

Beyond the Orthodoxy of Rule of Law and Justice Sector Reform

A Framework for Legal Empowerment and Innovation through the Convention on the Rights of Persons with Disabilities

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The Convention on the Rights of Persons with Disabilities (CRPD),¹ the first legally binding international human rights treaty to address the rights and fundamental freedoms of one billion persons, provides a framework for legal empowerment and innovation that challenges traditional conceptualizations of justice-oriented development intervention. The CRPD implicitly renounces the orthodox view that top-down justice sector and rule of law initiatives should be the primary target of law and development efforts. Although the CRPD does not discount—in fact, it explicitly requires—the reform of legal systems, justice sectors, and institutions in meeting its obligations, it goes well beyond the traditional focus on development donors to embrace an empowerment model that implicates nonformal and decentralized justice and administrative systems and processes, local communities in development, and the duties of private as well as public actors in fostering inclusion. The legal empowerment framework set forth in the CRPD has significant implications not only for bridging rights and development in the context of disability but also more broadly for other marginalized groups living in poverty.

The UN General Assembly adopted the CRPD, along with its Optional Protocol,² by general consensus and the instruments were opened for signature by states parties on March 30, 2007.³ It attained the requisite 20

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- 1 Convention on the Rights of Persons with Disabilities, GA Res. 61/106, UN Doc. A/RES/61/106 (Dec. 13, 2006) (hereinafter, CRPD).
- 2 Optional Protocol to the Convention on the Rights of Persons with Disabilities, GA Res. 61/106, Annex II, UN Doc. A/RES/61/106 (Jan. 24, 2007) (hereinafter, Optional Protocol).
- 3 Updated information on signatures and ratifications is available at <http://www.un.org/esa/socdev/enable/rights/humanrights.htm> (accessed Jul. 25, 2012).

ratifications in short order, triggering its entry into force on May 3, 2008.⁴ The impetus for drafting the treaty was the exclusion of an estimated 1 billion persons with disabilities from their communities, where they are routinely denied access to education, employment, health care services, and basic needs.⁵ More often than not, persons with disabilities live in poverty and experience lower levels of education and income compared to the general population.⁶ Research indicates that in all countries, disability prevalence rates are significantly higher among groups with lower economic status, underscoring the reinforcing relationship between poverty and disability.⁷

Prior to the adoption of the CRPD, no international instrument comprehensively addressed the multitude of barriers experienced by persons with disabilities, and only a handful of states had well-developed disability rights law and policy frameworks.⁸ Where states did have disability-related legislation, often such laws explicitly introduced disability discrimination, for example, denying persons with disabilities the right to vote, to obtain an education, to serve as a juror, to open a bank account, to own property, or to work in certain sectors. In other instances, provisions relating to disability evoked welfare-oriented as opposed to comprehensive human rights protection. Although the human rights of persons with disabilities were implicitly addressed within the framework of general human rights law, and were to some extent reflected in several disability-specific nonbinding initiatives, this framework was insufficient to advance disability human rights and provide an impetus for change at the state level.⁹

4 For more on the rights of persons with disabilities generally, see *Human Rights and Persons with Disabilities*, www.un.org/esa/socdev/enable/rights/humanrights.htm (accessed Jul. 24, 2012). For a comprehensive overview of the CRPD, see Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8(1) *Human Rights L. Rev.* 1–34 (2008); M. A. Stein & J. E. Lord, *Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities*, in *The UN Convention on the Rights of Person with Disabilities: European and Scandinavian Perspectives* (O. M. Arnardóttir & G. Quinn ed., Martinus Nijhoff 2008).

5 See World Health Organization and World Bank, *World Report on Disability* 29 (2011), available at http://www.who.int/disabilities/world_report/2011/report/en/ (accessed Jul. 25, 2012).

6 *Id.*, at 39.

7 Daniel Mont, *Measuring Disability Prevalence*, SP Discussion Paper No. 0706 (Disability & Development Team, HDNSP, World Bank, Mar. 2007), available at <http://siteresources.worldbank.org/DISABILITY/Resources/Data/MontPrevalence.pdf>. See also Sophie Mitra, Aleksandra Posarac, Brandon Vick, *Disability and Poverty in Developing Countries: A Multidimensional Study* World Development (Jul. 27, 2012).

8 See Gerard Quinn, *Resisting the “Temptation of Elegance”: Can the Convention on the Rights of Persons with Disabilities Socialise States in Rights Behaviour?* in *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* 215, 224–29 (1st ed., O. M. Arnardóttir & G. Quinn ed., Martinus Nijhoff 2009).

9 For a review of the need for further development of domestic disability law frameworks, see Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform, Disability Rights Law and Policy: International and National Perspectives* 3, 25–45 (Mary Lou Breslin & Sylvia Yee ed., Disability Rights Education and Defense Fund 2002), available at http://www.dredf.org/international/degener_quinn.html (accessed Jul. 24, 2012).

The CRPD fills this gap insofar as it provides a road map for the development and reform of domestic disability law and policy in alignment with international human rights principles, but also in its creation of mechanisms and duties to foster the empowerment of disability advocates and their representative organizations. In obligating states parties to pursue specific national-level implementation measures to give full effect to its provisions, the CRPD advances the kind of broad-based approach to human rights advocacy contemplated in the legal empowerment literature.¹⁰ Moreover, recognition of the link between poverty and disability in the CRPD provides added support for legal empowerment approaches in the context of disability.¹¹ In sum, the CRPD calls for innovation to advance domestic disability advocacy to support the human rights and fundamental freedoms of the globe's "largest minority."¹²

CRPD: Structure and Overall Content

The CRPD comprises 25 preambular paragraphs and 50 operative articles that set out the historical progression of international disability rights and highlight issues of particular import.¹³ It has an introductory set of provisions outlining its purpose (Article 1), key definitions (Article 2), and several general (cross-cutting) articles that are to be interpreted and applied across all articles of the treaty text (Articles 3–9).¹⁴ The CRPD is the first international human rights treaty to prohibit discrimination on the basis of disability and, significantly, to require the provision of reasonable accommodation in order to meet its nondiscrimination and equality requirement. It has a novel provision (Article 9, Accessibility) detailing state obligations in the area of accessibility that is broadly defined and is driving innovation in numerous spheres and affects not only states but private actors as well. The CRPD enumerates specific substantive civil, political, economic, social, and cultural rights (Articles 10–30). It establishes a system of monitoring and implementation (Articles 31–40), and it includes provisions that govern the operation of the CRPD (Articles 41–50).

