

## DISABILITY IN ITALY: THE LEGAL CONCEPT

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### I. INTRODUCTION

It is rather difficult, from a legal point of view, to give a straightforward definition of “disability” within the Italian system, since only in 1992 an autonomous notion of “handicapped person” was introduced by Act No. 104.<sup>1</sup> As a matter of fact, for a long time, the subject matter of physical or mental impairments that can affect the human being has been approached by the legislature within the narrow perspective of countervailing economic consequences deriving from the reduction or the loss of working capability and/or from the difficulty of the human being to carry out an independent existence.

This has been due to the fact that the Italian social protection system has been based from the very beginning on a highly pragmatic approach, in the sense that dependency or independence of each citizen had to be evaluated only according to his or her earning capacity on the labor market. In such a perspective the very concept of disability, as we know it today, has never been considered relevant as such either by the Italian Constitution<sup>2</sup> or by the ordinary legislature, since public authorities’ commitment should not exceed the provision of benefits in cash aimed at countervailing the state of need of the claimant. This led to the prevalence of a monetary compensation approach that did not take into account consequences provoked within the social sphere by the dependency deriving from the above-mentioned events. In this field, a fundamental role has always been played by the family, to which a moral duty of taking care of the disabled person was traditionally recognized.<sup>3</sup>

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1. Law No. 104, Feb. 5, 1992, supp. ord. Gazzetta Ufficiale della Repubblica Italiana [hereinafter Gazz. Uff.] No. 39, supp. ord., Feb. 17, 1992.

2. COST. art. 38 (Italy) (recognizing the right to social security).

3. See E. Ales, *Famiglia e diritto della sicurezza sociale: modelli e strumenti giuridici per un nuovo Stato sociale*, 1 IL DIRITTO DEL LAVORO 153 (1999).

As a matter of fact, on the one hand, in 1978, a National Health Service (NHS), financed out of general taxation, was introduced, on the other, in 2000, the Italian legislature adopted a comprehensive intervention in order to create a public-private integrated social protection system aimed at supporting citizens in need, not only from an economic point of view, but also for providing benefits in services and in kind, coping with the problem of social inclusion<sup>4</sup> of persons who are affected by the above-mentioned impairments and have, consequently, to be considered disabled.<sup>5</sup> Although the Italian social protection system is now slowly shifting toward a more “socially sensitive” model, as witnessed by the above-mentioned Acts of 1992 and 2000,<sup>6</sup> it is rather evident that the long-lasting presence of the above-mentioned pragmatic approach of mere monetary compensation for impairments has produced relevant consequences even on such a virtuous development as far as the definition of disabled person is concerned.

In order to clarify these consequences it will be worthwhile to present a summary overview of the way in which the subject matter of impairment has been dealt with within the above-described traditional approach to social protection. In doing so, our starting point has inevitably to be represented by the social security domain, in which schemes and provisions covering such conditions of the human being has been provided since the very beginning of its development. Our overview will, obviously, be strictly oriented at and focused on the definition of the impairment resulting from the personal scope of application of the most important provision in the field. This will allow us to present useful elements on which legislative intervention of the nineties concerning handicap and disability has been based.

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4. On the issue of social inclusion also at EU level, see E. Ales, *La modernizzazione del modello di protezione sociale europeo: la lotta all'esclusione sociale attraverso l'open method of co-ordination*, 27 QUADERNI DI DIRITTO DEL LAVORO E DELLE RELAZIONI INDUSTRIALI 37 (2004).

5. See Law No. 328, Nov. 8, 2000, supp. ord. Gazz. Uff. No. 265, Nov. 13, 2000; E. Ales, *Diritto del lavoro, diritto della previdenza sociale, diritti di cittadinanza sociale: per di un "sistema integrato di microsistemi"*, in ARGOMENTI DI DIRITTO DEL LAVORO 981 (2001).

6. See Law No. 328 of 2000; Law No. 104 of 1992.

II. REDUCTION OR LOSS OF WORKING CAPABILITY AND  
DIFFICULTY OF THE HUMAN BEING TO CARRY OUT AN  
INDEPENDENT EXISTENCE: AN OVERVIEW OF LEGAL PROVISIONS  
WITHIN THE SOCIAL SECURITY DOMAIN

If our analysis has to start from the social security domain, the traditional distinction on which the Italian social security system has been built up has to be immediately stressed, i.e., that of the presence of schemes financed out of general taxation (social assistance) and schemes financed by employers' and the employees' contribution by consequence of the compulsory enrollment principle of workers that rules the social insurance model in Italy.<sup>7</sup>

A. *Social Assistance Schemes for Citizens*

A first group of provisions refers to social assistance benefits that, in the view of disability, can be considered belonging to the traditional "passive" approach (benefits in cash) since, even though their names may evoke benefits in kind, in reality they consist in a mere economic support by which the beneficiary has to cope with the need.<sup>8</sup> Anyone but a worker who finds himself or herself in the above-mentioned conditions (the reduction or the loss of working capability and/or the difficulty of the human being to carry out an independent existence) because of a natural or mechanic event not linked to the performance of a working activity can be covered by these provisions. In order to correctly understand the way of reasoning followed by the Italian legislature, we have to imagine the existence of the human being artificially divided into three periods, according to a conceptual model typical of the European experience.

The first period is placed between birth and the fifteenth year of age: during this period, according to a legal presumption, no working capability can be recognized to anybody so that the degree of his or her dependency/independence may not be calculated adopting working capability as a relevant parameter. For this reason the criteria of permanent difficulties to perform tasks and functions related to age are used in order to recognize the right of the claimant to a monetary benefit.

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7. E. Ales, *Occupational Accidents in a EU Perspective: Is There Place for the Principle of Freedom of Choice?*, EUR. L.J. (forthcoming).

