equal opportunities conception of equality which animates that law.<sup>104</sup>

Most recently, by contrast, Hervey and Rostant argue that EU law ‘embraces a ‘social model’ in its definition of disability discrimination.’<sup>105</sup> Mulder, while discussing EU equality law, suggests that:

The need to consider differences has explicitly been recognised within the context of disability, as it is asymmetrical by protecting disabled people only and imposes duties of reasonable accommodation. It is not simply external requirements such as lack of accessibility that hinders disabled people’s equal market engagement, as highlighted by the *social model of disability*, but also personal impairments that can create additional burdens on the disabled population, because of physical experiences linked to the disability, such as pain, experience of depression, arthritis, fatigue or diabetes.<sup>106</sup>

In substance she seems to allude to the fact that EU equality law has embraced a social-contextual understanding of disability, rather than a pure social model.

Differently from other scholars Quinn and Flynn, in their seminal article on the ‘*Transatlantic Borrowings*’, highlight that ‘[t]he intellectual roots of EU disability law and policy were most assuredly not native to Europe’ and claim that ‘EU law can trace its roots to

---

<sup>102</sup> C O’Brien, ‘Article 26’ in S Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2021) 743-778.

<sup>103</sup> See eg R Whittle, ‘The Framework Directive for Equal Treatment in Employment and Occupation: An Analysis from a Disability Rights Perspective’ (2002) 27 *European Law Review* 303. This author suggested that it is crucial ‘that the legislative concept of impairment does not [...] ignore the *social dimension to disability*’, but he does not specifically cite Oliver’s work.

<sup>104</sup> DL Hosking, ‘Great Expectations: Protection from Discrimination because of Disability in Community Law’ (2006) 31 *European Law Review* 667-689.

<sup>105</sup> T Hervey and P Rostant, “‘All About That Bass?’ Is Non-Ideal-Weight Discrimination Unlawful in the UK?” (2016) 79 *The Modern Law Review* 248-282.

<sup>106</sup> J Mulder, ‘What is Vulnerability Anyway? Tracing the EU Notion of the Vulnerable Consumer through the Eyes of EU Non-Discrimination Law’ (2021) 46 *European Law Review* 740.

American and even broader international influences'.<sup>107</sup> While many scholars connect the prompts for a social model orientation of EU disability law to the UK disability studies scholarship, Quinn and Flynn argue that the 'underpinnings of EU anti-discrimination law and policy as applied in the disability field are unmistakably and recognizably American.'<sup>108</sup> They connect EU non-discrimination law to the US civil rights movement. In doing so, however, they discuss the divide between medical and social models at length, while using different terminology. They do not use the term 'social model of disability' but refer to the 'social construct thesis on disability' and include in the latter the US civil rights perspective and use the general term social model to encompass 'the welfare traditions of Europe.' Interestingly, the authors do refer to UK scholarship, namely Michael Oliver.<sup>109</sup> Further, when looking at the medical model, they also mention the UK scholar Tom Shakespeare as one that 'has recently revived elements of the medical model by pointing to the obvious — which is that disability is not altogether a figment of some imagined social construct. It is real and has some roots in physical or medical impairments'.<sup>110</sup> While commenting on Shakespeare, Quinn and Flynn embrace the view that 'the medical model is in fact a parody of the truer medical mission which—shorn of paternalism—is perfectly compatible with the civil rights perspective'.<sup>111</sup>

As mentioned above, the use of terminology among legal authors varies considerably and reflecting the blurred boundaries of the debate on the models of disability. Alongside general references to the social model, or to the social-contextual model, there are also references to the human rights model. For example, Waddington, in an earlier work with a broader focus published in *Netherlands Quarterly of Human Rights*<sup>112</sup> mentions the human rights model of disability. She claims that '[t]he medical model of disability has increasingly been rejected in favour of a model which embraces a human rights approach.'<sup>113</sup> In that regard she suggests that:

[a]t the pan-European level, probably the most important manifestation of this change in attitude has been an amendment to the Treaty of the European Community allowing for legislative action to combat disability discrimination and the subsequent adoption of a Framework Employment Directive addressing, *inter alia*, disability discrimination.<sup>114</sup>

Notably, Waddington, in other works, mostly with reference to the CJEU (as it will be further discussed in section 5), has also referred to the Luxembourg judges as embracing the social-

---

<sup>107</sup> G Quinn and E Flynn, 'Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability' (2012) 60 *The American Journal of Comparative Law* 23–48.

