

The United Nations Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability

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I. INTRODUCTION

The United Nations Convention on the Rights of Persons with Disabilities (“the Convention”)¹ was formally adopted by the United

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¹ See generally THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDANAVIAN PERSPECTIVES (Oddny Mjoll Arnardottir & Gerard Quinn eds., Martinus Nijhoff Publishers 2009).

Nations General Assembly in December 2006 and opened for signature and ratification in March 2007.² It is the first global human rights convention of the 21st Century.³ It has already attracted some eighty-five ratifications and is currently in force.⁴ The speed with which it entered into force and the number of ratifications received thus far is something of a record in the United Nations.

The Convention is accompanied by an Optional Protocol, which is purely optional for states, as its title suggests.⁵ If states ratify the Optional Protocol then they agree to accept a complaints mechanism that will enable a new United Nations Committee on the Rights of Persons with Disabilities to entertain both group and individual complaints.⁶ Surprisingly for treaties such as this, there have been forty-eight ratifications of this Protocol, which is effective only in those states that have opted in.⁷

The Convention provides both a moral compass for change as well as legal benchmarks against which to measure that change. Regrettably, the United States did not take an active part in the negotiations during the drafting of the convention. President Obama, nevertheless, signed the Convention in July 2009.⁸ This lifted hearts all around the world and signaled the United States' re-engagement with disability law reform throughout the world. The Convention has since been sent by the Administration to the Senate to enable the ratification process to begin. The ratification process itself could take up to a year. Because the Convention is, in essence, a non-discrimination instrument, it is quite closely aligned with the Americans with Disabilities Act of 1990 and is indeed consonant with broader currents in United States disability law. That aspect should allow for a relatively smooth ratification process.

Upon ratification, the United States will be empowered to play a full part in the new Conference of States Parties set up under the Convention, which enables states to exchange best practices. It will also enable the United States to put forward candidates for election to the new United Nations Committee on the Rights of Persons with Disabilities, which performs the traditional roles assigned to a treaty-monitoring body

² See generally Symposium, *The United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. OF INT'L LAW AND COM. 287 (2007).

³ See INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK (Catarina Krause & Martin Scheinin, eds., Abo Akademi University Institute for Human Rights 2009).

⁴ Currently there are 143 signatories to the Convention and 87 to the Optional Protocol. There are also 75 ratifications to the Convention and 48 to the Optional Protocol. United Nations, Rights and Dignity of Persons with Disabilities, <http://www.un.org/disabilities/> (last visited Oct. 12, 2009).

⁵ Convention on the Rights of Persons with Disabilities, Optional Protocol, G.A. Res. 61/106, Annex II, U.N. Doc. A/RES/61/106 (Jan. 24, 2007) (hereinafter also "the Convention").

⁶ *Id.*, Annex II, art. 1.

⁷ UN Enable, *Convention and Optional Protocol Signatures and Ratifications*, <http://www.un.org/disabilities/countries.asp?id=166> (last visited Nov. 29, 2009).

⁸ Press Release, U.S. International Council on Disabilities ("USICD"), Statement from USICD President Marca Bristo on the United States signing the UN Convention on the Rights of Persons with Disabilities (July 30, 2009), available at http://www.usicd.org/detail/news.cfm?news_id=25+id=92.

(interpretation, the formation of “conclusions,” and recommendations based on periodic state reports, etc.). All in all, ratification will allow for a repositioning of the United States at the international level on disability rights. Additionally, ratification will enable the United States to contribute more directly to the process of disability law reform around the world, and learn from innovative practices that might assist it in overcoming common impasses.

Some perspective on the disability challenges throughout the world is necessary to assess the potential of the Convention. It is estimated that at least ten percent of any given population has a disability, which means that nearly 650 million people worldwide have disabilities.⁹ According to the United Nations Development Program (UNDP), most of them, more than 500 million, live in developing countries.¹⁰ It is further estimated by the United Nations that twenty percent of the poorest people in the world have disabilities. Persons with disabilities have been described by the United Nations as the world’s “largest minority.”¹¹

The causes of disability vary, but they include social and economic deprivation, malnutrition, violence, and warfare.¹² That is, human rights violations can lead to disability, and having a disability exposes one to a high risk of further human rights violations. The impacts of disability are enormous and include chronic under-education, higher rates of physical violence and rape, multiple forms of discrimination (especially in the case of gender), higher rates of mortality, and severe unemployment.¹³ The United Nations Educational, Scientific, and Cultural Organization (UNESCO) has noted the near invisibility of children with disabilities in educational statistics. It surmised that “about 35% of all out-of-school children have disabilities . . . and that fewer than 2% of children with a disability are enrolled in school. In Africa, more than 90% of all disabled children have never gone to school.”¹⁴ The heightened physical vulnerability of persons with disabilities is especially true of persons with intellectual disabilities who suffer great stigma in many parts of the world.¹⁵ The International Labour Organization estimates that the unemployment rate of persons with

⁹ UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, SOME FACTS ABOUT PERSONS WITH DISABILITIES (2006), available at <http://www.un.org/disabilities/convention/pdfs/factsheet.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

¹² UK DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, EDUCATION’S MISSING MILLIONS INCLUDING DISABLED CHILDREN IN EDUCATION THROUGH EFA FTI PROCESSES AND NATIONAL SECTOR PLANS: MAIN REPORT OF STUDY FINDINGS 11 (2007).

¹³ SOME FACTS, *supra* note 9.