The general requirements set forth in Article 4 make clear the need to ground CRPD obligations in national law, policy, and programming in consultation with persons with disabilities. Thus, Article 4 requires states parties to consult with and involve persons with disabilities in developing and implementing legislation and policies and in decision-making processes, including development planning. In this sense, the CRPD underscores the need to engage with stakeholders and their representative organizations, reflecting a

10 See Stephen Golub & Kim McQuay, *Legal Empowerment: Advancing Good Governance and Poverty Reduction*, in *Law and Policy Reform at the Asian Development Bank* (ADB 2001); Anna Palacio, *Legal Empowerment of the Poor: An Action Agenda for the World Bank* (ARD 2006).

11 *World Report on Disability*, *supra* note 5, at 39.

12 *Id.*, at 29.

13 CRPD, *supra* note 1.

14 The CRPD articles are available at <http://www.un.org/disabilities/default.asp?id=259> (accessed Jul. 25, 2012).

shift toward legal empowerment approaches, as opposed to only stand-alone, top-down rule of law interventions. Top-down initiatives are needed and are required by the CRPD—including training of lawyers and judiciaries—but these interventions rest within the context of a legal empowerment, access to justice approach.

The CRPD lays out a framework for national-level monitoring that includes cross-governmental coordination, independent monitoring (inferred to be performed by a national human rights institution, or NHRI), and stakeholder participation (Article 33). A Committee on the Rights of Persons with Disabilities—the CRPD’s treaty-monitoring body—is tasked with monitoring implementation by states parties through its oversight of the mandatory reporting requirement and the issuance of general recommendations for the state party concerned.¹⁵ The Optional Protocol to the CRPD,¹⁶ consisting of 18 articles, gives the committee competence to examine individual complaints with regard to alleged CRPD violations by parties to the protocol. It allows states parties to opt into participation in individual and group communications procedures, as well as an inquiry procedure, all of which are overseen by the committee.¹⁷ These mechanisms are important vehicles for empowering local disabled people’s organizations (DPOs) to bring individual violations and systemic abuses to the attention of the committee for its review.

An innovative mechanism that can facilitate disability advocacy is the establishment of a periodic meeting of a Conference of States Parties (COSP), as set forth under Article 40 of the CRPD. Disability advocates and their representative organizations are using the COSP in ways that reflect creative approaches to legal empowerment.¹⁸

The CRPD stands out among the core human rights conventions in affirming the role and impact of international cooperation in promoting the implementation of progressive disability reforms and in establishing a framework to foster international cooperation and inclusive development programming. Through Article 32, the CRPD is the first human rights convention to detail the kinds of measures states parties can take to facilitate the implementation of the convention.¹⁹ Article 32 promotes the need to ensure that international

15 For an overview of the development, mandate, and future potential of the CRPD committee, see M. A. Stein & J. E. Lord, *Monitoring the Committee on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential*, 31 Hum. Rights Q. 689 (2010).

16 Convention on the Rights of Persons with Disabilities, Optional Protocol, United Nations, available at <http://www.un.org/disabilities/default.asp?id=311> (accessed Jul. 25, 2012).

17 The committee undertook consideration of an individual communication in which it found a violation of CRPD rights. See Committee on the Rights of Persons with Disabilities, *HM v. Sweden, Communication No. 3/2011*, Views adopted by the committee at its seventh session (Apr. 16–27, 2012), available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Jurisprudence.aspx>.

18 See UN Enable, *Conference of States Parties*, available at <http://www.un.org/disabilities/default.asp?id=1535> (accessed Jul. 25, 2012).

19 Katherine Guernsey, Marco Nicoli, & Alberto Ninio, *Convention on the Rights of Persons with*

cooperation initiatives, including development programs, are accessible and inclusive of people with disabilities.²⁰ Thus, it gives credence to the importance of mainstreaming disability in development to achieve not only the goals and objectives of this convention but also goals for poverty reduction and empowerment within the development community as a whole.²¹ States are encouraged to support capacity building and the exchange of knowledge and best practices, strengthen research collaborations and access to scientific knowledge, and offer technical and economic assistance to help meet a state's obligations under the convention.²² This provision may extend CRPD standards, via development programming, to effect change in discrete contexts such as electoral law reform and practice, community-based rehabilitation, and DPO capacity building.

The convention sets forth general obligations familiar to human rights treaties—prompting national law reform and domestic incorporation of its provisions. It provides a framework for national-level disability rights advocacy and action. Significantly, the convention draws together a diverse set of obligations that, when surveyed, constitute a map of advocacy and empowerment opportunities at the local, national, and international level. In so doing, the CRPD plots a course for a human rights practice that goes beyond traditional justice sector and rule of law interventions and includes legal empowerment and innovation that is locally driven, community focused, and civil society oriented.²³

The CRPD as a Framework for Empowerment and Innovation: Beyond Rule of Law and Justice Sector Orthodoxy

The CRPD evokes a model of disability rights realization reflective of the literature on legal empowerment. This is specifically reflected in the following articles:

- Articles 4 and 8 specify that raising disability rights awareness is a general obligation requiring strategies aimed at dismantling barriers posed by stigma and discrimination, making the justice system more accessible.
- Article 4 proposes that law is a tool for strengthening legal rights through disability legal reform and legal framework development in terms of both substance and process.

Disabilities: Its Implementation and Relevance for the World Bank, SP Discussion Paper No. 0712 (World Bank 2007).

20 CRPD, *supra* note 1.

21 UN Enable, *The Millennium Development Goals (MDGs) and Disability*, available at <http://www.un.org/disabilities/default.asp?id=1470> (accessed Jul. 25, 2012).