8. See Decree-Law No. 509, Nov. 23, 1988, Gazz. Uff. No. 278, Nov. 26, 1988; Law No. 508, Nov. 21, 1988, Gazz. Uff. No. 277, Nov. 25, 1988; Law No. 18, Feb. 11, 1980, Gazz. Uff. No. 44, Feb. 14, 1980; Law No. 118, Mar. 30, 1971, Gazz. Uff. No. 82, Apr. 2, 1971.

The second period is placed between the fifteenth and the sixtieth, for women, or the sixty-fifth, for men, year of age: during this period, always according to a legal presumption, everybody owns a theoretically full working capability so that this one can be well considered the relevant parameter of his or her dependency/independence. Reduction or loss of the working capability gives the right to a monetary benefit that should allow the economic independence of the person concerned. As we will see after dealing with the notion of disability as far as employment services are concerned, it is very important to stress the fact that a reduction of the working capability, which gives entitlement to a social security benefit, does not exclude in itself the possibility for the beneficiary to perform, by his or her residual capability, an adequately structured working activity.

The third period is placed between the sixtieth, for women, or the sixty-fifth, for men, year of age and death: during this period, always according to the same legal presumption, anyone loses his or her working capability, so this can no longer be considered a relevant parameter of his or her dependency/independence. Once again, the criteria of permanent difficulties to perform tasks and functions related to age are used in order to recognize to the claimant a right to a monetary benefit.

In any case, an *Indennità di accompagnamento* (accompanying grant) is granted to fully incapable or dependent persons or for persons with limited mobility, without any age limit. Finally, an *Indennità mensile di frequenza* (monthly attendance grant) is provided for persons under eighteen who attend rehabilitation courses or school classes. In the case of blind and deaf and dumb persons, the nature of the physical impairment plays a relevant role within the structuring of social assistance, leading to the provision of peculiar schemes and benefits on the sole basis of their physical conditions.<sup>9</sup>

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9. For blind persons: a) *Ciechi assoluti*, absolutely blind in both eyes; b) *Ciechi parziali*, partially blind (no more than one-twentieth of residual sight from both eyes, even using corrective instruments). Benefits: a) absolutely blind: *pensione non reversibile per ciechi assoluti* (pension for absolutely blind with no entitlement for survivors—from eighteen years old to death); *Indennità di accompagnamento* (accompanying grant—see text under *invalidità civile*); b) partially blind: *pensione per ciechi parziali* (pension for partial blind, which is means-tested and has no age limit); *indennità speciale per ciechi parziali* (special grant for partially blind, which is not means-tested and has no age limit). See Law No. 138, Apr. 3, 2001, Gazz. Uff. No. 93, Apr. 21, 2001; Law No. 508 of 1988; Law No. 382, May 27, 1970, Gazz. Uff. No. 156, June 23, 1970; Law No. 406, Mar. 28, 1968, Gazz. Uff. No. 98, Apr. 17, 1968; Law No. 66, Feb. 10, 1962, Gazz. Uff. No. 61, Mar. 7, 1962.

Benefits for deaf and dumb persons (those affected by deafness from birth or who become deaf during the first years of life before learning to speak) include: *pensione non reversibile per sordomuti* (pension for deaf and dumb, which covers those between eighteen and

*B. Social Insurance Schemes for Workers*

Within the framework of social insurance schemes covering workers, we have to distinguish two different groups of provisions. The first group is that one covering workers who have lost or seen reduced their working capability because of work accidents or industrial diseases that occurred during and are linked to the performance of a working activity considered, by the legislature, highly dangerous. It is self-evident, taking into account what we have said before, that persons under fifteen are excluded from the personal scope of application of these provisions, since, from a legal point of view, they have no working capability at all. Persons over sixty, if women, or over sixty-five, if men, are included only if they become incapable to work during the second above-described period of their existence for the reasons stated above.

In our perspective, a high degree of relevance has to be recognized to the distinction between permanent and temporary nature of working incapability deriving from work accidents or industrial disease, since one of the legislative interventions that refers to the notion of disability<sup>10</sup> is aimed at looking for a possible reinsertion of the injured or sick worker within the labor market using his or her residual working capability.

Permanent incapability is that one that will last lifelong. At its turn, it can be partial, i.e., affecting over 10% of the full working capability, according to a system of evaluation that will be explained later or absolute, i.e., affecting between 80 and 100% of the full working capability.

Temporary incapability to work is one lasting for a limited period of time, after which the worker regains his or her previous working capability. At its turn it can be partial, in the sense that it only affects the specific ability of the worker, not allowing him or her to perform usual tasks, or absolute, excluding the performance of any task. Benefits in cash (like the Permanent Inability Annuity, to which we will come back later)<sup>11</sup> and medical care are provided by the relevant

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sixty-five years of age, is means-tested, and provides no entitlement for survivors); *indennità di comunicazione* (communication grant, which varies by the level of hypacusia, is not means-tested, and provides no entitlement for survivors). All citizens are covered by this scheme. See Law No. 508 of 1988; Law No. 33, Feb. 29, 1980, Gazz. Uff. No. 59, Feb. 29, 1980; Law No. 381 of 1970.

10. See Law No. 68, Mar. 12, 1999, Gazz. Uff. No. 57, Mar. 23, 1999.

11. For permanent, total, or partial inability to work: *rendita da inabilità permanente* (permanent inability annuity), a wage-related benefit; *assegno per assistenza personale continuativa* (Personal Continuous Assistance Grant), which is added to the permanent inability

social insurance body (INAIL—*Istituto Nazionale per gli Infortuni sul Lavoro*).