¹⁴ UNESCO, EDUCATION FOR ALL GLOBAL MONITORING REPORT 179 (2006), http://www.unesco.org/education/GMR2006/full/chapt7_eng.pdf (citations omitted). See also UK DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, EDUCATION’S MISSING MILLIONS INCLUDING DISABLED CHILDREN IN EDUCATION THROUGH EFA FTI PROCESSES AND NATIONAL SECTOR PLANS: MAIN REPORT OF STUDY FINDINGS (2007).

¹⁵ See generally THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL (Stanley Herr, Lawrence Gostin & Harold Hongju Koh eds., Oxford University Press 2003).

disabilities is as high as eighty percent in some countries.¹⁶ One commentator suggests that up to \$2.23 trillion in global gross domestic product (GDP) is lost annually through the absence of persons with disabilities from the workforce.¹⁷ This occurrence represents a great amount of forgone economic activity as well as state revenue.

Poverty is a vicious cycle for most persons with disabilities.¹⁸ And the loss is not all personal. Family members are also impacted by disability—especially mothers who stay at home to care for children with disabilities or for the elderly with disabilities.¹⁹ Their opportunity costs can be quite high. Thus, disability tends to have a negative ripple effect on others, especially on families and careers.²⁰ This adds considerably to the numbers of persons *affected* by disability.

Importantly, the rising tide of economic development does not tend to elevate the status of persons with disabilities. Transitioning to a market economy tends to leave persons with disabilities behind. One recent World Bank study notes the extreme difficulty for poor persons with disabilities (and their families) to emerge from poverty in transitioning countries.²¹ Persons with disabilities tend to fall behind in good times as well as in bad. Something more is needed besides an exclusive reliance on economic growth to elevate the status of persons with disabilities.

All in all, these statistics are very bleak. They add to the urgency of the general fight against poverty, because poverty is such a potent cause of disability. The statistics also reveal the human misery experienced by disabled people in poverty. Disability should not automatically lead to poverty. The link—though strong—is not inevitable and can be broken. It is the absence of appropriate policy responses to disability that lead to poverty and not the disability in itself. The move to the human rights framework of analysis in the disability context is significant as it can help plot a path out of poverty.

The next question is whether and how this new Convention can be used to reverse the above situation. In this short essay I want to reflect

¹⁶ See INTERNATIONAL LABOUR ORGANIZATION, FACTS ON DISABILITY IN THE WORLD OF WORK (2007), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_087707.pdf.

¹⁷ Roseangela Berman Beiler, Inter-American Institute on Disability & Inclusive Development, Remarks at World Congress on Communication for Development, Rome (October 25, 2006), available at http://siteresources.worldbank.org/DISABILITY/Resources/News---Events/463933-1163109717105/RBB_WCCD.pdf.

¹⁸ Mainstreaming Disability in the Development Agenda: Note by the Secretariat, Commission for Social Development, E/CN.5/2008/6, 23, at 2 (November 23, 2007), available at <http://www.un.org/disabilities/default.asp?id=708>.

¹⁹ See MILTON SELIGMAN & ROSALYN BENJAMIN DARLING, ORDINARY FAMILIES - —SPECIAL CHILDREN: A SYSTEMS APPROACH TO CHILDHOOD DISABILITY 29 (Guilford Press 2007), 3rd ed., Guilford Press, 2007.

²⁰ *Id.*

²¹ See ECONOMIC IMPLICATIONS OF CHRONIC ILLNESS AND DISABILITY IN EASTERN EUROPE AND THE FORMER SOVIET UNION, pp. xiv-xv (Cem Mede ed., World Bank 2008).

on this question. I believe part of the answer lies in an understanding of why the Convention was deemed necessary in the first place. One might respond by insisting that the existing United Nations human rights treaties did not adequately address disability and that something drastic was required. This is true. But I will suggest that a deeper reason has to do with the systemic failure of “normal” politics to address disability. Persons with disabilities are largely “invisible citizens,” especially in developing countries. They tend not to engage in the political process. That means that stereotypes often go unchallenged and the cycle of exclusion is simply reinforced. It is suggested that, to a large extent, the success of the Convention will depend on how it can help trigger a new form of disability politics of engagement as well as responsiveness to the vices of persons with disabilities. As will be seen, the Convention actually creates new political openings. The Convention effectively requires a new “focal point” on disability to exist within governments to combat the almost universal tendency to place disability in disconnected silos of policy. It also requires states to set up or task existing national human rights institutions (e.g., the Human Rights Commission) to conduct independent monitoring and to actively protect persons with disabilities. Such authoritative and independent institutions are necessary to prevent slipping back into policies that rely more on charity or pity rather than rights of justice. Crucially, the Convention requires government and independent human rights agencies to work closely with persons with disabilities. It is this new triangulation between government, independent national human rights mechanisms, and civil society that offers the best hope for a sustainable process of disability law reform throughout the world.

II. WHY A CONVENTION ON DISABILITY?

With due deference to John Adams, Thomas Jefferson espoused a particular theory of republican government—a theory that both justified the Revolution and continued to inform his view as to the future development of the United States.²² He may have been wrong—certainly Adams viewed him as wrong—but he was steadfast in his vision. Yet even Jefferson did not, or could not, face the contradiction between declaring that “all men were equal” in the Declaration of Independence on the one hand, and continuing the institution of slavery on the other.²¹ Famously, he did not face the contradiction. That came much later with the Civil War Amendments. While his values were admirable, his application of them was flawed.

²² See generally JOSEPH ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON (Vintage 1998).