22 CRPD, *supra* note 1.

23 For a discussion of the limitations of orthodox justice sector and rule of law interventions, see Golub & McQuay, *supra* note 10.

- Articles 13, 28, and 32 facilitate disability rights implementation through strategies of inclusion, including in justice sector institutional capacity building.
- Articles 16, 33, and 34–40 provide strategies for strengthening the monitoring and enforcement of disability rights.

Although countries have enthusiastically supported, ratified, and signed the CRPD,²⁴ many face challenges in implementing the convention due to disempowering social contexts for persons with disabilities and underdeveloped legal systems. This reality raises a variety of issues, among them the differentiation between developed and developing countries in capacities for implementation and the varied perspectives on the nature and definition of disability.

The CRPD does not provide a concrete definition of disability but states that “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”²⁵ This conceptualization demands a shift in how policymakers think about disability. For example, disability laws in some countries define disability with a finite list of observable impairments, ignoring hidden disabilities that arise from chronic or mental illness, learning and cognitive difficulty, and accident, and disregarding environmental and interactional issues completely.²⁶

Prior to the adoption of the CRPD, many disability laws and policies operated mainly from the perspective of medical and welfare perspectives on disability, in which a person with a disability is presumed to be incapable of equal participation in society.²⁷ This conception leads to a dependence on welfare policies and charity programs to address the “needs” of persons with disabilities and their families.²⁸ Many of the concepts set forth in the CRPD may seem foreign to policymakers and at times may be at odds with the legislative approaches used in some countries. Thus, states parties need to bring about significant law and policy reform and development to align with the shift required by the CRPD²⁹—presenting challenges, but also creating opportunities for significant innovation.

24 For an updated list of ratifications and signatories, see <http://www.un.org/disabilities/countries.asp?id=166> (accessed Jul. 25, 2012).

25 CRPD, Article 1, *supra* note 1.

26 See, for example, the case of India in Andrew Byrnes, *Disability Discrimination Law and the Asian and Pacific Region* (Paper 3), in *Resources on Harmonization of National Legislation with the Convention on the Rights of Persons with Disabilities in Asia and the Pacific*, available at <http://www.unescap.org/sdd/issues/disability/crpd/files/Paper-III-Andrew-20110121.pdf>.

27 Kayess & French, *supra* note 4.

28 *Id.*

29 Arlene Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 *Syracuse J. Intl. L. & Com.* 287 (2007).

The provisions and motivations under Article 32, which covers international cooperation, offer the potential to assist states parties struggling with challenges in crafting required innovations and facilitating access to resources to aid in implementation. Promoting the exchange of technical knowledge and best practices while providing resources for capacity building will aid government workers and practitioners at all levels to usher in improvements and reforms to policies, programs, and practices. Addressing disability in international aid and development funding and support will help low- and middle-income states parties to provide far-reaching and inclusive programs that meet their goals and obligations under the CRPD.

The following sections discuss the general schema of legal empowerment and innovation set forth in the CRPD and provide illustrations of how CRPD obligations are pursued in different ways to effect change. These include raising awareness of disability rights; strengthening disability rights; facilitating disability rights; and improving monitoring and enforcement of disability rights.

Raising Awareness of Disability Rights

The various barriers faced by persons with disabilities in developing countries combine to restrict their access to information and awareness of their rights, a situation also faced by persons living in poverty and other disadvantaged groups. As emphasized in the *World Report on Disability*, persons with disabilities are likely to live in poverty and are very often restricted in their access to education, employment, transportation, and health care and often live in isolation from the wider community.³⁰ The social determinants of legal empowerment, therefore, are severely restricted for persons with disabilities. The need for awareness-building initiatives, including legal literacy programs, participatory human rights education tied to action at the local level, legal aid bureaus, and inclusive development programming aiming to integrate persons with disabilities into mainstream programming (such as health, economic development, democracy and governance, and education), are important and implicit in the CRPD framework.

The CRPD recognizes in Article 8 (awareness raising) that a precondition to legal empowerment is combating the stigma that seeds discrimination. In so doing, the CRPD signals the central role that legal empowerment plays in addressing the situation of persons with disabilities (and indeed any historically marginalized group). Consistent with legal empowerment models, awareness raising is a fundamental precondition of disability rights realization and comprises both understanding of legal rights and an appreciation of how to claim those rights through action.³¹ CRPD provisions that require public consultation as well as accessibility measures in the contexts of law and policy making,

30 *World Report on Disability*, *supra* note 5, at 39.

31 Golub & McQuay, *supra* note 10, at 7.

training health professionals in disability rights awareness, and the general obligation to promote the training of professionals and staff working with persons with disabilities in the CRPD rights framework are important facilitators of rights awareness and are central to legal empowerment.³²

There are numerous examples of innovative disability rights awareness-raising initiatives, many of which are integrated into development programming, as opposed to implementation limited to one-off training events. In Liberia, during the historic 2004 elections in which the first woman African head of state was elected, DPOs used the electoral process to raise the voice and visibility of Liberians with disabilities. At the time, Liberian DPOs were aware of the CRPD drafting process and requested, as part of their election work, information about international standards on disability to help them draft a national disability law. Facilitated through the international election administration organization, the International Foundation for Electoral Systems and BlueLaw International LLP, the project's goal was to foster DPO cooperation through the creation of a coalition that affected all phases of the electoral process—voter education and registration, polling, electoral observation and monitoring, and postelection assessment.³³

The methodology was to position members of the Liberian disability community as leaders and experts and to conduct participatory human rights education in raising awareness and understanding about election access on the part of election commissioners.³⁴ A poignant illustration of successful advocacy occurred during a training of 50 election officials from the Liberian National Election Commission. During the workshop, disability advocates, including persons with various types of disabilities, simulated vote casting at a polling station to illustrate the numerous barriers that they had experienced in previous elections.³⁵ This method used humor that was effective, and it imparted serious messages of discrimination and exclusion based on stereotyping and generalized lack of knowledge. Drawing on their individual experiences, members of the group demonstrated the barriers that can stand in the way of access and participation for a voter with disabilities, ranging from physical and communication barriers experienced by persons with physical and sensory disabilities to barriers rooted in ignorance and stigma.