<sup>108</sup> *Ibid.*

<sup>109</sup> They cite in footnotes M Oliver, 'The Social Model in Action: If I had a Hammer' in C Barnes and G Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (Disability Press, 2004) 18.

<sup>110</sup> Quinn and Flynn (n 107) referring to Shakespeare (see *supra* section 2 of this chapter).

<sup>111</sup> *Ibid.*

<sup>112</sup> LB Waddington, 'Evolving Disability Policies: From Social-Welfare to Human Rights an International Trend from a European Perspective' (2001) 19 *Netherlands Quarterly of Human Rights* 141-165.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.* 155.

contextual model of disability.<sup>115</sup> Referring in the footnotes to the vast literature on models, and citing Michael Oliver, she has defined that model:

as based on a socio-political approach which argues that disability stems primarily from the failure of the environment to adjust to the needs and aspirations of people with impairments, rather than from the inability of people with impairments to adapt to the environment. According to this model, disability is the result of an interaction between an impairment and an inaccessible and discriminatory environment, rather than being the consequence of a medical condition which results in reduced ability.<sup>116</sup>

On the whole, legal scholarship has (variously and with diverse terminology) referred to the social model. When commenting on the Employment Equality Directive or on the evolution of the EU action on disability, differently from what has happened in commentaries to CJEU case law, authors rarely engage critically with the model itself to a great extent. Regardless of the somewhat fuzzy reliance on UK scholarship and to the father of the social model, Michael Oliver, legal scholarship has tended to use the dichotomy medical/social model as lens of analysis. In that connection, the bedrock of disability studies has served as platform for the development of EU disability law as a cross-cutting field which is concerned with the fulfilment of disability rights and addresses equality claims of persons with disability. Disability law as a new academic field applies what Anna Lawson has termed as ‘disability critique’ to different strands of substantive law.<sup>117</sup> EU disability law makes no exception.<sup>118</sup> While being complex, stratified and reflecting the inherent sophistication of the EU legal order,<sup>119</sup> it does embed the idea of ‘disablement’ faced by persons with disabilities. It hence aims to reflect on the extent to which EU law and policy address (and redress) the disadvantage experienced by people with disabilities.

## <a> THE LEGACY OF THE SOCIAL MODEL WITHIN THE DEBATE ON CJEU CASE LAW

The influence of disability studies and the legacy of the social model emerges prominently in commentaries over CJEU case law on disability. The primary and obvious reason is that most cases (albeit not all) centre on the concept of disability for the purpose of EU law.

The first, and most widely criticised judgement, *Chacón Navas*, concerned a Spanish employee who, after being off work sick for eight months, was dismissed. The case arose from a preliminary ruling of the *Juzgado de lo Social* of Madrid which *inter alia* asked whether the employee’s health condition could be considered a disability according to the Employment

---

<sup>115</sup> See eg Waddington (n 66) 576; See also Waddington and Broderick (n 67) 57–60.

<sup>116</sup> Waddington (n 66) 579.

<sup>117</sup> A Lawson, ‘Disability Law as an Academic Discipline: Towards Cohesion and Mainstreaming?’ (2020) 47 *Journal of Law and Society* 558-587.

<sup>118</sup> The existence of EU disability law as a field has been variedly recognized. See eg Schiek who, while commenting on CJEU case law, states ‘Disability law experts have already commented on these rulings from the perspective of EU disability law and policy [...]’ D Schiek, ‘Intersectionality and the Notion of Disability in EU Discrimination Law’ (2016) 53 *Common Market Law Review* 35-63.

<sup>119</sup> Broderick and Ferri (n 1).

Equality Directive. In answering that question, the Court adopted a narrow interpretation of disability, based upon the medical model, and clearly distinguished the concept of sickness from that of disability. Waddington, in one of the first comments on the decision, cites Oliver's work, and clearly contrasts the medical model adopted by the Luxembourg judges and the social model.<sup>120</sup> Along the lines traced by Waddington, subsequent discussions of CJEU case law refer to this decision as epitomizing the medical model.<sup>121</sup>