²¹ See JOSEPH ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 81-119 (Vintage 2002).

Likewise, let me suggest that the issue in disability law and policy across the world has nothing to do with the integrity of our legacy values such as dignity, autonomy, or equality. Instead, it has to do with the way in which these values are deflected, misapplied, or not applied at all in the context of disability.

After all, we had an entire edifice of human values enshrined in the two headline United Nations human rights treaties: the International Covenant on Civil & Political Rights²² and the International Covenant on Economic, Social & Cultural Rights.²³ They were further particularized in the various United Nations thematic treaties focused on women (Convention on the Elimination of All Forms of Discrimination Against Women),²⁴ on children (Convention on the Rights of the Child),²⁵ and on racial minorities (International Convention on the Elimination of All Forms of Racial Discrimination).²⁶ It is a very fair question to ask why these treaties—which purported to be *universal*—did not in fact yield benefit for persons with disabilities?²⁷

Some will explain the lack of efficacy by saying that there were “demand-side” problems—that persons with disabilities themselves did not look to these treaties for validation of their claims and for just satisfaction. Some will say that there were “supply-side” problems—that the people appointed to the various treaty monitoring bodies were just not attuned to disability as an issue of equality and rights. Both explanations are correct.

Yet I think there is a deeper reason. The cultural discounting of persons with disabilities was in fact reflected in the intellectual structure of these treaties, especially in the way they were interpreted. At one level there was no need for a new convention since the existing normative instruments were certainly capable of being applied in the context of disability. On the other hand, there was little prospect of this application unless the prodding of a wholly new legal instrument was

²² International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Mar. 23, 1976), *available at* <http://www2.ohchr.org/english/bodies/hrc/index.htm#law/ccpr.htm>.

²³ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (Jan. 3, 1976), Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360, *available at* <http://www2.ohchr.org/english/bodieslaw/cescr.htm/index.htm>.

²⁴ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (Sept. 3, 1981), *available at* <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

²⁵ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456, G.A. Res. 44/25, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (Sept. 2, 1990), *available at* <http://www2.ohchr.org/english/bodies/crc/index.htm>.

²⁶ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 350G.A. Res. 2106 (XX), 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (Jan. 4, 1969), *available at* <http://www2.ohchr.org/english/bodies/cedr/index.htm>.

²⁷ See generally Theresia Degener & Gerard Quinn, HUMAN RIGHTS AND & DISABILITY: THE CURRENT USE & FUTURE POTENTIAL OF UNITED NATIONS HUMAN RIGHTS INSTRUMENTS IN THE CONTEXT OF DISABILITY, Office of the United Nations Commissioner on Human Rights (United Nations Publications 2002).

added to the equation.

So the main value of the Convention—like the Fourteenth Amendment—is that it forces us to face the contradiction between the “myth system” and “operation system” of our laws.²⁸ It is said that John Brown made it impossible for people to sit on the fence on slavery. After Harper’s Ferry, you had to take a side.²⁹ The Convention is our Harper’s Ferry moment on the world stage with respect to disability. Holding the mirror of the Convention up to society is important. It seems that the default setting of nearly every culture in the world is to discount persons with disabilities without experiencing any sense of contradiction. Henceforth, it is no longer possible to explain away the exclusion of persons with disabilities on grounds of paternalism or a sense of misplaced welfare.

But facing the contradiction is only the beginning. One reason the contradiction was never faced in the past was the relative absence or invisibility of persons with disabilities from the political process. The Convention forces an acknowledgement of the contradiction between our universal values and our practice on disability throughout the world. Just as importantly, the Convention removes the invisibility of persons with disabilities and partners them with government in moving the reform process forward. So the Convention provides a tool to force acknowledgement of a contradiction. But in creating new political openings for persons with disabilities to interact with government, it also enables change to happen.

III. THE LIMITS AND POSSIBILITIES OF INTERNATIONAL LAW AS AN ENGINE OF CHANGE

Before detailing how the Convention creates space for a new dynamic of disability politics and reform, let me first address a threshold issue—the value of international law, which often nags at the back of all our minds.

Some will make exaggerated claims for international law: that it can force recalcitrant states to conform, that it contains hard and fast norms that, if interpreted properly, lead to one right answer on every question. I do not believe this, and very few public international lawyers claim this. It is true that international courts such as the European Court of Human Rights can have a dramatic impact. But that court has spent decades building up its institutional legitimacy. In any event, there is no court attached to the Convention, merely a standard “treaty monitoring

²⁸ See generally Craig Haney, *The Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process*, 15(2) LAW & HUM. BEHAV. 183 (1991).

²⁹ See generally EVAN CARTON, *PATRIOTIC TREASON: JOHN BROWNE AND THE SOUL OF AMERICA* (Free Press, 2006).

body.” As befits a convention that in its essence pivots on the equality idea, there will be many occasions when the language of the text restates rather than resolves hard cases.

There are others who will claim that international law does not exist in the sense that it can significantly drive state behavior.³⁰ Rather, states comply when they want to and when it suits their interests to do so. This may be descriptively true in many instances, but that does not mean that international law is robbed of all autonomy. In any event, even if one were to subscribe to this view, it would certainly be true to say that it is in the interests of the United States to engage in the convention process because espousing and spreading the concept of freedom is not just in the interests of the United States—it is the primary interest.

There is a third way that international law can bring about a transformed domestic policy environment. It is said that socialization and acculturation can also nudge meaningful change.³¹ In other words, states—or at least actors within states such as senior policymakers and especially those conscious of their country’s international reputation—could become socialized to align policy with the cosmopolitan norms and thus bring about meaningful change.