The second group of provisions is that one covering workers who find themselves in the above-mentioned conditions because of an event that is not linked to working activities covered by the work accident and industrial disease scheme. As a matter of fact, a specific social insurance scheme is provided for the reduction of the loss of working capability due to physical or mental failures (such as car accidents or heart attack). Also in this case we have to distinguish between different status, that of workers affected by invalidity, i.e., a reduction of at least one-third of the working capability in relation to his or her skills and attitudes; and that of workers affected by inability, i.e., by absolute and permanent impossibility to perform any work. Benefits in cash (like the Ordinary Invalidity Grant, to which we will come back later)<sup>12</sup> and medical care are provided for both categories of workers by the relevant social insurance body (INPS—*Istituto Nazionale per la Previdenza Sociale*).

From what we have seen so far, we can conclude that the Italian social security system approaches the issues of working incapability and difficulties of the human being to carry out an independent existence in a very fragmented way, distinguishing them according to reasons that led to the impairment and to the subjective conditions of the person concerned. A first consequence of such an approach is that similar situations are treated in a different way in (economic) terms of benefits provided. A second and more relevant consequence to us is that each one of the above-mentioned schemes is called to make its own evaluation of the presence or the degree of the above-mentioned preconditions. Such an evaluation, as we will try to explain in the following paragraph, is carried out according to highly differentiated models that will obviously produce different results, although referable to the same concrete situation of impairment.

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annuity for totally disabled persons. For temporary absolute inability to work: *indennità giornaliera* (daily grant), a wage-related grant.

12. For invalidity: *assegno ordinario di invalidità* (ordinary invalidity grant) for a period of three years, renewable twice on demand, then automatically confirmed; *assegno privilegiato di invalidità* (privileged invalidity grant), for workers whose invalidity derived from the performance of working activities not covered by the work accident and professional disease scheme. For inability: *pensione di inabilità* (inability pension); *assegno mensile di assistenza personale continuativa* (personal continuous assistance grant), which is added to the inability pension for totally dependent persons. Law No. 222, June 12, 1984, Gazz. Uff. No. 165, June 16, 1984.

III. EVALUATION MODELS APPLIED WITHIN THE SOCIAL SECURITY DOMAIN IN ORDER TO DEFINE THE NOTION OF WORKING INCAPABILITY AND DIFFICULTY OF THE HUMAN BEING TO CARRY OUT AN INDEPENDENT EXISTENCE: TWO PARAMOUNT EXAMPLES

In order to clarify the relevance of our point concerning the negative consequences of the presence of different evaluation models of assessing the existence of similar preconditions for disability, we would like to propose an overview of the way in which these models operate in concrete, with reference to two of the above-mentioned benefits: the Ordinary Invalidity Grant and the Permanent Inability Annuity. Within the wide range of the above-described schemes, we have chosen two benefits that can be considered paramount examples of the philosophy on which the Italian system is based.

As a matter of fact, the Ordinary Invalidity Grant (OIG) has been used, for a long time, by the Italian Government instead of introducing more effective unemployment schemes, in order to keep the official unemployment rate lower than that was in reality. That was possible due to the fact that, before 1984, the relevant notion of inability was linked to the residual “earning capability” of the worker, referring both to the given socio-economic conditions of his or her place of residence and—but less—to his or her physical conditions. Only after 1984 has the mentioned notion of invalidity been linked to the “residual working capability” of the claimant in itself, with no reference to socio-economic condition but only to personal and specific professional attitudes of the worker.

On the other hand, the Permanent Inability Annuity (PIA) can be considered one of the basic benefits within the Italian social insurance system. With its long-lasting history and application (the relevant scheme was established in 1891<sup>13</sup>), it allows one to investigate the very core of one of the most important definitions of impairment, at least from the traditional point of view, that one linked to work accident and professional diseases. Within our perspective, both these provisions are inspired by the logic of economic restoration of the damage and, for this reason, as we will see, both refer to the level of invalidity more than stressing the relevance of the impairment in social terms and in terms of residual employability of the beneficiary.

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13. See E. Ales, *Modelli teorici e strumenti giuridici per la tutela dei lavoratori: la nascita delle assicurazioni sociali in Italia*, 6 RIVISTA DEGLI INFORTUNI E DELLE MALATTIE PROFESSIONALI 717 (1999).

### A. *Ordinary Invalidity Grant (OIG)*

In order to facilitate the comprehension of the assessment procedure, we have structured our analysis according to three different sections concerning: A) invalidity assessment criteria; B) methods of assessment; and, C) instruments used in measuring extent and scope of invalidity. Such an articulation of the subject matter will be used for the PIA too, allowing us to emphasize differences between the two procedures.

#### 1. Invalidity Assessment Criteria

A first core element for the assessment of invalidity obviously consists in the diagnosis of medical conditions, through a Medical Assessment (hereafter MA). As a matter of fact, invalidity may derive from the permanent reduction of at least one-third (up to 80%) of working capability of the insured person due to disease (not occupational) or to a physical or mental impairment. All sorts of pathologies—including congenital—are taken into account within the scope of application of OIG. The recognition of debilitating symptoms of a condition is one of the most relevant elements of the above-mentioned diagnostic activity, since it is not the pathology itself that is relevant, but its consequences on the individual. This is due to the fact that no list is provided by the law in order to define a static correspondence among certain pathologies and a predefined level of invalidity. Furthermore, it is important that the event that led to invalidity does not fall under the scope of application of the work accidents and professional diseases scheme. If this not the case, the cause of pathologies is not relevant as such for the entitlement to OIG. During the MA, an important role is played by the evaluation of the above-mentioned conditions but only with reference to the working activity performed by the claimant and to his or her working environment. Notwithstanding the fact that OIG strictly refers to working capability and working environment, assessment of restrictions in activities of daily life is provided in order to give to MA a complete picture of the personal capacities of the claimant.