After *Chacón Navas, HK Danmark*<sup>122</sup> was the first decision following the EU accession to the CRPD. In this case, the Court overtly cited Article 1(2) CRPD, and, in the attempt of interpreting the Employment Equality Directive in a manner consistent to the Convention, elaborated a definition of disability that is said to be based on the social-contextual model conceptualisation enshrined in the CRPD,<sup>123</sup> or to align with the social model.<sup>124</sup> Legal scholars commenting on subsequent case law such as *Z v A Government*,<sup>125</sup> *Glatzel*,<sup>126</sup> *Kaltoft*,<sup>127</sup> *Daouidi*<sup>128</sup> and *Ruiz Conejero*<sup>129</sup> referred extensively to the dichotomy of medical model vs social model, often criticising the judges for failing to fully embrace the social model.<sup>130</sup> The most contentious decision was certainly *Z v A Government*. Waddington argues that:

whilst the Court certainly paid lip service to the CRPD and the social-contextual approach to disability in this judgment, it is submitted that it failed to follow through on the implications of its own definition, and failed to apply it correctly.<sup>131</sup>

Similarly critical views were proffered by other scholars, including myself.<sup>132</sup> In a similar vein, with reference to *Glazell*, O'Brien has argued that the EU's definition of disability is based on 'the language of the social model of disability, but adhering to a predominantly medical

---

<sup>120</sup> LB Waddington, 'Case C-13/05, *Chacón Navas v Euresit Colectividades SA*, judgment of the Grand Chamber of 11 July 2006' (2007) 44 *Common Market Law Review* 487.

<sup>121</sup> Ferri and Favalli (n 5). See also DL Hosking, 'A High Bar for EU Disability Rights' (2007) 36 *Industrial Law Journal* 228.

<sup>122</sup> C-337/11 *HK Danmark* ECLI:EU:C:2013:222.

<sup>123</sup> Ferri (n 88).

<sup>124</sup> LB Waddington, 'HK Danmark (Ring and Skouboe Werge). Interpreting EU Equality Law in the Light of the UN Convention on the Rights of Persons with Disabilities' (2013) 17 *European Anti-Discrimination Law Review* 13.

<sup>125</sup> Case C 363/12 *Z v A Government Department* ECLI:EU:C:2013:60 *supra*.

<sup>126</sup> Case C-356/12 *Glatzel* ECLI:EU:C:2014:350 *supra*.

<sup>127</sup> ECJ 18 December 2014, Case C-354/13, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund* ECLI:EU:C:2014:2463.

<sup>128</sup> ECJ 1 December 2016, Case C-395/15 *Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal* ECLI: EU:C:2016:917.

<sup>129</sup> ECJ 18 January 2018, Case C-270/16 *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal* ECLI:EU:C:2017:788.

<sup>130</sup> Waddington and Lawson (n 8) 474; D Ferri and S Favalli, 'Tracing the Boundaries between Disability and Sickness in the European Union: Squaring the Circle?' (2016) 23 *European Journal of Health Law* 5; Waddington (n 8) 339.

<sup>131</sup> Waddington (n 66) 576-591.

<sup>132</sup> See *inter alia* Ferri and Favalli (n 128).



model.’<sup>133</sup> With regard to *Daouidi*,<sup>134</sup> I maintained that the CJEU ‘has also fallen short of the objective of incorporating the social model embedded in the CRPD into EU law.’ In a similar vein, Broderick, while commenting on *Ruiz Conjero*, indicates that ‘[t]he contrast the CJEU draws between the concepts of “illness” and “disability” is at odds with the interpretation of the CRPD Committee’,<sup>135</sup> and arguably with the model endorsed by the CRPD.

There is little doubt that the attempts of the CJEU to interpret EU law in a manner consistent with the CRPD have supported a growing reliance on disability studies literature in legal scholarship. Even those who do depart from the social model as lens of analysis, in fact build on the idea of disability as social construct in many ways. Schiek posits that ‘the dichotomy between a medical and a social model of disability is not a sufficient starting point to develop the notion of disability for the purposes of EU discrimination law, especially if addressing intersectional inequalities.’<sup>136</sup> Instead of classifying CJEU case law as compliant with a medical or social model of disability, she advocates for an intersectional approach and a capacious view of disability. In doing so, however, she engages extensively with disability studies scholarship, and with the origin of the social model, from the UPIAS manifesto. She also engages with the critique to the social model and proposes to move beyond it. Further, Miller, in commenting on case law related to the disability discrimination, claims that ‘instead of using the social model of disability to benchmark how the [CJEU]’s case law has developed’, he compares CJEU judgments to decisions of US courts related to the Americans with Disabilities Act.<sup>137</sup> Miller claims the inefficacy of the social model as lens of analysis. He adopts a critical stand against ‘the unifying lament’ of disability law scholarship contending that while the CJEU:

gives lip service to the “social model”, which conceptualises disability primarily as a social phenomenon that is rooted in social oppression, in reality, the Court’s rulings reveal an inability to fully disassociate itself from vestiges of the “medical model”, which views disability as a personal tragedy that should be primarily addressed through medical intervention.<sup>138</sup>