If a critical mass of key policymakers can be brought, either through “persuasion” or “socialization,” to tackle a core impediment (especially one that might have huge symbolic value such as outdated conceptions of legal capacity), then change can happen. Of course, the really interesting thing about such policy breakthroughs is that even when there is significant domestic pushback this resistance tends to fade through time and the momentous change of today becomes simply part of the (new) orthodoxy of tomorrow, thus making further change easier.

But how can we ensure “persuasion” and “socialization” occur? One should not rely on the fact that many state delegates were “persuaded” or “socialized” during the negotiations. Such delegates must also become “policy entrepreneurs” within their own administrations upon their return home or inspire others to initiate that change. Because diplomats do not normally rotate home a new set of institutional champions, who are strongly motivated to reshape domestic law and policy in line with the Convention, will have to emerge. This can only happen when the Convention is used to open a new space for a different kind of disability politics.

³⁰ See JACK E. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (Oxford Press 2005).

³¹ See generally Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L LAW 171 (2003); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004).

IV. THE CONVENTION—SUBSTANTIVE RIGHTS AND PROCEDURAL INNOVATION

Let me briefly highlight some features of the roadmap for reform in the Convention—both in terms of substance and, most importantly, process.

A. Substantive Rights

Benjamin Franklin once said that he developed a lifelong aversion to drafting a text only to see it edited by a committee.³² Yet it has to be said that the text of the Convention produced by the Ad Hoc Committee in the United Nations seems to have survived reasonably intact with a clear focus.

What kinds of obligations for change do states undertake in the Convention? Mechanically speaking, Article 4 contains general obligations of the States Parties above and beyond the more specific obligations contained in the individual Articles.³³ It requires that legislation should be adopted where needed, inconsistent legislation should be repealed, disability should be mainstreamed into policy formulation, and active consultation should take place with persons with disabilities and their representative organizations on all relevant matters. In short, Article 4 converts the Convention into a trigger for worldwide disability law reform.

I spoke earlier of the Convention as providing a moral compass for change. The values in this compass are contained in Article 3.³⁴ These are important. They demonstrate the paradigm shift. Just as important, where there are ambiguities in the text, they are to be resolved in light of the values.³⁵ In that Article, the values or principles that animate the convention are said to be: dignity, individual autonomy, non-discrimination, full and active participation and inclusion, respect for difference, equality of opportunity, accessibility, equality between men

³² Gerard Quinn, Member, Irish Human Rights Commission, Presentation to New Zealand Parliament (Feb. 19, 2009).

³³ The Convention, *supra* note 5, art. 4.

³⁴ *Id.*, art. 3.

³⁵ Vienna Convention on the Law of Treaties, Art. 31(1), May 22, 1969, U.N. Doc. A/Conf.39/27, 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875 (1969), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

and women, and respect for the evolving capacities of children with disabilities.³⁶

These values are hardly revolutionary in themselves, but the point is they are revolutionary in the disability field, and perhaps even more so in the intellectual disability field. These values inform the various rights, many of which are connected. These rights either protect persons with disabilities against the abuse of power, especially in vulnerable situations; nurture the capacities of persons with disabilities so that they can take their place alongside their fellow citizens as equal participants in society; or empower persons with disabilities to use the new opportunities arising from an equality strategy.

As to the kind of convention that the Convention could have become, the drafters were presented with a number of choices at the outset. First, the Convention could have become a substantive convention containing stand-alone substantive rights like the Convention on the Rights of the Child.³⁷ This would have been quite robust, but it was not the preferred option. Secondly, it could have been just a simple non-discrimination convention containing a bald proscription against unfair treatment. Two or three articles would have done. Indeed, there were one or two proposals to this effect on the table at the beginning of the process. That would not have been of much use, because it would simply have focused on the need to ensure equal treatment in the abstract without reference to any particular policy area, and without reference to the need to go the extra mile to provide material support to enable persons with disabilities to exercise their rights in reality and not merely on paper. It certainly would not have been nuanced enough to capture and respect differences, especially with respect to intellectual disability.

Finally, it could have been a hybrid of a non-discrimination convention and one that attached a broad swath of rights such as life, liberty, education, etc. This was in fact the approach adopted. So the Convention is not merely a non-discrimination convention, it also provides a web of substantive rights. The Convention blends together a mix between classic rights such as liberty and more substantive rights like the right to education. It then animates both sets from the perspective of securing the equal effective enjoyment of these rights using the non-discrimination tool.

Put another way, the goal, in the language of Ambassador McKay, was not to create new rights, but to ensure, through the use of non-discrimination principles, that all existing rights were made equally effective for persons with disabilities.³⁸ It follows that the technical challenge facing the drafters was to tailor the existing continuum of rights to the specific context of disability. This is stated explicitly in

³⁶ The Convention, *supra* note 5, art. 3.

³⁷ Convention on the Rights of the Child, *supra* note 25.

³⁸ UN Enable, Statements Made on the Adoption of the Convention on the Rights of Persons with Disabilities (2007), available at <http://www.un.org/esa/socdev/enable/convstatementgov.htm>.

Article 1.³⁹ So, the purpose is to secure the equal effective enjoyment of rights.