A second major element of the assessment of invalidity is represented by the evaluation of the residual ability to undertake remunerative employment. It is carried out during MA by medical practitioners, without any participation of labor market experts because, in the case of OIG, the rate of invalidity is defined by taking into account the work usually and prevalently performed by the claimant at the moment of the event. One may say that this

evaluation is made confronting the physical and mental condition of the claimant after the pathology has produced its effects, in relation to his or her working attitudes and to his or her professional skills, with reference to the previously prevalent activity. The assessment has to refer to the specific working capability of the claimant, i.e., first to the job the worker performed before the event occurs. No assessment of ability to participate in other valued social activities is provided.

## 2. Methods of Assessment

As we can easily derive from what we have just said, in this case medical examination and diagnosis constitute the core of the assessment of invalidity. It consists of a two-step procedure carried out, first of all, on the patient by a medical practitioner of the NHS, who has to fill in a questionnaire prepared by INPS in order to claim for OIG, in which the pathology has to be clearly described, and second, on the patient as claimant by INPS medical practitioners.

This latter is the most interesting and controversial phase of the OIG assessment system. As a matter of fact, such a traditional and exclusive attribution of competencies to the provider led to the development of highly-specialized medical staff within it, which, nothing being said by the legislature, has defined guidelines or assessment of the most relevant pathologies, according to what we can call a technical discretionary power, even constantly taking into account progresses made by legal medicine. In particular, INPS, through its General Directorate for Legal Medicine, has elaborated specific guidelines on the way medical assessment has to be performed, according to diagnostic protocols. More generally, INPS has defined a questionnaire (called a legal medical report) that has to be filled in by the medical practitioners who are carrying out MA, in which a complete examination of the functioning of the main physical systems is carried out according both to the diagnosis done by NHS medical practitioner and to general health conditions as they appear to INPS practitioners.

Another point of interest refers to the observation and assessment of a person's capability by medical practitioners. During MA, a direct investigation of a person's working capability is carried out by INPS practitioners, according to a very detailed questionnaire that is aimed at giving a concrete understanding of the residual working capability of the claimant. Evaluation refers to the heaviness of work, the position in which work has to be performed (sitting, upright, etc.), working environment (humid, hot, cold, open air,

indoor, temperature variations, use of stairs or ladders, etc.), working conditions (work alone or together, using machines or particular instruments, etc.), in order to decide if the yet-to-be-performed working activity will produce abnormal wear and tear on the worker and can produce a life danger. MAs' decisions are strictly binding for INPS that ratified them without any other assessment.

### 3. Instruments Used in Measuring Extent and Scope of Invalidity

MA is the main instrument for measuring the extent and the scope of invalidity as far as OIG is concerned. Even though impairments that give the entitlement to OIG may be exactly the same as those that give entitlement to PIA, in the case of OIG, no statutory list of impairments is provided by the law, as happens for PIA. Moreover, caselaw explicitly denies the analogous application of such a list to MAs concerning OIG. Since the law requires a personal evaluation of residual working capability, it is clear that the highest degree of medical discretionary power rules MAs. Since these are carried out at a local level in each INPS section, INPS' General Coordination on Legal Medicine has developed common protocols for more frequent pathologies—for instance, carcinomas—in order to obtain MAs as homogeneous as possible.

The same basic purpose of the assessment procedure, i.e. to give the MA the widest range of decisional power in order to fit the specific needs and conditions of the claimant, constitutes the most important point of criticism of it. As a matter of fact, the vague definition of residual working capability provided by the legislature gives too much discretionary power to MA, so that the definition of invalidity may be considered a sort of empty box that is filled by MA according to INPS guidelines.

### *B. Permanent Inability Annuity (PIA)*

#### 1. Inability Assessment Criteria

Also in the case of PIA, medical diagnosis can be considered a crucial element for the definition of what is called, in this case, inability. As a matter of fact, in order to be entitled to such a benefit, physical or mental permanent conditions that will totally withdraw or partially reduce—by at least 10%—the working capability of the injured or ill worker are required. On the other hand, the scheme providing PIA presents a more detailed and sound legal framework, which limits the discretionary power of the provider and gives to the

claimant a certain degree of clearness within the valuation process, even though, obviously, with a lower degree of flexibility.

This is extremely clear in the case of professional diseases that are listed by the law and in which a medical diagnosis of the disease, together with the declaration of the worker to have performed a peculiar activity to which the disease is linked by the law, will suffice in order to guarantee the eligibility for PIA, without any further need of proof in relation to the causal link between work and disease. For all other diseases the burden of proof is borne by the worker.

The same happens as far as work accidents are concerned, since the entitlement to PIA is recognized if the worker, during the performance of a peculiar working activity defined as dangerous by the law, suffers physical or mental damage that derives from a violent and quick event. This must have been produced by an abnormal power in an exactly defined moment in time and space. The worker has to inform the employer immediately in order to start the assessment procedure. Both lack or loss of anatomical structures or functions are assessed in order to quantify the degree of inability. As we will see later, the above-mentioned events constitute the basis for the definition of the degree of inability according to the table of correspondence given by the law.

Assessment of restrictions in sensory perception or emotional response is carried out in the case of work accidents in order to define the degree of inability. Since these events are not inserted within any table of correspondence, the Central Medical Directorate of INAIL, edited in 1999, detailed guidelines for its staff in which standard definitions of the degree of inability deriving from each event in this field are given (see below). On the contrary, no assessment of restrictions in activities of daily life is provided, since the inability only refers to working capability. Such an assessment is provided only in the case of a claim of the *Personal Continuous Assistance Grant* that can be added to the benefit if the worker becomes totally dependent for his or her subsistence. Surprisingly, no assessment of ability to undertake remunerative employment and to participate in other valued social activities is provided, since, as explained above, PIA is a mere restorative benefit.

