

Law and People with Disabilities

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Abstract

This article describes the progressive development of disability law, particularly in light of international developments that are transforming domestic disability law frameworks. It provides an overview of the conceptualization of disability in law, charting the shift from a medical model to a social model of disability and more recently to a human rights model. The abstract covers the implications of the Convention on the Rights of Persons with Disabilities (CRPD), and the processes and approaches for translating international disability law standards into national level law. It sheds light on the contemporary disability rights landscape in the light of dramatic legislative action promoted by the adoption of the CRPD.

Introduction

People with disabilities represent 15% of the world's population, many of whom experience discrimination and exclusion and live in poverty, with restricted access to basic goods and services (World Health Organization and World Bank, 2011). The United Nations adopted the Convention on the Rights of Persons with Disabilities (the Convention or CRPD) and its Optional Protocol in 2006, with the aim of establishing a comprehensive framework to promote and protect the rights of persons with disabilities (CRPD, 2006; Optional Protocol, 2006). The Convention elaborates minimum legal standards to address disability discrimination and to promote equality for persons with disabilities in all spheres of life – political, social, economic, cultural, and civil (Schur et al., 2013). The Optional Protocol allows individuals and groups to seek redress at the international level when these standards are not met, and provides for an independent committee of experts to undertake investigations into serious breaches.

At the time the Convention was proposed, in 2001, very few countries around the world had any disability law or policy framework. Its drafters recognized that, throughout the world, national disability law and policy remained underdeveloped or, worse, contained explicitly discriminatory provisions that strip persons with disabilities of their rights (Stein and Lord, 2012). In many respects, law was a tool for exclusion and oppression of persons with disabilities. Fewer than 50 countries had disability discrimination laws, while many countries limited the rights of persons with disabilities through laws and policies, that for instance, excluded persons with disabilities from exercising their right to vote, placed arbitrary restrictions on their right to certain types of employment or limited their ability to take part in the judicial process as witnesses, jurors, or even claimants. In other examples, disability was addressed narrowly, as a social welfare matter, typically coordinated at the government level by ministries of health or social welfare (Degener and Quinn, 2002).

Since 2006, many countries have adopted the standards in the Convention through the process of ratification (UN Enable). As of 26 August 2013, 133 countries have ratified and 156 have signed the Convention (UN Enable). Ratification is an important step in recognizing disability rights at the national level. Countries around the world are undertaking comprehensive and cross-cutting reviews to assess the compatibility of their laws to the Convention and, where needed, to reform and develop laws to bring the national legal system into alignment with the Convention's standards. Law reform is one step

in ensuring full respect for the enjoyment of the rights of persons with disabilities; yet other measures are needed in order to effect real change. Budgets must be allocated to ensure adequate implementation of laws; the public must be made aware of the rights of persons with disabilities to ensure that their actions do not obstruct persons with disabilities from enjoying their rights; and monitoring mechanisms must be put into place to protect disability rights (Lord and Stein, 2008). In addition, persons with disabilities and their representative advocacy organizations must have the capacity to claim their rights and to participate in law, policy, and programming (Lord et al., 2012).

This article considers the progressive development of disability law, particularly in the light of developments at the international level that have promoted the transformation of domestic disability law frameworks. It first provides an overview of the conceptualization of disability in law, focusing on transitional perspectives and examining current trends. It charts the shift from a medical model of disability to a rights-oriented social model of disability in law and policy. Thereafter, the article considers the CRPD framework and its implications for law reform. Then, it addresses the processes and approaches for translating international disability law standards into national level law. The article concludes with observations on the contemporary disability rights landscape in the light of dramatic legislative action promoted by the adoption of the CRPD.

Conceptualizing Disability in Law

The conceptualization of disability in law and policy has progressed, in the post–World War II era, from a limited, medicalized, and welfare-oriented understanding to a rights-based, sociocontextual perspective. The implications of these perspectives are significant and help to explain the gradual enlargement of the disability law landscape. The various models of disability are discussed in turn.

Models of Disability and Their Influence on Disability Law

As stated by Kimberlé Williams Crenshaw, “law... embodies and reinforces ideological assumptions about human relations that people accept as natural or even immutable” (cited in Berg, 1999: p. 4). The conceptualization of and cultural discourse on disability in society has evolved overtime, and these changes are reflected in the nature and scope of laws that impact persons with disabilities.