But what does equality mean in the context of disability? It goes beyond merely respecting difference to positively accommodating difference. While on the subject of non-discrimination, it has to be recalled that comparative law throughout the world adds an obligation of “reasonable accommodation” in the context of disability.⁴⁰ Failure to achieve such accommodation is automatically deemed to be discrimination under most comparative law.⁴¹

The equality or egalitarian ideal goes beyond formal rights and even beyond “reasonable accommodation.” It animates a large category of economic, social, and cultural rights (such as the right to education). Including these rights was entirely appropriate if only for the simple reason that it is obviously not enough to remove formal obstacles to persons with disabilities—it is also necessary to equip them with the means needed to make new opportunities a reality.

Equally as important, such socioeconomic rights are regarded as more programmatic, in the sense they can only be achieved through time, and the obligations they give rise to are referred to as “obligations of conduct.”⁴² That is, the obligation is not so much to achieve a particular result immediately but to lay down a positive dynamic of change that will lead to results within a reasonable time frame. In the language of international law, the obligation is to “progressively achieve” the realization of such rights.⁴³ This contrasts with the so-called “obligations of results” which accompany classic civil rights, such as liberty, which are immediately achievable.⁴⁴

This seemingly academic distinction between “obligations of

³⁹ The Convention, *supra* note 5, art. 1.

⁴⁰ See, e.g., United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons With Disabilities, United Nations General Assembly, *The Concept of Reasonable Accommodation in Selected National Disability Legislation*, U.N. Doc. A/AC.265/2006/CRP.1 (Dec. 7, 2005) (discussing the “reasonable accommodation” obligation as applied in Australia, Canada, the European Union, Ireland, Israel, New Zealand, the Philippines, South Africa, Spain, Sweden, the United Kingdom, the United States, and Zimbabwe).

⁴¹ See, e.g., United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, United Nations General Assembly, *Intervention—Article 2* (Jan. 31, 2006), available at <http://www.un.org/esa/socdev/enable/rights/ahc7nhri.htm> (“The US courts and indeed many other courts throughout the world have built up an elaborate body of jurisprudence on ‘reasonable accommodation’ over several decades and especially since the enactment of the rightly famous Americans with Disabilities Act (1990). This comparative jurisprudence is almost unanimous in explicitly pegging ‘reasonable accommodation’ to the non-discrimination norm.”)

⁴² See The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 20 HUMAN RIGHTS QUARTERLY 691, 694 (1998) (“The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right.”).

⁴³ Juan Mendez, Remarks, Human Rights and the Future: Advancing Human Rights in a Dangerous World, International Center for Transnational Justice (Sept. 17, 2008), available at <http://www.ictj.org/en/news/features/1982.html>.

⁴⁴ See generally Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, available at <http://www1.umn.edu/humanrts/instree/y3gctpw.htm>.

conduct" and "obligations of result" is actually quite crucial in the context of the Convention. Undoing the legacy of the past takes time and resources. Choices will have to be made and priorities set.

The site for considering this issue under the Convention is Article 4.2, which implies that with respect to economic, social, and cultural rights, the main obligation of a state is to "progressively achieve" the realization of the same.⁴⁵ In short, the Convention creates "obligations of conduct" with respect to programmatic rights, and "obligations of immediate result" with respect to civil and political rights. Of course, the Convention does not tell you which is which—that requires an analysis of each particular right in question.

The presence or absence of the dynamic of change is the most important aspect. Resources will have to be re-deployed to bring about better outcomes. This will take time as well as the re-engineering of social services, and persons with disabilities have waited decades or longer for positive change. Given these considerations, one may question whether the notion of progressive achievement undermines the Convention.

The notion of progressive achievement genuflects to an inescapable reality that resources are finite and some change takes time. Yet this nod toward reality in the Convention does not rob the concept of some core meaning. There must be some positive dynamic in place—it must be measurable, and it should lead to positive results within a reasonable time frame. This much is already evident from the General Comments of the Committee on Economic, Social, and Cultural Rights.⁴⁶

The sister organization of the European Union, the Council of Europe's Committee on Social Rights, had occasion about four years ago to visit the issue in the context of the slow rates of integrating children with autism into the education system. While acknowledging arguments about resource scarcity, the Committee said:

When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allow[] it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others [sic] persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional

⁴⁵ The Convention, *supra* note 5, art. 4.2.

⁴⁶ United Nations Economic & Social Council, Committee on Economic, Social, & Cultural Rights, Implementation of the International Covenant on Economic, Social, and Cultural Rights, General Comment No. 3, U.N. Doc. E/1991/23 (Dec. 14, 1990), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?OpenDocument).

shortcomings.⁴⁷

This supplies an illustration of the more general point, which is that the notion of progressive achievement is in fact positive and that bodies such as the new United Nations Committee on the Rights of Persons with Disabilities should be able, from a legal point of view, to determine whether sufficient progress has in fact been made.

And the concept works in reverse. Assuming a period of economic retrenchment, which is exactly where we are right now throughout the world, the notion of progressivity should allow for moments of regression provided that: (1) there is a conscious process to mitigate the worst effects on the worst off, and (2) some floor provision is in place. The first prong guards against the temptation to cut back first against the weakest. The second prong insists on some minimum level of provision to maintain human dignity and autonomy. It is not good enough from either a moral or a legal point of view to say that progress has to be postponed. In any event, the prospect of eventual economic recovery does not assure progress, as a rising tide certainly does not raise all boats, for example, when it comes to disability generally or intellectual disability in particular.