32 CRPD, *supra* note 1, at Article 4.

33 Janet E. Lord & Michael A. Stein, *Participation in International Agreements as Transformative Social Change: The UN Convention on the Rights of Persons with Disabilities*, in *Making Rights Real* (Jody Heymann ed., Cambridge U. Press 2012).

34 *Id.*

35 For more on using participatory human rights education to forward disability rights, see Janet E. Lord and Nancy Flowers, *Human Rights Education and Grassroots Peace Building*, in *Human Rights and Conflict: New Actors, Strategies and Ethical Dilemmas* (Julie A. Mertus & Jeff Helsing ed., United States Institute of Peace 2006).

Strengthening Disability Rights

To strengthen disability law frameworks so they are more in line with international standards on disability rights, the substance as well as the process of the law must be reformed. Substantive and procedural reforms can create accessible and consumer-oriented dispute-settlement procedures. These range from legal claims brought before courts and human rights tribunals to electoral complaints mechanisms to complaints procedures of national human rights institutions. Procedural reforms are a core part of enhancing access to justice for marginalized groups, including enhancing the accessibility of notice requirements, the right to be heard, access to information rights, and the provision of reasonable accommodations.

Legislative Reform to Modify Legal Frameworks and Stimulate Legal Empowerment

Although legislation and policies by themselves do not assure full implementation of the CRPD, they are a necessary pillar of the effort to facilitate change. Similar to states parties to other core human rights conventions, states parties to the CRPD are required to adopt specific legislation that prohibits discrimination in all spheres.³⁶ Such laws should aim at eliminating barriers to access that constitute both formal and substantive discrimination, attribute obligations to public and private actors, and introduce measures to bring about equitable access to all rights. Although the CRPD is relatively new, it has already promoted significant law and policy shifts. This work is being undertaken at various levels, including in constitutional development and reform, national-level law reform and development, and targeted law reforms in discrete contexts.

For some countries, antidiscrimination legislation will require a change in the overall approach toward tackling inequities. For example, Japan does not have comprehensive antidiscrimination laws and policies, and the concept of nondiscrimination in regard to disability is not considered a part of the broader civil and human rights initiative.³⁷ With its ratification of the CRPD, Japan is developing disability discrimination law and policy for the first time.³⁸ States parties should consider using incentives to encourage public and private actors to change their attitudes and behavior in relation to individuals and groups facing systemic discrimination, or penalize them in case of noncompliance. The identification and elimination of barriers will frequently require devoting greater resources to issues of access. Particular attention must be given to ensuring that laws and policies are implemented in practice.

In Nepal, DPOs worked to ensure that the voices of persons with disabilities were heard during the drafting of a new constitution. The Kathmandu

36 CRPD, *supra* note 1, at Article 4.

37 J. Nakagawa & P. Blanck, *Future of Disability Law in Japan: Employment and Accommodation*, 33(1) *Loy. L.A. Intl. & Comp. L. Rev.* 173 (2010).

38 *Id.*

Center for Independent Living in Nepal held workshops that were strategically designed by the organizers to build linkages among DPOs, civil society organizations, and international actors—such as the United Nations—in the constitution-drafting process. Although few DPOs in the country had previously focused on law and policy advocacy, one objective of the constitution-drafting participation was to help build the capacity of DPOs to engage actively in law and policy reform and development and to engage with international civil society partners to increase understanding of international standards on disability.³⁹

In other countries, notably South Africa, Uganda, Zambia, and Thailand,⁴⁰ DPOs have likewise used constitution-building processes to leverage disability rights. Ecuador issued a presidential executive decree in 2007 to promote the development of disability programs across all sectors and introduced a chapter on disability in its 2008 constitution.⁴¹ Article 54 of Kenya's 2010 constitution "seeks to minimize barriers to equalization of opportunities in all aspects of social-cultural, economic and political life" for persons with disabilities.⁴² In Egypt, efforts are under way to adopt a national disability law, situate disability within the new constitutional framework, and revise the election law in conformity with the CRPD. Enhancing political participation is critical in postconflict and transitioning countries.

Legal Empowerment to Support the Reform of Policies, Plans, and Strategies

Since the adoption of the CRPD, countries have started developing disability action plans where none existed previously, as well as incorporating disability into their broader national action plans. Thailand developed the National Plan for Persons with Disabilities' Quality of Life Development Plan 2007–11 to issue guidelines for an integrated approach to disability and development programs in the country.⁴³ States parties should ensure that strategies, policies, and plans of action are in place and implemented in order to address barriers to access. Economic policies, such as budgetary allocations and measures to stimulate economic growth, should take into account the need to guarantee the effective enjoyment of all CRPD rights. Public and private institutions should be required to develop plans of action to address nondiscrimination,

39 Lord & Stein, *supra* note 33.

40 The Thai constitution of 2007 includes "anti-discrimination provisions and guarantees accessibility to social welfare and services for persons with disabilities." For legislative developments as reported to the CRPD committee, see United Nations, *Compilation of Legislative Measures Undertaken in the Implementation of the Convention on the Rights of Persons with Disabilities: 2011 Update* (CRPD/CSP/2011/CRP.5), available at http://www.un.org/disabilities/documents/COP/crpd_csp_2011_crp.5.doc (accessed May 24, 2012).

41 *Id.*

42 *Id.*

43 *Id.* For a more extensive discussion of law and policy within the context of HIV and disability, see Janet E. Lord, *HIV/AIDS, Disability and Discrimination: A Thematic Guide on Inclusive Law, Policy and Programming* (One Billion Strong, Washington, D.C. 2012).

and states should conduct human rights education and training programs for public officials and make such training available to judges and candidates for judicial appointments.