## 2. Methods of Assessment

Having passed the first medical examination carried out by a NHS practitioner, the worker becomes automatically a claimant and, as such, he or she is examined by medical practitioners employed by

INAIL or appointed by it. No direct investigation of a person's capabilities by medical or other professionals (e.g., labor market specialists) is provided. INAIL medical practitioners only verify a worker's degree of inability, determining this according to the list of correspondence provided by the law. The final decision on the presence of inability is taken by INAIL according to the mentioned internal evaluation after having verified the employment of the workers in the listed activities.

### 3. Instruments Used in Measuring Extent and Scope of Inability

As far as PIA is concerned, a worker's medical record and history has to be considered of high relevance within the evaluation of the degree of inability and of consequent entitlement and amount of PIA. As a matter of fact, terms of reference of the evaluation cannot be considered a standard notion of working capability but of that possessed by the injured worker at the moment in which he or she was employed in the listed activity. So, any pre-existing impairment has to be recorded in his or her personnel file at the moment of hiring. In particular, if the impairment is not due to working activity, the loss of working capability and, consequently, the amount of the benefit, will be calculated taking into account the pre-existing degree of inability. The most important instrument for assessment of inability is the statutory list of impairments, defined in clinical terms and provided directly by the law.<sup>14</sup>

Since, as we stated above, PIA is a passive policy benefit, neither general labor market information about jobs that are "equivalent" to the one performed by the claimant, nor information about labor market conditions or availability of commensurate jobs, nor information about employment prospects (e.g., availability of vacancies in suitable employment and/or previous employment), nor information about a person's characteristics and backgrounds are provided by the scheme in order to reinsert beneficiaries with residual working capability within the labor market. From this summary and situated overview of the social security system we can derive two relevant considerations.

First, the fact that, until 1992, the Italian system only provided social security benefits like OIG and PIA to persons affected by impairments, without offering them any other support in the view of

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14. Presidential Decree No. 1124, June 30, 1965, *supp. ord. Gazz. Uff. No. 257, Oct. 13, 1965.*

their (re)insertion within society, led to a situation of substantial social exclusion of disabled persons who could only rely on initiatives adopted by families or by NGOs.

Second, the fact that invalidity and inability, although expressions of the same problems, are assessed according to a completely different evaluation model, leads to an unreasonable differentiation as far as the treatment of persons affected by impairments is concerned, not only under the point of view of the entitlement to benefits provided by the different schemes but also, as we will see later, within the perspective of a general definition of handicap and disability.

The following paragraphs are dedicated to the analysis of the impact that these consequences have produced on the legislation that was enacted during the nineties on handicap and disability, with specific reference to the definition of these concepts.

#### IV. THE DEFINITION OF HANDICAPPED PERSONS BY ACT NO. 104 OF 1992 AS A CONSEQUENCE OF THE TRADITIONAL APPROACH TO IMPAIRMENT

As a direct consequence of the lack of public intervention aimed at supporting persons affected by impairments beyond the narrow perspective of the economic compensation of working incapability and difficulty of the human being to carry out an independent existence adopted by the above-described social security system, the Italian Parliament, in 1992, passed Act No. 104.<sup>15</sup> As far as the personal scope of application is concerned, this Act refers to: a) *persona handicappata* (handicapped person), i.e., any person in a condition of physical, mental, or sensory handicap, which causes him or her difficulties in learning, in establishing social relations, in integrating into the labor market and that may lead to social exclusion or social disadvantage; b) *persona con handicap in situazione di gravità accertata* (severe handicapped person), i.e., a person whose handicap has so reduced his or her individual autonomy that permanent, global, and continuous assistance is needed.

If, on the one hand, it is rather evident that, in this case, the definition of handicap represents a crucial issue as far as the entitlement to benefits is concerned, on the other, Act No. 104 of 1992 is based on a different approach,<sup>16</sup> according to which the reasons of the impairment (handicap) are not relevant as such, since the aim of

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15. Law No. 104, Feb. 5, 1992, supp. ord. Gazz. Uff. No. 39, Feb. 17, 1992.

16. *Id.*

the provision is to cope with its consequences. For this reason, and taking into account what we have stressed before as far as the traditional passive approach to impairment within social security is concerned, theoretically speaking, the definition of handicap should not rely on the evaluation models provided by the same social security system. In practice, even if it would be hard to state the presence of a direct and formalized link between the two domains, allowing a comprehensive definition of handicap (taking into account the social security aspects), interferences, as far the definition is concerned, are frequent and relevant.

In order to clarify this point, let us start, as we did before, from a practical example consisting of a benefit to which a handicapped person may be entitled according to Act No. 104 of 1992, i.e., the Severe Handicapped Persons Leaves (SHPL), which consists of paid leaves granted both to relatives responsible for handicapped persons and to the handicapped worker.<sup>17</sup> Also in this case, the definition of severe handicap conditions comes immediately at stake.

A medical diagnosis of physical, mental, or sensory conditions that cause difficulties in learning, in establishing social relations, in integrating into the labor market, and that may lead to social exclusion or social disadvantage is obviously required by the law, but it does not entail, as with OIG and PIA, either special responses to particular diseases and conditions or the recognition of debilitating symptoms of a certain condition in order to be entitled to the benefit.