Why is this important? Many (not all) of the changes required in the intellectual disability field will be resource-intensive. Therefore, they will be subject to the looser obligation of “progressively achievement.” It remains to be seen what attitude the new United Nations Committee on the Rights of Persons with Disabilities will take toward this crucial issue. This concern has become even more important in the context of the worldwide recession.

One more aspect of the shift to equality bears emphasis, especially in the context of intellectual disability. We have in the past—nearly everywhere in the world—adopted a very narrow view of difference. The processes of constructing difference and labeling differences not only marked one apart but also kept one apart. Access to life opportunities were limited to those who conformed to dominant ideals. If a person differed, he or she had to be made to fit the system—the system did not have to adjust to take him or her into account. This paradigm played itself out in the debate between inclusion (adjusting systems to persons) and assimilation. Well, that war of ideas is over. The convention decisively opts for an inclusive philosophy. This decision is nowhere more evident than in Article 24, which deals with the right to education.⁴⁸

So, in sum, the Convention seeks to give equal effectiveness to all human rights to persons with disabilities. It rejects assimilation and requires positive respect for difference. It mandates a rolling program of

⁴⁷ *Autism- Europe v. France*, No. 13/2002, European Committee of Social Rights, Decision on the Merits ¶ 53 (Nov. 4, 2003), *available at* http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC13Merits_en.pdf.

⁴⁸ The Convention, *supra* note 5, art. 24.

reform—one that actively takes into account the views of persons with disabilities themselves. In addition to the usual international bodies of interpretation, the Convention takes the logical extra step of requiring a domestic process of change to be put into place, encompassing a governmental “focal point” as well as independent bodies to monitor and protect these rights. There are other vital provisions in the Convention dealing with international cooperation. Suffice it to say, the Convention should dramatically affect how development aid is conceived and implemented.

B. Procedural Innovation

At the international level a new treaty body has been established—the United Nations Committee on the Rights of Persons—which will assess state performance by reviewing periodic state reports.⁴⁹ It will have the competence to entertain individual or group complaints, provided the relevant government opts in to an Optional Protocol to that effect.⁵⁰ It will clarify the norms of the Convention.⁵¹ Civil society groups in fact advocated for something different during the negotiations, but the states reverted to this very traditional model of monitoring.⁵² The Committee can be looked to for authoritative interpretations of the Convention in the years ahead. Such interpretations will be developed in line with the established jurisprudence of the other treaty-monitoring bodies, including those that are attached to conventions that the U.S. has already ratified.⁵³

A Conference of States Parties has also been established at the international level with an extremely wide discretion to exchange policy perspectives. This has the potential to channel the collective effort of states. It could become the main clearinghouse in the world on disability law and policy—provided it has the right leadership. This is another reason why active engagement by persons with disabilities is needed.

The procedural innovations at the domestic level are the most remarkable of all. Oliver Wendell Holmes once wrote that to truly assess a new idea, a value, or a legal instrument, “cynical acid” must first be poured over it, and then one must see if anything remains.⁵⁴ The pulse of the Convention resides in this shift from viewing persons with

⁴⁹ *Id.*, art. 34-35.

⁵⁰ *Id.*, Optional Protocol, Annex II, Art. I.

⁵¹ *Id.*

⁵² UNITED NATIONS DEPT. OF ECONOMIC AND SOCIAL AFFAIRS, RECOMMENDATIONS FROM THE EXPERT GROUP TO CIVIL SOCIETY 5 (2007), available at <http://www.un.org/disabilities/default.asp?id=359>.

⁵³ See Convention on the Rights of the Child, *supra* note 25; see also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (June 26, 1987), available at <http://www2.ohchr.org/english/bodies/cat/index.htm>.

⁵⁴ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 463 (1897).

disabilities as objects to viewing them as subjects. But it is much more than that.

There are a lot of bad laws, policies, and programs around the world on disability. The rights and obligations contained in the convention will enable one to challenge these laws. That, at any rate, is a lawyer's way of looking at the Convention. A broader view of the Convention and its potential to help frame change is needed. I believe you miss the point if you confine the Convention to the traditional role of challenging bad laws and policies. The most important potential of the Convention is its potential to transform the process that leads to those laws in the first place.

One reason why bad laws were enacted in the past was the relative invisibility of disability and of persons with disabilities in the political process. For one thing, the opportunity costs of political participation were formidably high for persons and their families simply struggling to survive. In addition, the policy process tended to work from a very narrow policy narrative—one that simply equated disability with cost and foreclosed serious analysis of reform. This absence of the most important voices from the table meant that these deficiencies could not be readily undone.

The framers of the Convention were cognizant of the fact that unless processes are changed, there will be few effective outcomes. The democratic system can right itself, but it can only do so when the full panoply of voices comes to the table. That is why the mantra “nothing about us without us” is now enshrined in Article 4 of the Convention.⁵⁵ This requires ongoing and active consultation between government and persons with disabilities.

To govern is to choose. This does not mean that persons with disabilities have a trump card. But it redresses a fundamental flaw and measurably enhances the prospects of greater equity and better outcomes.

There is another design flaw of which the framers were aware. International law exists “out there”—in the ether. In general, there is no transmission belt to ensure that the fresh air of international law can reach into and revive the domestic reform process. One may score the odd victory in Geneva, but there the victory remains. The trick is to find some way of ensuring that the norms of the Convention gain traction where they count most—in Peoria, in Dublin, in Lusaka. They have to become somehow “owned” by administrations everywhere. Policymakers need to become motivated to see the symmetry between the Convention and their domestic reform agenda. Most importantly, policymakers should see themselves as giving back to the international arena. This is a two-way street.