Projects aimed at building human rights knowledge and advocacy techniques are often pursued in a vacuum, effectively disconnected from follow-up action plans. For instance, some efforts to train local DPOs regarding the CRPD have been provided without enabling those groups to exercise their newly acquired capabilities. Consequently, although DPOs have gained knowledge, they remain unsure how to appropriately utilize it. The Harvard Law School Project on Disability, in cooperation with BlueLaw International and American Institutes for Research, worked with a coalition of DPOs in Zambia. The objectives were to learn more about the CRPD with a specific aim to make public health services, including HIV/AIDS education, be disability inclusive.⁴⁴ One of the strategies was the placement of a disability advocate on the team implementing a large-scale HIV program involving a large international organization and a number of local organizations. The provision of disability expertise in the form of a dedicated staff member and the provision of training to a network of disability advocates engaged in both disability policy and HIV education at the community level increased the capacity of DPOs and enabled them to achieve better access to health care, the CRPD goal they identified as a priority.

Facilitating Disability Rights

Measures in the CRPD aim to ensure the facilitation of the rights set forth in the treaty. The CRPD is a framework in which disability rights may be exercised through a variety of measures that identify and then dismantle the barriers that stand in the way of the legal empowerment of persons with disabilities. Such facilitation efforts include the accessibility measures identified in Article 9, the measures of reasonable accommodation and positive measures in Article 5, institutional and individual capacity building, and means to facilitate access to the mechanisms of justice.

Accessibility in Virtual Spaces

The CRPD has helped to bridge another major frontier in disability empowerment and inclusion in the mainstream—ensuring that accessibility is not limited to the physical realm alone but extends to virtual spaces as well. Information and communication technologies (ICTs) are a major driver in social and professional interchange in today's world and permeate almost all transactions and interactions in society. Today, ICT-enabled services and resources are central features of many socioeconomic development initiatives, including promoting access to banking, health care, education, income

44 For a brief discussion of this project, see <http://www.bluelawinternational.com> (accessed Jul. 24, 2012).

generation, disaster response and management, and social networking and civic participation.⁴⁵ This raises the stakes in ensuring that ICTs are accessible to people with disabilities for two reasons: one, ICT-enabled development can significantly help to level the playing field for people with disabilities;⁴⁶ and two, the lack of accessibility will add to their exclusion from major development programs, leading to further marginalization.⁴⁷

The CRPD addresses accessible ICTs and assistive technologies (AT) throughout, most specifically in Articles 9, 21, and 26, emphasizing the critical role these technologies play in realizing all rights, such as access to justice, freedom of expression, and rights to political participation, education, health rehabilitation, and employment.⁴⁸ However, Web accessibility and the availability of accessible ICTs remain low despite the wide ratification of the CRPD. The Global Initiative for Inclusive ICTs (G3ict) issued the CRPD Progress Report on ICT Accessibility 2010 based on a survey of 33 countries. This report found that

- Only 58 percent of the countries studied included ICT in accessibility definitions in laws or regulations.
- Only 36 percent had laws, policies, or programs to define public procurement rules for accessible ICTs.
- Sixty one percent enabled persons with disabilities to input information in accessible and usable formats to access services offered online.
- Sixty seven percent had laws, policies, or programs that ensure that government communications using ICTs are provided in accessible and alternative formats (for example, sign language or Braille).

The pervasiveness of ICTs in most socioeconomic domains requires states parties to develop laws and policies to support a comprehensive, coordinated, and successful approach to promoting ICT accessibility for all. Peter Blanck and colleagues at the Burton Blatt Institute at Syracuse University have worked closely with the European Union (EU) to assess the adequacy of laws and policies to ensure broad ICT accessibility. The lessons learned through this work resonate across countries.

45 Deepthi Samant, Rebecca Matter, & Mark Harniss, *Realizing the Potential of Accessible ICTs in Developing Countries*, in *Disability & Rehabilitation: Assistive Technology* (Informa Healthcare 2012, doi:10.3109/17483107.2012.669022, available at <http://informahealthcare.com/doi/pdfplus/10.3109/17483107.2012.669022>) also forthcoming in print.

46 *Id.*

47 Peter Blanck, *Towards a Right under the ADA to Web Access for People with Cognitive Disabilities* (Coleman Institute for Cognitive Disabilities 2012), available at http://www.colemaninstitute.org/images/documents/research_development/2012CTowardsARightUnderTheADA.pdf; M. V. Vicente & A. J. Lopez, *A Multidimensional Analysis of the Disability Digital Divide: Some Evidence for Internet Use*, 26(1) *The Information Society* 48–64 (2010).

48 CRPD (2006), available at <http://www.un.org/disabilities/default.asp?navid=13&pid=150> (accessed Jul. 24, 2012).

Laws, policies, and regulations must address accessibility in the entire accessibility supply chain, including “content production, content transmission, and content rendering.”⁴⁹ Thus, policies must cover the producers and developers as well as the deployers of technology (that is, service providers such as banks).⁵⁰ Different countries have different approaches for such an undertaking. For example, in the United States different pieces of legislation covering different products, agencies, and sectors that utilize ICT-based services—a piecemeal approach—coexist with broad-sweeping legislation such as the Americans with Disabilities Act.⁵¹ Depending on the political climate and national interest, both approaches may need to be used. Additionally, states parties should promote collaboration and agreement among the different stakeholders such as consumers, service providers, manufacturers, and law enforcement to create broad support for institutional drive due to the differing interests of and impacts on each stakeholder group.⁵² Issues such as ICT accessibility encompass the need for top-down (impose direct obligations on the supply side) as well as bottom-up (rights for users/consumers) types of legislation.⁵³ Some states will need to support public and private mechanisms for harmonization toward uniformity of law.

Another issue that is increasingly a challenge for law and policymakers is that of convergence—the “erosion of boundaries” between different types of previously separate ICT products and services such as the transmission of television content delivered over the Internet.⁵⁴ The expansion of such services may fall in the gray areas not clearly covered by accessibility legislation or regulation. As discussed by Cullen et al.:

Telephony over the Internet often falls outside the scope of legislation dealing with accessibility of voice telephony and there is a lack of clarity as to whether interactive TV is a broadcast or a telecommunications service, or neither of these but a new class of service from an e-Accessibility regulatory point of view.⁵⁵

Finally, it is important to address the issue of the existence and transferability of standards and regulations for ICT products and services across

49 Kevin Cullen et al., *Accessibility of ICT Products and Services to Disabled and Older People: Towards a Framework for Further Development of EU Legislation or Other Co-ordination Measures on eAccessibility* (European Commission 2008).