On the other hand, it is difficult to say if recognition of an event or experience that caused the handicap is needed. As a matter of fact, in this case medical assessment is primarily aimed at investigating if the presence of the above-mentioned physical, mental, or sensory conditions leads to difficulties of integration or to the permanent and total loss of independence. So one may say that, in certain cases, the evaluation of handicap may follow a first MA within the social security system from which a certain degree of invalidity/inability has emerged (e.g., a combination of partial invalidity and handicap assessments if the claimant of SHPL is a worker in severe handicap conditions). In other cases, the assessment of handicap conditions may absorb MA of impairment required under the social security system, just because according to Act No. 104/1992 the same Medical Panel (MP, to which we will come back later) is responsible for both assessments.<sup>18</sup> This will happen, for instance, if parents claim a

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17. *Id.*

18. *Id.*

Pension for Partial Blind for their child. In the same assessment, MP may declare the entitlement to the Pension and the consequent presence of a condition of handicap or severe handicap of the child. In this case, the assessment of blindness is carried out using a list of rating impairments according to which the degree of invalidity and of handicap will be declared.

The same conclusion can be reached in the case of the assessment of restrictions concerning physical movements, sensory perceptions, or emotional responses. After an MA, MP can be asked to assess once more and for the different purpose of handicap recognition the mentioned restrictions in order to state the entitlement to SHPL. Since this can be considered an active policy measure, the assessment shall not refer to the degree of inability related to working capability but to the presence of difficulties in integrating the handicapped into social life.

The assessment of restrictions in activities of daily life can be considered the most important part of the task attributed to MP in order to state handicap conditions. The very scope of such an assessment is to clarify what kind of personal behaviors and actions cannot be performed because of the impairment and what kind of assistance will be needed for personal life. In order to give scientific basis to this assessment, an MP will have to use WHO instruments, such as ICIDH-2.

In order to present the claim for the assessment of handicap conditions, a medical certificate issued by an NHS medical practitioner in which the nature of the impairment is stated, is, as usual, needed.<sup>19</sup> As far as the assessment of conditions or entitlement to SHPL is concerned, the claimant must refer to the previously mentioned MPs, set up at a local level by the National Health Service within the *Aziende Unità Sanitarie Locali* (AUSL), i.e., a totally different evaluation body compared to those appointed within the social security system by INPS and INAIL.

On the other hand, and more relevant, since 1990 (according to Act No. 295), MPs are also responsible for the assessment of health conditions of persons claiming social assistance benefits provided under the social security system (see par. 1.1).<sup>20</sup> In this case, a statutory list of impairments contained in the Decree of the Ministry of Health February 5, 1992 has to be applied during the assessment.<sup>21</sup>

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19. Presidential Decree No. 698, Sept. 21, 1994, Gazz. Uff. No. 298, Dec. 22, 1994.

20. Law No. 295, Oct. 15, 1990, Gazz. Uff. No. 246, Oct. 20, 1990.

21. Ministerial Decree, Feb. 5, 1992, supp. ord. Gazz. Uff. No. 47, Feb. 26, 1992.

MPs are composed of a medical examiner who presides over the MP and two medical practitioners, one of them chosen from specialists in occupational medicine. During the assessment, the claimant can be assisted by his or her own practitioner.

In order to decide which kind of support is needed by the claimant, and, in certain cases, by relatives who are responsible for his or her assistance, MPs, integrated from time to time by social workers and experts in the relevant sector, will assume detailed information on claimant conditions. In particular, all this information is required in order to establish to what extent the handicapped person may profit from the benefits provided by the law, according to the nature and the degree of the impairment, to the Residual Individual Capability (RIC) and to the efficacy of rehabilitative care.

RIC may be seen as the crucial concept within the assessment of independency of the claimant. It derives from a comprehensive evaluation of all aspects of an individual's attitude toward social life and it entails something more than a mere medical assessment. That is the reason why MPs are integrated by experts in different fields of human science. Following the different degree of RIC, handicap conditions are qualified, according to the discretionary power of the MPs, as slight, medium, heavy, and severe. Only the latter is, as we have seen, strictly defined by the law.

In case of assessment for SHPL, MPs are integrated, according to Article 4 Act No. 104/1992 by a social worker and an expert chosen in relation to the nature of the case that is to be examined.<sup>22</sup> Decisions made by MPs are transmitted to the Local Medical Committee for Invalidity and War Pensions, an administrative body set up by the Ministries of the Treasure, Interior, and Defence (because of the competences on war pensions), composed also of practitioners, who have to certify the decision. If no motivated observations come from the Committee, the assessment can be confirmed by MPs. Claims against decisions made by MPs and Committees have to be directed to the High Medical Committee set up by the Ministry of the Treasury.

A certificate of handicap is finally released to the claimant, together with the entitlement to SHPL, if severe conditions are assessed. A clear-cut conclusion can be derived from the just proposed analysis. Although based on a theoretically speaking different approach founded on the evaluation of consequences of impairments on the person affected, such a system is subject to heavy interference by the social security assessment procedures, both from

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22. Law No. 104 art. 4, Feb. 5, 1992, *supp. ord. Gazz. Uff. No. 39, Feb. 17, 1992.*

the point of view of the previous assessment of the nature of the impairment that leads to the recognition of the handicap condition, and from the point of view of the simultaneous evaluation of impairment and handicap conditions that are carried out by MPs when the claimant is asking for a social insurance benefit.

In the latter case, we can say that such an interference can be considered a positive one, since the same evaluation body is called to assess the nature of the impairment and the consequences derived from it in terms of handicap. However, in the first case, a negative effect has to be highlighted. As a matter of fact, the relevance of the assessment carried out under social insurance schemes confirms the yet-to-be mentioned unjustified differentiation as far as the evaluation of the same impairment is concerned.