The framers of the Convention actually took the next logical step by going beyond a simple listing of rights with a monitoring system

⁵⁵ The Convention, *supra* note 5, art. 4, para. 3.

hovering in the pure ether of international law. They enshrined a domestic institutional architecture for change in Article 33.⁵⁶ This article lies at the very heart of the Convention, for it attempts to put in place an architecture of change at home—in Washington, D.C., or Dublin—that can transform processes that if left undisturbed simply lead to even more bad laws and policies.

Article 33.1 demands the existence of a “focal point” as well as a coordination mechanism within government.⁵⁷ This gets at and seeks to unravel the “silo phenomenon,” whereby most governments in the world disperse responsibility for disability across many departments and even within departments. The predictable result is similar to the “tragedy of the commons,” whereby no entity takes lead responsibility and the chaos that ensues creates massive cracks into which ordinary people fall.⁵⁸ Article 33 is truly innovative,⁵⁹ particularly in light of the Convention’s requirement of this government mechanism to consult actively with persons with disabilities.⁶⁰

Yet something else is needed to ratchet a dynamic of reform into place. Good governance is about accountability, and accountability is not just an end in itself; it helps keep the reform process moving in the right direction. It underpins, rather than undermines, effectiveness. That is why the framers took another logical step by requiring states to designate an independent body or set of bodies to “promote, protect and monitor” progress in implementing the Convention.⁶¹ The language is somewhat open-ended—an example of constructive ambiguity to bring along those governments (not including the United States government) that do not see accountability in quite the same positive light. But the intent to harness an independent body in the process of ensuring the norms are real and not rhetorical is clear.

Human rights commissions, civil rights commissions, and national disability bodies such as the National Council on Disability will have to be at the forefront of such implementing bodies. A first step in a rational process of “designating” this independent entity or entities under Article 33.2 could well be to map out which entities already do some “promotion, protection and monitoring” and meld them together appropriately.⁶²

The triangulation at the domestic level is complete when one realizes that Article 33.3 also requires that the monitoring by the relevant independent body be done in active consultation with persons with

⁵⁶ *Id.*, art. 33.

⁵⁷ *Id.*, art. 33.1.

⁵⁸ Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 13, 1968, at 1243, available at <http://www.sciencemag.org/cgi/reprint/162/3859/1243.pdf>.

⁵⁹ The Convention, *supra* note 5, art. 33.

⁶⁰ *Id.*

⁶¹ *Id.*, art. 33.2.

⁶² *Id.*

disabilities.⁶³ This is both unique and remarkable and has no precedent. This consultation requirement will perhaps prompt some thinking by commissions on the larger issue of the relationship between independent commissions and civil society. At the end of the day, such bodies still have their functions to perform, but the performance of these functions will be very considerably enriched by interaction with civil society. There are embryonic models out there, but it is early yet.

Article 32 on International Cooperation is going to be key in helping to embed this dynamic of change, especially in those countries where disability has been neglected.⁶⁴ It does not specifically require development aid to be increased or even earmarked, but it does require that development is inclusive of and accessible to persons with disabilities.⁶⁵ This requirement entails the proofing of development aid programs from a disability perspective. Just as important, it requires facilitating and supporting “capacity-building,” which includes the sharing of information, experience, training programs, and best practice.⁶⁶ This “capacity-building” will be where the experience of the United States will be most telling. Logically, this should lead the United States government to find and support ways of transferring both knowledge and skills from its civil society to the nascent disability community abroad. The Article requires cooperation with respect to research as well as technical assistance.⁶⁷ The United States certainly has this research prowess, and it would be good to see it harnessed to help others ratchet up their own research capacity on disability.

These process-based innovations are the key to the success of the convention. Unless the “normal” process of change can be enriched with disability perspectives, that process is likely to continue ignoring the just claims of persons with disabilities.

V. THE FUTURE OF INTERNATIONAL DISABILITY LAW & POLICY

The Convention’s significance is underplayed if it is viewed merely as supplying a set of norms against which to measure bad laws and policies. Instead it should be seen as an instrument that can transform the process that makes these laws in the first place. The Convention does not simply impose obligations—it seeks to improve the democratic process by opening it up to voices that were previously excluded or discounted.

States, commissions, and civil society can only bring these voices

⁶³ *Id.*, art. 33.3.

⁶⁴ Convention, *supra* note 5, art. 32.

⁶⁵ *Id.*, art. 32(1)(a).

⁶⁶ *Id.*, art. 32(b).

⁶⁷ *Id.*, art. 32(c).

to the table—and trust the process to reach the right outcomes—by actively listening to and discussing with persons with disabilities themselves. The process of drafting the Convention showed how useful and constructive this engagement can be. The key to the success of the Convention will be in how well states can embed the domestic institutional architecture for change envisaged by Article 33.

The United States has been a global leader in disability law reform for at least the last 20 years. The United States' civil rights tradition continually forces people to confront the contradiction between myth and reality. And the focus on using law to underpin freedom and choice—and not to undermine it—is inspiring. The United States' model is one model and it is not perfect. But the United States has spent at least two decades building it and confronting many of the challenges and puzzles others now face. The United States needs to share this, partly to help others and partly to gain new perspectives that may help the United States navigate some of its own internal issues.