Miller posits that the term ‘social model’ means different things to different people, and that such a ‘malleability’ is the root of this success but also the cause of its limited normative value. While arguing the vagueness of the social model, he does make extensive reference to Oliver’s

---

<sup>133</sup> C O’Brien, ‘Driving Down Disability Equality? Case C-356/12 Wolfgang Glatzel v Freistaat Bayern, Judgment of 22 May 2014’ (2014) 21 *Maastricht Journal of European and Comparative Law* 723; See also C O’Brien, ‘Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability’ in D Kochenov (ed), *Citizenship and Federalism in Europe: The Role of Rights* (Cambridge University Press, 2016).

<sup>134</sup> D Ferri, ‘Daouidi v Bootes Plus SL and the Concept of ‘Disability’ in EU Anti-Discrimination Law’ (2019) 10 *European Labour Law Journal*.

<sup>135</sup> A Broderick, ‘*Ruiz Conejero*: (Re-)Conceptualizing Disability-based Discrimination and Sickness Absence at Work’ (2019) 5 *International Labor Rights Case Law* 86-91.

<sup>136</sup> Schiek (n 118).

<sup>137</sup> J Miller, ‘The European Disability Rights Revolution’ (2019) 44 *European Law Review* 67-88.

<sup>138</sup> *Ibid*.

theorisation of the social model.<sup>139</sup> In that, he clearly develops his counterargument building on disability studies, even though for critical purposes.

Miller's critique that there is no univocal understanding of the social model is well founded. However, it is undeniable that all commentators have (in some way or another) dealt with the social model. Disability studies underpin to varying degrees legal analysis of case law, and in some cases authors such as O'Brien or Schiek do engage deeply with the concept of disabling barriers and question the reasoning of the Court in that it fails to challenge oppressive social structures and stigma. Even when struggling with the idea of disability as a social construct or highlighting the practical difficulties of a social model interpretation in Court,<sup>140</sup> or calling for different approaches such as the intersectional one,<sup>141</sup> all scholars discuss or confront the social model.

#### <a> CONCLUDING REMARKS

The development of the social model of disability as a product of agency, activism and mobilisation of persons with disabilities has generated an intense academic debate which resulted in the forming of the interdisciplinary (and still evolving) field of disability studies. The adoption of the CRPD, in 2006, has brought additional flesh to the discussion on the models of disability, prompting lawyers to engage with disability studies. The human rights model, in all its nuances, supplements the social model in that it roots the view of disability as social construct into legal principles such as that of equality.

EU legal scholarship has (variedly and with diverse terminology) referred to the social model of disability, referring for the most part to Michael Oliver. When commenting on the evolution of the EU action on disability, differently from what has happened in commentaries to CJEU case law, authors tend to engage very little with the model. While footnotes often indicate that literature on the models of disability is vast, legal scholars, for the most, fail to recognise the plurality of critical counter-hegemonic elaborations to dominant medicalised understandings of disability, and tend to embrace a broad dichotomy medical/social model as lens of analysis. The analysis of CJEU case law provides, in some cases, for richer insights into the nuances of the social model. Commentaries do engage with why the Luxembourg judges have failed to address exclusionary societal structures, attitudes, and practices. Commentaries of decisions such as *Z v A Government Department*, *Glatzel* or *Daouidi*, by proposing a critique of the Court, look at the way in which disability is socially created.

Lawson and Priestley have already suggested that the social model as such provides a 'helpful lens through which [to] analyse legal rules'.<sup>142</sup> More generally, this chapter suggests that disability studies as multifaceted academic field can offer important theoretical approaches to better understand how law can dismantle barriers faced by persons with disabilities. If we look in particular at EU law, it is undeniable that disability studies have displayed and will display in the future an important influence not only on the development of EU disability law, but also on EU law scholarship because they offer theoretical frameworks and open-textured

---

<sup>139</sup> Ibid. 69-70.

<sup>140</sup> Hervey and Rostant (n 105).

<sup>141</sup> Schiek (n 118).

<sup>142</sup> Lawson and Priestley (n 98) 14.

concepts for the analysis of EU legislation and case law. In that regard, disability studies can further support legal interpretation and critique that enrich and go beyond the discussion about normative compliance of EU legislation to the CRPD.