In this view, the fact that, in a legal perspective, handicap can be considered as a second level concept linked to specific preconditions referable to the person concerned will emphasize the relevance of the above-mentioned differentiations deriving from the diverse evaluation models provided for within the social security system, instead of leading to a unitary and comprehensive assessment of the nature of the impairment and the degree of the handicap, as is highly desirable when seeking equal treatment for persons affected.

#### V. DISABILITY AS A SECOND LEVEL CONCEPT AND ITS CONSEQUENCES ON EMPLOYMENT SERVICES: THE DISABLED WORKER

The “second level approach” has been confirmed also by the second relevant legislative intervention enacted during the nineties,<sup>23</sup> concerning the reform of employment services for persons affected by impairments.<sup>24</sup> Yet, in 1968, the Italian Legislature set up a compulsory hiring system for these persons by employers, based on the assessment of the impairments carried out under the social security system. This meant, as we have stressed before, that no relevance was recognized to the evaluation of the residual working capability of the worker, who was often placed within the firm without a real chance of being effectively employed by the employer.

In order to recognize a substantive right to work<sup>25</sup> of persons affected by impairment, Act No. 68 establishes a complex evaluation

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23. Law No. 68, Mar. 12, 1999, Gazz. Uff. No. 57, Mar. 23, 1999.

24. DIRITTO AL LAVORO DEI DISABILI, COMMENTARIO ALLA LEGGE NO. 68 DEL 1999 (M. Cinelli & P. Sandulli eds., 2000).

25. CONST. art. 4 (Italy).

system of the residual working capability, which is aimed at placing workers in a suitable job and workplace, allowing the employer to profit from their performance.<sup>26</sup>

In this case, the above-mentioned preconditions coincide with or are linked to the reduction or loss of working capability deriving from an impairment that is assessed according to the above-described evaluation models: those provided by social insurance, when impairment affects a worker; that provided by Act No. 104 of 1992, when the person concerned falls under the scope of the social assistance system.<sup>27</sup>

The Italian legal system introduced a further notion, that one who is disabled has a right to particular employment services, based on the above-mentioned evaluation models. Although this can be considered, at first sight, as a mere functional definition, since it just recognizes the entitlement to the particular employment services according to the presence of the above-mentioned preconditions, it will be worth analysis because, following the peculiar evaluation process to which the person is submitted, an interesting notion of the disabled worker emerges.

Moreover, taking into account what we have said before as far as the conditions under which one can be considered handicapped also entails difficulties to be integrated into the labor market (see par. 3), a concrete danger of overlapping may be envisaged by consequence of the establishment of a peculiar placement system dedicated to disabled persons, defined according to the evaluation model provided by Act No. 104 of 1992.<sup>28</sup>

The functional definition of a disabled person provided by Act No. 68 of 1999, notwithstanding its narrowest scope of application, may interfere with that of handicapped person provided by Act No. 104 of 1992 when it comes to difficulties of integration within the labor market.<sup>29</sup>

For these reasons we would like to offer a summary of the basic ideas that rule the assessment of the degree of disability within the Employment Services for Disabled (ESD) in which traditional impairments and handicaps are at stake. This is a global assessment

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26. Law No. 68 of 1999.

27. Law No. 104 of 1992.

28. *Id.*

29. *See id.*; Law No. 68 of 1999.

approach that will involve doctors, social workers, labor market experts, teachers, and employees' and employers' representatives.<sup>30</sup>

As we highlighted before, ESD may be seen as the most complex product of a new active approach toward disability. This means that under its umbrella, all sorts of impairments can be considered in relation to the residual working capability of the disabled person. The basic concept is, then, that through ESD the State shall try to find, by all necessary means, a working activity suitable for the disabled person in order to guarantee his or her social inclusion.

This task is performed, first of all, by using the system of global assessment of capabilities in relation to labor market data. It is evident that such a process starts from a medical diagnosis of physical and mental conditions. Nevertheless, in this view, many problems arise from the fact that ESD has to be considered as an umbrella policy because of the stressed coexistence of different models of assessment of disability conditions. As a matter of fact, ESD covers persons affected by all the above-described impairments and, for this reason, no special responses to particular diseases or conditions and no recognition of debilitating symptoms are required.

As an umbrella provision, ESD also covers workers injured by work accidents or affected by professional diseases in order to find them suitable employment. It is very interesting to stress that, according to Act No. 68/1999, in these cases the assessment carried out using the above-described method for PIA is sufficient to evaluate and to verify the residual working capability of the claimant, so that the Specific Assessment (hereafter SA) required for all other forms of impairments by the same Act No. 68/1999 is not needed.<sup>31</sup> This is surprising, because, as we have seen before, the method used for PIA is only aimed at defining the degree of inability of the worker, without any real assessment of global residual working capability.

The same remark can be proposed as far as the assessment of lack or loss of anatomical structure or function is concerned. If we take into account an identical event, e.g., total loss of the right arm, a different assessment process will be followed depending on whether the loss occurred because of a work accident or because of other reasons not connected with working activity. In the first case, the only assessment will be the one performed under PIA scheme. In the second case, a first assessment will be provided in order to declare the

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30. For a first evaluation of the process in action *see* ISTITUTO PER LO SVILUPPO DELLA FORMAZIONE PROFESSIONALE DEI LAVORATORI [ISFOL], SOCIETÀ DELL'INFORMAZIONE E PERSONE DISABILI (A. Scialdone, P. Checucci & F. Deriu eds., 2003).