Europe is in the middle of transforming its social model to accommodate a civil rights perspective. The EU has signed the Convention and is due to affirm it by the end of 2009. This could have a dramatic impact on the kinds of legislative proposals that the European Commission presents to the Council of Ministers and the European Parliament. It should also dramatically impact the EU development aid budget, which is now the single largest aid budget in the world.⁶⁸ The EU ratification only affects EU law inasmuch as the EU has legal competence. In fact, most legal competence with respect to disability is retained by the EU Member States. The EU Presidency (of the Council of Ministers) has now agreed to share perspectives with the Member States for both ratification and implementation. The Member States understand the need for common legislative and policy approaches even where the matter in question is not squarely a matter for EU law. A number of EU Member States are either adopting national disability strategies for the first time because of the Convention or amending existing strategies.

The Convention, if and when ratified by the United States, should help reinforce law-reform trends in the United States. It does not fatally undermine sovereign responsibilities—it helps align them with challenges faced elsewhere. Ratification would allow the domestic courts to take the Convention into account in the interpretation of domestic legislation. The Convention would not supplant domestic legislation and the primacy of the legislature. Yet it is certainly desirable within all common law countries to interpret domestic law in a manner consistent with international legal obligations. As Justice Stephen Breyer would say, this would enable the United States to have a

⁶⁸ See European Commission—Development, *Financing for Development*, http://ec.europa.eu/development/how/monterrey_en.cfm.

meaningful conversation with the world on common challenges.⁶⁹

Furthermore, there is sufficient “margin of appreciation” to allow discretion at the domestic level. And the aforementioned concept of “progressive achievement” affords sufficient latitude for the United States and other states to begin laying the groundwork for social supports to underpin freedom. Australia has publicly pledged to adopt a national disability strategy based explicitly on the Convention.⁷⁰

Additionally, the new Conference of States Parties would provide a unique platform to initiate a serious sharing of ideas, experience, and expertise to trigger the law-reform process worldwide.⁷¹ This can also be done bilaterally, but the impact would be magnified many times over through active participation in the Conference of States Parties.

The United States also has invaluable experience with respect to its institutional architecture for change. Without this institutional architecture, no sustainable process of change is possible. Very few countries have this, and many are eager to learn. Article 32 on International Cooperation provides a way to channel support for this process of change.⁷² This is not just about knowledge of laws and policies; it has more to do with transferring skills and know-how.

When Jefferson was based in Paris he reputedly had a small part to play in the drafting of the French Declaration of the Rights of Man.⁷³ He was a true internationalist and understood that the pursuit of liberty knows no borders. He could not face the contradictions between the myth of equality and the reality. But we can. Let me be so bold as to suggest that as the United States faces the process of ratification and then implementation, the spirit of freedom represented by Jefferson be your guide.

The Convention is actually much more important than its application to disability. It articulates a theory of justice that every citizen can subscribe to and in which every citizen has a stake. It is not a case of special rights for a particular group; it is about equal rights for all. And it is about making the democratic process open to all voices so that blockages can be dissolved and solutions found to deal with the legacy of the past and build a more inclusive society for all. So the American disability rights revolution now belongs to all, and the world again looks to the United States for leadership.

⁶⁹ Meg Charendoff & Asher Hawkins, *Breyer: 'Never Heard a Voice Raised in Anger' on High Court*, THE LEGAL INTELLIGENCER, Jan. 23, 2006 (“[T]here is no reason not to analyze how the judiciaries in other democracies have tackled common challenges.”)

⁷⁰ AUSTRALIAN DEPARTMENT OF FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS, NATIONAL DISABILITY STRATEGY, available at <http://www.fahcsia.gov.au/sa/disability/progserv/govtint/Pages/nds.aspx>.

⁷¹ United Nations Convention on the Rights of Persons with Disabilities, Strategies for Implementing Disability Convention, available at <http://www.disabled-world.com/news/implementing-disability-convention.php>.

⁷² The Convention, *supra* note 5, art. 32.

⁷³ DECLARATION OF THE RIGHTS OF MAN (France 1789), available at http://avalon.law.yale.edu/18th_century/rightsos.asp.

It is said that law is too important to be left to lawyers.⁷⁴ Fred Rodell, a famous legal realist at Yale,⁷⁵ once wrote that the practice of law should be made a criminal offense! Naturally, I disagree. I disagree not simply because the sentiment emanates from overstretched and overworked stereotypes, but mainly because, on occasion, law intersects with ethics. As Holmes once said, “law is the witness and external deposit of our moral life.”⁷⁶ To live in that intersection—where law intersects with ethics to produce justice—is inspiring. More importantly, it can lead to practical change that affects the lives of many.

To see a theory of justice embodied in a single instrument gives one confidence in the possibility of seeking justice through law. The Americans with Disabilities Act encapsulated and gave expression to a new sense of justice for persons with disabilities. It led to many innovative laws throughout the world. And so it is with the new United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). I once wrote that while disability rights is an American invention, it is now truly a global challenge.⁷⁷ The UNCRPD is a beacon for an international consensus on justice and disability.

⁷⁴ ELIZABETH FROST KNAPPMANN & DAVID SCHRAGER, THE QUOTABLE LAWYER 217 (1998).

⁷⁵ FRED RODELL, WOE UNTO YOU LAWYERS 271-72 (Fred B. Rothman and Co., 2d ed. 1987) (1939) (“Well, why not make the practice of law for money...a crime?”).

⁷⁶ Holmes, *supra* note 49, at 459.

⁷⁷ Gerard Quinn, Valerie Gordon Memorial Lecture, Next Steps: Towards a United Nations Treaty on the Rights of Persons with Disabilities, at the Northeastern University School of Law (April 1, 2004) (on file with author).