50 *Id.*

51 William N. Myhill, *Law & Policy Challenges for Achieving an Accessible eSociety: Lessons from the United States*, in *European Yearbook on Disability Law* vol. 2 (L. Waddington & G. Quinn ed., Intersentia 2010).

52 Samant, Matter, & Harniss *supra* note 45.

53 Cullen et al., *supra* note 49.

54 Rajendra Singh & Siddhartha Raja, *Convergence in Information and Communication Technology: Strategic and Regulatory Considerations* (World Bank 2010), available at http://publications.worldbank.org/index.php?main_page=product_info&cPath=0&products_id=23785 (accessed Jul. 25, 2012).

55 Cullen et al., *supra* note 49, at 65.

national boundaries. The lack of accessibility standards and policies across regions can create significant challenges for individuals with disabilities in an increasingly global society and impede progress toward the fulfillment of the CRPD. The challenge of CRPD implementation in the context of virtual spaces raises numerous issues pertaining to developing-country needs and underdeveloped capacity.

Common but Differentiated Obligations between Developed and Developing States?

The notion that international obligations may introduce flexibility and differential treatment for rich and poor countries is a pragmatic response to real disparities in technical and economic capacities to comply fully with treaty standards. Bodansky's typology of treaty design features that affect obligatory stringency in the international environmental realm is instructive in this regard; it includes flexible or contextual commitments; differential standards; and reservations.⁵⁶ Although it may be anathema to suggest that human rights obligations are somehow contingent or differential on the basis of resources, there are indeed concepts that do, in essence, render obligations either less stringent in the sense of temporality (that is, progressive realization in relation to economic, social, and cultural rights)⁵⁷ or more flexible in the sense of providing states with a margin of appreciation for the operationalization of a requirement to suit country contexts or in allowing reservations, declarations, and understandings.⁵⁸

Thus, it is possible to speak in terms of "common but differentiated responsibilities" in the CRPD.⁵⁹ However, legal, institutional, and economic underdevelopment is not an escape hatch for avoiding compliance. The CRPD goes further than any other human rights convention in establishing a framework for international cooperation that accommodates divergent levels of economic development and unequal capacities to address disability rights in a comprehensive manner.⁶⁰ Article 32 represents one model for making international human rights law responsive to such challenges and to foster substantive disability rights equality among states.⁶¹

56 D. Bodansky, *The Art and Craft of International Environmental Law* (President and Fellows of Harvard College 2010).

57 CRPD, *supra* note 1, at Article 4(2).

58 *Id.*, at Article 46.

59 C. Stone, *Common but Differentiated Responsibilities in International Law*, 98 Am. J. Intl. L. 276–301 (2004).

60 Philippe Cullet, *Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations*, 10 European J. Intl. L. 549–82 (1999). For a helpful discussion of implementation challenges in another context, see G. Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5(2) World Trade Rev. 177–98 (2006).

61 CRPD, *supra* note 1, at Article 32.

Reasonable Accommodation as a Primary Means of Rights Facilitation

One of the most important facilitators of the rights recognized in the CRPD is the concept of required reasonable accommodation. The failure to provide reasonable accommodation to an individual with a disability, whether to facilitate access to education, work, health care, cultural activities, or other spheres of life, constitutes discrimination.

Reasonable accommodation is being implemented at the domestic level in numerous ways. One example of using the tools of legal empowerment to equip persons with disabilities and employers to better understand how to operationalize reasonable accommodation is the Job Accommodation Network, an initiative of the Office of Disability Employment Policy in the US Department of Labor. The Job Accommodation Network is a model for the provision of free, expert, and confidential guidance on workplace accommodations and disability employment issues.⁶² The service helps to identify practical solutions that benefit employers in meeting their reasonable accommodations duties and employees in negotiating job accommodations. The initiative focuses on workable solutions according to which legal requirements are satisfied within a framework that assists the employer and the employee in understanding legal requirements and measures that may be undertaken to meet them. This approach and similar initiatives are being operationalized as countries implement the obligations set forth in the CRPD. Other applications of reasonable accommodation under development pertain to the obligations set forth in Article 12 to facilitate empowered decision making. Law reform initiatives in Ireland and South Africa, for example, are putting into place models that will reasonably accommodate individuals with disabilities in decision making about all aspects of life, including medical and rehabilitation issues, financial and property matters, and political participation.⁶³

Improving Monitoring and Enforcement of Disability Rights

National legislation, strategies, policies, and plans should provide for mechanisms and institutions that effectively address the individual and the structural nature of the harm caused by disability discrimination and inequality of access to rights in all fields covered by the CRPD. Institutions dealing with allegations of disability discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions, and ombudspersons. These institutions should be accessible to all persons with disabilities without discrimination and consistent with principles of accessibility.

62 See Job Accommodation Network, <http://askjan.org/> (accessed Jul. 24, 2012).

63 For a discussion of the Irish initiative, see *Amnesty International Ireland, Mental Health Act 2001: A Review, Summary Paper* (undated). For a review of the South African effort to draft legislation on supported decision making, see South African Law Reform Commission, *Current Investigations, Progress Report*, available at <http://www.justice.gov.za/salrc/progress.htm>.

Institutions should be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of nonrepetition, and public apologies, and states parties should ensure that these measures are effectively implemented.

Improving Access to Dispute-Settlement Mechanisms

The drafters of the CRPD understood the barriers that exist for persons with disabilities in seeking access to justice for the vindication of their rights. Some of these barriers parallel those that all marginalized groups experience and that contribute toward disempowerment, while others are more specific to disability. There is an overall lack of awareness or unintended insensitivity to disability-related concerns and needs among court personnel, including inflexible court policies, practices, and procedures and inaccessible public information about courts and court services.