The early understanding of disability centered on its perceived biological origins, wherein impairment resulted from an injury, disease, or other medical condition (Logue and Blanck, 2010). This ‘medical model’ of disability focused on the impairment as a deviation from or disfigurement of the ‘normal’ human body and conceived of a person to be less capable than his or her peers without disabilities. The medicalization of disability is derived from assumptions and expectations of persons without disabilities about those experiencing life with a disability. This resulted in the notions of the disabled being weaker, less able to undertake and effectively accomplish activities such as going to school and getting a job, and more dependent on others for their subsistence (Berg, 1999; Blanck, 2004; Ingram, 2006; Muller, 2011; Stein, 2007).

With the cultural discourse focused on the presumed deficiencies of persons with disabilities and their resulting economic needs, the medical model shaped disability welfare laws around the world. Social welfare laws for persons with disabilities often equate disability with the inability to work and earn an income, and create government benefits that support people economically as well as provide them access to necessary medical, rehabilitation, and support services, for example, through medical insurance, cash benefits, and personal assistance services (Bagenstos, 2004; Blanck et al., 2013; Jones

and Marks, 2001). While social welfare laws for persons with disabilities were established early on in the twentieth century, they continue to provide government benefits and assistance in most countries despite the newer rights-based legislations.

Beginning in the 1970s, disability advocates began to question and dismantle the dominant medical view of disability and raised a different reason for the exclusion of the disabled in society. They countered that disability was a social, rather than a medical, condition, caused by the challenges in interacting with environments and systems, which are not designed to accommodate human differences and are thus inaccessible to persons with disabilities (Gray et al., 2003). The 'social model' of disability challenged the presumption that benefits, and welfare were the legal solutions to the exclusion of people with disabilities, and instead advocated for legislation that would remove barriers to their full social and economic participation. The social model of disability is seen as a 'minority model' of disability by some legal scholars, in that it defines persons with disabilities as a group, like other minorities, that has been willfully excluded from mainstream society due to stigma, negative attitudes, and stereotypes about their abilities and capacities (Bickenbach, 1999). The social model of disability shaped the next iteration of disability-related legislation with a focus on antidiscrimination and equal access (Blanck, 2014).

Antidiscrimination law aims to provide protections and safeguards to minority groups and promote equality of opportunity, along with resources to seek compensatory damages (Jones and Marks, 2001). As the social model of disability became the dominant view of disability, countries adopted antidiscrimination into their disability legislation either as the foundational premise or within sections targeted at employment and access to public and private goods and services. The Americans with Disabilities Act passed in 1990 has been widely viewed as the standard bearer of disability civil rights and antidiscrimination laws that were enacted in many countries in the 1990s (Blanck, 2006, 2008; Stein, 2007). In many countries, antidiscrimination law is coupled with legislation establishing quotas for persons with disabilities in education, employment, political representation, housing, and other domains (Byrnes, 2011; Degener, 2005; Kim, 2011) as a corrective measure to level the playing field. The social model of disability is related to the independent living movement in western societies where persons with disabilities fought for their right to live within inclusive communities independently, rather than be segregated in institutions or other exclusionary arrangements (Blanck, 2006).

The social model of disability focuses on the corrective measures required in a society to break down environmental and attitudinal barriers to participation and has conceptually organized the fight for civil rights for persons with disabilities. However, with time scholars and advocates have proposed a more comprehensive approach that looks beyond civil rights and liberties and frames disability as a human rights imperative. Stein and Stein (2007) describe this approach as a way to go beyond seeking only first generation civil and political rights through antidiscrimination legislation, to seeking first and second generation rights that include equality of opportunity on the "full spectrum of social, cultural, and economic measures" (p. 1205). A comprehensive 'human rights model' of disability will advance laws that aim to recognize the human rights of persons with disabilities; that is, "the fundamental, universal and indivisible principles by which every single human being can gain justice and equality" (Albert and Hurst, 2006: p. 2). The human rights model of disability has been

the founding element behind the CRPD, the first international treaty on disability. The next section discusses the application of human rights standards to disability law.