31. Law No. 68 of 1999.

degree of invalidity, according to the quoted tables contained in Decree of Ministry of Health February 5, 1992,<sup>32</sup> and SA will be then carried out by MPs according to specific provisions (see below). Both persons will be supported by ESD, but only the second one will benefit from the global evaluation of the residual working capability introduced by Act No. 68/1999 through SA.<sup>33</sup>

If we look only at the SA method introduced by Act No. 68/1999, we may see that a wide use of WHO's ICIDH instrument has been done as far as the assessment of restrictions in physical movements, sensory perceptions, or emotional responses is concerned.<sup>34</sup> As a matter of fact, MPs shall evaluate conditions of disability according to the Decree of the President of Council of Ministers January 13, 2000, which provides detailed parameters aimed at defining, first of all, the so-named Functional Diagnosis (FD) of the claimant.<sup>35</sup>

When it comes to the assessment of ability to undertake remunerative employment, we have to highlight a concrete overlapping between Act No. 104 of 1992 and Act No. 68 of 1999.<sup>36</sup> As a matter of fact, MPs, supported by a Technical Committee (TC) set up in each Province, have to draw up the Working and Social Profile (WSP), in which information is acquired with reference to the environment in which the disabled person is living, to his or her family situation, to his or her education, and to his or her employment conditions.

In order to draw up the WSP, MPs and TCs have to use data contained in FD and in the so-named Dynamic and Functional Profile (DFP); the latter refers to the school period of the claimant and has to be drawn up by teachers who were responsible for the disabled person during those years. The composition of the TC is of the highest interest: it witnessed the choice in favor of a new multidisciplinary approach to disability, since the TC is composed of medical examiners, social workers, employers' and employees' representatives, representatives of Local Governments at the regional and provincial level, labor market experts, and experts in disability care and rehabilitation. The task of TCs is to define, taking into account FD, a path for the disabled person that will highlight his or her working capability, setting up instruments and benefits to insert him or her into the labor market, and defining the notion of suitable employment for

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32. Ministerial Decree, Feb. 5, 1992, *supp. ord. Gazz. Uff. No. 47, Feb. 26, 1992.*

33. Law No. 68 of 1999.

34. *Id.*

35. *See* Ministerial Decree, Jan. 13, 2000, *Gazz. Uff. No. 43, Feb. 22, 2000.*

36. *Compare* Law No. 104 of 1992 *with* Law No. 68 of 1999.

each claimant. At the end of this procedure, MPs and TCs elaborate what is called a Joint Definition of Global Actual and Potential Capability (JDGAPC).

A NHS doctor assessment is always needed, as we saw before, to claim all benefits regarding disability in general. In this case, MPs are responsible for SA introduced by Act No. 68/1999 and also for previous assessments of all impairments, except those performed under the social insurance system.

In such a view, the personal record of the disabled person is of the highest importance since it is considered both in the previous assessment of impairment made by MPs or by INAIL and INPS practitioners, both within the SA introduced by Act No. 68/1999.<sup>37</sup> Furthermore, according to Decree January 12, 2000, FD is based also on the evaluation of the whole pre-existing medical record (NHS practitioner's, previous MPs', or INAIL's and INPS' assessment, which have to be collected by MPs during the drawing of FD).<sup>38</sup>

According to the ESD reform, provided for by Act No. 68/1999, within the framework of general Employment Services reform<sup>39</sup> (Legislative Decree No. 496/1997 as modified in 2003 by Act No. 30 and Legislative Decree No. 276) regional and provincial bodies of Local Government have to provide specific assessment and information on vacancies in suitable employment for the disabled person.<sup>40</sup> In order to give appropriate answers, these bodies are structured on a tripartite basis (employers', employees', and local governments' representatives).

## VI. CONCLUSIONS

Following the above analysis, it is easy to draw some synthetic conclusions on the legal concept of disability in Italy. For a long time, the traditional static approach to impairments has led to the absence of such a notion within the legal system, since the main worry of the Italian legislature was to provide economic compensation to the affected persons who had to take care of himself or herself with the

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37. Law No. 68 of 1999.

38. Ministerial Decree, Jan. 12, 2000, Gazz. Uff. No. 19, Jan. 25, 2000.

39. See E. Ales, *La nuova disciplina del mercato del lavoro tra "decentramento controllato" e "liberalizzazione accentrata"*, in ARGOMENTI DI DIRITTO DEL LAVORO 527 (1998); E. Ales, *Diritto all'accesso al lavoro e servizi per l'impiego nel nuovo quadro costituzionale: la rilevanza del "livello essenziale di prestazione"*, 1 DIRITTI, LAVORI, MERCATI 9 (2003).

40. See Decree-Law No. 469, Dec. 23, 1997, Gazz. Uff. No. 5, Jan. 8, 1998 (modified by Decree-Law No. 276, Sept. 10, 2003, supp. ord. Gazz. Uff. No. 235, Oct. 9, 2003; Law No. 30, Feb. 14, 2003, Gazz. Uff. No. 47, Feb. 26, 2003).

help of the family. No relevance in the public sphere was recognized as to the condition of impairment. Moreover, distinctions were made as far as the initial condition of the persons was concerned, leading to a discriminating fragmentation and diversifications of provisions for workers and non-workers, typical of an occupation welfare state model, like Italy's was and, partly, still is.

Only recently a dynamic approach has been introduced alongside the traditional one, taking into account the social relevance of problems deriving to persons affected by impairments. In this view, a general functional notion of the handicapped person was elaborated, in order to emphasize the public relevance of the impairment condition and provide adequate means and structures to cope with it.

Nevertheless, the traditional fragmented approach has continued to produce its effects on the recent legislative production of the nineties, since it has been used as a basis of definition of the disability notion, at least as far as the ESD are concerned. This means that the Italian legal system is still in a period of transition from its past to the future of a more "socially sensitive" approach. What will be the result of such a transition is difficult to say, but if the left-wing Government stimulated this new approach during the last part of the last century, at present the right-wing Government is coming back to the traditional approach, according to which impairment is not a relevant condition as far as public intervention is concerned, but families have to play a crucial role within the private sphere.