Given recognition that access to justice programs for marginalized groups is essential and must be pursued in conjunction with top-down justice sector reform strategies, there are numerous possibilities for the use of existing platforms to enhance disability inclusion. In Afghanistan, Global Rights partnered with local women's organizations and several universities to establish legal assistance bureaus in order to enhance women's access to family courts and justice.⁶⁴ Improving the accessibility of these courts to women, persons with disabilities, and other marginalized groups is essential to create well-trodden pathways for the enforcement of legal rights. DPOs are working to ensure that such community-based legal services are accessible to persons with disabilities. This is consistent with measures set forth in Article 13 of the CRPD.

Eliminating Barriers through Litigation

Legal empowerment approaches stress not only top-down training of judges and lawyers but also how to work within civil society to build capacity to engage in a range of activities that enhance and facilitate access to justice. Strategic litigation at the local level and through regional as well as international human rights mechanisms is an effective tool for change provided it is designed and implemented by local organizations and not driven by ill-informed outsiders. Experience with existing domestic disability laws and existing regional systems discloses the possibilities for change.

Antidiscrimination legislation with remedial measures is a tool that can help ensure equality and fair treatment in the face of continuing stigma and negative attitudes toward people with disabilities. In the United States, the Americans with Disabilities Act (ADA)⁶⁵ has significantly affected the ability of persons with disabilities to combat stigma and discrimination in the work-

64 See Global Rights, Afghanistan, http://www.globalrights.org/site/PageServer?pagename=www_asia_afghanistan (accessed Jul. 25, 2012).

65 See, generally, P. Blanck et al., *Disability Rights Law and Policy: Casebook* (Thomson/West 2009).

place. Consider the case of Don Perkl, an individual with intellectual disability, who was fired from Chuck E. Cheese, a pizza restaurant, because of his disability.⁶⁶ Despite support from his supervisor and his coworkers, he was fired by a regional manager who believed that Perkl was threatening to the restaurant patrons due to his disability and unfit for the job. A jury disagreed, awarding Perkl back pay, legal fees, and compensatory damages under the ADA, as well as US\$13 million in punitive damages, to deliver a strong message.⁶⁷ Without the ADA for recourse, Perkl would have faced severe difficulty in challenging the regional manager for blatant disability-based discrimination.

Across the globe, lawyers are undertaking similar cases in areas of disability rights. This work, including development projects that aim to strengthen the ability of civil society and legal aid clinics to undertake legal empowerment work, must target the elimination of systemic disability discrimination and segregation that inhibit equitable access to all rights for persons with disabilities. The Harvard Law School Project on Disability, for example, has served as amici in a number of cases before the European Court of Human Rights, as well as the European Committee of Social Rights.⁶⁸

Innovations in Monitoring: Disability Rights Budget Analysis

Standard rule of law approaches overemphasize legal interventions that not only are top-down and disconnected from the marginalized groups that legal frameworks are intended to serve but also privilege practices that emphasize court-focused action over other equally valid and in some instances more effective forms of interventions for marginalized groups. Legal empowerment approaches increasingly point to the efficacy of budgetary analysis as an important tool in bringing legal obligations to bear on government action.⁶⁹ In this regard, the CRPD sets up a framework that brings such approaches within its aperture.

The CRPD conceptualizes nondiscrimination and equality and encompasses a cross-cutting obligation that may be realized only through its application to specific substantive human rights, whether civil, political, economic, social, or cultural. It asserts a substantive equality approach that goes beyond formal equality and advances socially, economically, and historically marginalized groups.⁷⁰ Moreover, the CRPD is an affront to the discredited notion

66 See P. Blanck, *Americans with Disabilities and Their Civil Rights: Past, Present, and Future*, 66 U. Pitt. L. Rev. 687–719 (2006), for a discussion of this and other ADA cases in which Blanck was involved as an expert witness and legal counsel.

67 *Id.*

68 See *Alajos Kiss v. Hungary*, App. No. 38832/06 (Eur. Ct. of Human Rights, May 20, 2010), paragraph 4.

69 See Gillian MacNaughton & Paul Hunt, *A Human Rights–Based Approach to Social Impact Assessment*, in *New Directions in Social Impact Assessment: Conceptual and Methodological Advances* 355, 360 (Frank Vanclay & Ana Maria Esteves ed., Edward Elgar 2012) (Budget analysis “reveals human rights problems and affords means to tackle them”).

70 Janet E. Lord & Rebecca Brown, *The Role of Reasonable Accommodation in Securing Substantive*

that civil and political rights require little in the way of positive action and investment of resources by states in order to effect implementation.⁷¹ The CRPD brings the human rights framework together in requiring reasonable accommodation through positive measures in all areas of life.⁷²

The implications of this model for legal empowerment underscore the sophistication of the CRPD framework. In projecting the need for a multifaceted approach to implementation, the CRPD embraces the need for budget analysis to track the extent to which states parties undertake the measures required to realize all rights under the CRPD, even those subject to progressive realization. Disability rights budget analysis encompasses an approach according to which a state party's allocation of resources in a given area (for example, education, employment, or community living) is scrutinized and assessed.⁷³ Budget analysis can be used to identify the sufficiency of resource allocation in an attempt to secure the rights of a particularly disadvantaged group.⁷⁴ In this regard, the Limberg Principles on the Implementation of Economic, Social, and Cultural Rights⁷⁵ stress that statistical information and information on budgetary allocations and expenditures should be presented in such a way as to facilitate the assessment of compliance with economic, social, and cultural rights obligations.⁷⁶

Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities, in *Critical Perspectives on Human Rights and Disability Law* 273 (Marcia Rioux, Lee Ann Bassler, & Melinda Jones ed., Martinus Nijhoff 2011).

71 See Anna Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* (Hart 2008).

72 See Lord & Brown, *supra* note 70.

73 See Gillian MacNaughton, *Human Rights Frameworks, Strategies, and Tools for the Poverty Lawyer's Toolbox*, J. Hum. Rights Prac. 83, 95. See also Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 Wash. L. Rev. 449, 459 (2008) (asserting that budget analysis in the disability rights context is an "essential component" of disability rights advocacy work).