As described above, different conceptualizations and cultural realities often lead to different legal responses to disability. Despite their differences, these legal responses frequently coexist within legal systems; countries use a combination of welfare, antidiscrimination, affirmative action, and human rights-based legal approaches for persons with disabilities. Most countries use a variety of legal mechanisms such as constitutional law, civil rights law, and criminal law to employ and implement these differing legal approaches (Degener, 2005). Increasingly, countries are turning to constitutional law to incorporate the human rights model of disability and articulate the recognition of the human rights of persons with disabilities in the highest law of the land. In some countries, notably South Africa, Uganda, Zambia, and Thailand (United Nations, 2011), disabled people's organizations (DPOs) have used constitution-building processes to leverage disability rights. Ecuador introduced a chapter on disability within its 2008 Constitution while also issuing a Presidential Executive Decree in 2007 to promote the development of disability programs across all sectors (United Nations, 2011). Kenya provides another example of constitutional change to advance disability rights and the CRPD through Article 54 in its 2010 Constitution which "seeks to minimize barriers to equalization of opportunities in all aspects of social-cultural, economic and political life" for persons with disabilities (United Nations, 2011).

Criminal laws that focus on persons with disabilities demonstrate the contradictory, complex, and varying contextualization's of disability prevalent in society. Many such laws concern persons with disabilities as victims of crime, stemming from the increasing recognition of hate crime, violence, and abuses against persons with disabilities (International Network of Women with Disabilities, 2011; Hughes et al., 2012; Piggott, 2011; Shakespeare, 2012). On the other hand, some types of disabilities, especially psychosocial disabilities, have been criminalized and penalized through laws that mandate involuntary confinement and forced institutionalizations (Perlin and Szeli, 2012; Szmukler, 2010).

Emergence of International Human Rights Law Standards on the Rights of Persons with Disabilities

The rationale for the development of a disability-specific human rights treaty was the virtual invisibility of persons with disabilities from the human rights system and the reality that an estimated one billion persons with disabilities around the world are excluded from society and are routinely denied access to education, employment, health care services, and basic needs (World Health Organization and World Bank, 2011: p. 29). Moreover, persons with disabilities are far more likely than others to live in poverty.

International human rights law did little to address the human rights of persons with disabilities prior to the adoption of the CRPD. No international human rights treaty comprehensively addressed the multitude of barriers experienced by persons with disabilities. While few states had developed disability rights law and policy frameworks, where they did have disability-related legislation, often they explicitly sanctioned disability discrimination; for example, denying persons with disabilities the right to vote, obtain an education, serve as a juror, open a bank account, own property, or work in certain sectors (Quinn, 2009). Welfare oriented approaches to disability law and policy served to construct the development of holistic, rights-oriented legal protections (Degener and Quinn, 2002).

The UN General Assembly adopted the Convention on the Rights of Persons with Disabilities by general consensus in 2006, opening for signature by states parties on 30 March 2007. It attained the requisite 20 ratifications in short order, triggering its entry into force on 3 May 2008.

The CRPD is the first legally binding international humanrights treaty to address the rights and fundamental freedoms of one billion persons and to set forth a framework for comprehensive domestic legislation to address disability rights (CRPD, 2006). The terms of the CRPD require the reform of legal systems, justice sectors, and institutions in meeting its obligations. Significantly, it goes beyond this traditional focus and brings within its ambit nonformal and decentralized justice and administrative systems and processes and recognizes the role that local communities play in rights protection and the duties of private as well as public actors in fostering inclusion (Lord et al., 2012). Its potential for shaping national disability law and policies and transforming institutions is far reaching.

The CRPD is responsive to the legal void that existed at the international level in disability law. The CRPD charts a progressive and comprehensive course for the development and reform of domestic disability law and policy in alignment with international human rights principles. It includes monitoring mechanisms intended to build the capacity of national governments, national human rights institutions, and DPOs in advancing disability rights.

UN Disability Convention Structure and Content

The CRPD comprises 25 preambular paragraphs and 50 articles. Its preamble lays out the historical progression of international standards on disability and highlights issues of importance, including the understanding of disability as a socially constructed phenomenon. The 50 operative articles in the Convention provide a comprehensive legal framework for the consideration of civil, political, economic, social, and cultural rights within the specific context of disability. It is the most detailed framing of the rights of persons with disabilities found in any treaty and serves to amplify the protections to which persons with disabilities are entitled in other, nondisability- specific human rights instruments (Kayess and French, 2008).