74 S. Farrior, *Human Rights Advocacy on Gender Issues: Challenges and Opportunities*, 1 J. Hum. Rights Prac. 83–100 (2009). See I. Diokno and M. Socorro, *A Rights-Based Approach towards Budget Analysis* 8 (International Human Rights Internship Program 1999), available at <http://www.crin.org/docs/resources/publications/hrbap/RBABudgetAnalysis.pdf> (accessed Feb. 22, 2012); Helena Hofbauer et al., *Dignity Counts: A Guide to Using Budget Analysis to Advance Human Rights* (International Budget Partnership 2004), available at http://www.iie.org/en/Programs/IHRIP/~/_/media/Files/Programs/IHRIP/Dignity_Counts.ashx (accessed Feb. 22, 2012). Budget analysis can also serve an important role in the realm of women's rights. See, for example, Debbie Budlender & Rhonda Sharp, *How to Do a Gender-Sensitive Budget Analysis: Contemporary Research and Practice* (Commonwealth Secretariat 1998), available at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B1171EF87-2C5C-4624-9D76-B03CF35F4E65%7D_AusAIDTr.pdf (accessed Feb. 22, 2012).

75 United Nations, Economic & Social Council, *Limburg Principles on the Implementation of Economic, Social, and Cultural Rights*, paragraph 79, UN Doc. E/CN.4/1987/17 (Jan. 8, 1987).

76 *Id.*

Inclusive Development Monitoring, Indicators, and Benchmarks

States parties are obliged to monitor the implementation of measures to comply with CRPD obligations. Monitoring should assess both the steps taken and the results achieved in the elimination of barriers to effective access. National strategies, policies, and plans should use appropriate indicators and benchmarks in operationalizing the CRPD. Monitoring and evaluation practitioners have made significant advances in developing performance indicators to simplify the task of monitoring and evaluating human rights implementation and development interventions. Although most countries have a long way to go before they have effective monitoring and evaluation in the realm of disability and other areas, many are establishing monitoring and evaluation working groups comprising representatives from government, donor agencies, civil society, the UN system, and academic institutions. These groups seek to identify and adapt the indicators appropriate for their countries and to harmonize the collection, analysis, and reporting of data.

As the first human rights convention to explicitly call upon states parties to reform their development assistance programs to include people with disabilities, the CRPD provides an important impetus for international cooperation and assistance. Considerable effort must be taken to ensure that donor governments and recipient developing countries adhere to the inclusive development mandate. This is unlikely to be achieved through the vehicle of national disability legislative reform, but instead must be implemented through the adoption and monitoring of development policies. Participation in development decision making is a major focus of many DPO capacity-building endeavors, and is reflected in the Australian Agency for International Development Disability Strategy, along with other donor initiatives. Groups such as Handicap International have worked to ensure that development tools, such as the processes to develop poverty reduction strategy papers in developing countries, are inclusive and conducted in collaboration and consultation with local DPOs.

Looking Forward

The CRPD provides a conceptual model for the legal empowerment of persons with disabilities through innovative and broad-based interventions. Its obligations are to be implemented through actions required by the mechanisms familiar to the rule of law orthodoxy. Moreover, beyond law and policy change, CRPD obligations are to be applied through culture building, participatory and empowering engagement in decision making, inclusive development practices, disability rights education, rights-based budget analysis, and other activities. The CRPD calls upon states, as well as development actors and DPOs, to engage in a variety of human rights actions in order to realize its implementation—from scoping exercises that examine accessibility obligations in law and policy to law reform, law development, and human rights education that raises awareness among a wide array of stakeholders.

The CRPD embodies the potential for a significant transformation in disability legislation, policies, and programs around the world to empower persons with disabilities through full and equal enjoyment of all human rights and fundamental freedoms. Many governments and development practitioners realize this necessity, but do not have adequate knowledge of effective practices and solutions. The CRPD addresses this concern prominently through Article 32, which highlights the role that capacity building, technical assistance, and the exchange of evidence-based knowledge and best practices can play in facilitating the changes that may be required after ratification. Intellectual assistance plays a role, as does monetary assistance to support actions by low- and middle-income countries to put the convention into practice.

Article 32 encourages financial assistance to aid in CRPD implementation through inclusive and accessible aid programming. When international development addresses disability only as a separate issue distinct from mainstream programs, the result is a vicious circle where individuals with disabilities are further excluded and marginalized from the benefits of most economic and social development reforms and actions.⁷⁷ Hence, Article 32 is critical to assist states parties in meeting their obligations under the CRPD and requires strong international cooperation. The international development community, together with the international disability rights community, can play a significant role in assisting states parties to reform their laws, policies, and programs to implement the CRPD by strengthening technical assistance, providing financial support to implement the articles of the convention, and exchanging knowledge on best practices. Article 32 requires states parties to work with each other and with relevant organizations to support capacity building “through the exchange and sharing of information, experiences, training programmes and best practices” and to “facilitate cooperation in research and access to scientific and technical knowledge.”

Knowledge and practices can be exchanged via networks that encourage dialogue and collaboration through multiple communication strategies among researchers in academic institutions, think tanks, and governments across geographic regions. Participants in such networks can share findings from their activities that increase awareness and understanding about people with disabilities in areas such as deinstitutionalization and community living, employment and economic empowerment, legal capacity, human rights, and access to health care, education, and technology.

One example of such a network is the Global Forum on Law, Justice and Development (GFLJD), initiated by the World Bank’s Legal Vice Presidency together with a number of academic and institutional partners from around the world. The GFLJD aims to bring together stakeholders in the fields of law, justice, and development, combining the economic, legal, and technical aspects of a range of targeted issues beyond disability. By introducing disability into this network, practitioners can work toward mainstreaming the needs of

⁷⁷ Samant, Matter, & Harniss, *supra* note 45.

persons with disabilities across the spectrum of law, justice, and development programs around the world.

The approaches to legal empowerment and innovation called for in the implementation of the CRPD can be built upon to advance an emerging disability rights narrative with roots at the community as well as national level. Empowerment and innovation will be achieved in these reform efforts only with the full participation of and meaningful consultation with persons with disabilities and their representative organizations.