The CRPD has an introductory set of provisions that outline its purpose (Article 1), set out key definitions (Article 2), and articulate general articles that apply and must be interpreted and applied across provisions of the treaty (Articles 3–9). One of these general provisions is Article 5, Equality and Nondiscrimination, which prohibits discrimination on the basis of disability and requires the provision of reasonable accommodation. Article 9, Accessibility, creates obligations for accessibility in a variety of contexts. Articles 10–30 enumerate specific substantive rights of the Convention, including civil, political, economic, social, and cultural rights. The CRPD establishes a system of national and international level monitoring and implementation (Articles 31–40), and, like other treaties, contains provisions that govern its operation (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. It requires states parties to consult with and involve persons with disabilities in developing and implementing legislation and policies and in decision-making processes (CRPD, 2006: art. 4). Accordingly, the CRPD affirms the rights of stakeholders and their representative organizations to be heard, and signals recognition that participation and inclusion in decision-making is a precondition of legal empowerment.

The CRPD establishes national level monitoring requirements with three dimensions. It calls for cross-governmental coordination in recognition that disability is a cross-cutting issue, requires independent monitoring to be performed by a national human rights or disability rights institution, and calls for stakeholder participation in domestic monitoring (CRPD, 2006: art. 33). A committee on the Rights of

Persons with Disabilities – the CRPDs 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. The Optional Protocol to the CRPD, consisting of 18 articles, gives the Committee competence to examine individual complaints with regard to alleged CRPD violations by parties to the protocol (Optional Protocol, 2006). It allows states parties to opt into participation in individual and group communications procedures and establishes an inquiry procedure, both of which are overseen by the Committee. These mechanisms are vehicles for empowering disability advocates and their representative organizations to bring complaints for individual violations as well as systemic abuses to the attention of the CRPD for review. Finally, the CRPD establishes a periodic meeting of a Conference of States Parties to consider issues relating to implementation (CRPD, 2006: art. 40). This mechanism allows state parties and disability advocates to engage in dialogue regarding implementation and best practices in law and policy reform consistent with the CRPD.

In sum, the CRPD sets forth general obligations familiar to human rights treaties – requiring national law reform and domestic incorporation of its provisions. It also provides a blueprint for national level disability rights advocacy and action. Significantly, the Convention contains a diverse set of obligations that, when surveyed, constitute a map of advocacy and empowerment opportunities at the local, national, and international levels. In so doing, the CRPD plots a course for a human rights practice that goes beyond traditional, top-down law reform-oriented approaches to embrace legal empowerment and transformation that is locally driven, community focused, and civil society oriented (Lord et al., 2012).

Translating International Standards into National Legislation

Although more than 130 countries have enthusiastically supported, ratified, and signed the CRPD, 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 varied perspectives on the nature and definition of disability, and the differentiation between developed and developing countries in capacities for implementation and distinctions in approach to domestic legislative reform to bring about human rights implementation. These challenges are considered in turn.

Defining Disability in Law

Defining disability in law and policy is complex and no universal definition exists. Even within a single legal system, a multitude of definitions may be used to define disability in discrete contexts. Defining disability is highly relevant for identifying the class of individuals for whom disability rights protection is accorded. 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” (CRPD, 2006: art. 1). As such, the understanding of disability in the CRPD sets a baseline, from which states may expand disability rights protection to cover, for instance, disability discrimination in the case of an individual who is temporarily disabled.

The CRPD makes clear that the term ‘person with disabilities’ in the Convention ‘includes’ individuals with long-term impairments and thus ‘persons with disabilities’ may indeed encompass a broader category of persons at the national level. Further, impairments are referred to in the CRPD as

‘physical, mental, intellectual, or sensory’ in recognition that disability is diverse with the implication that legislation must provide protection to disabled persons whatever their impairment be. Legislation excluding a given category of individuals with disability from protection, for instance, voting exclusions based on mental disability, is prohibited (CRPD, 2006: arts. 1, 12, 29).

This conceptualization demands a shift in how policymakers have reflected on 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 traumas due to accidents, and disregarding environmental and interactional issues completely (Byrnes, 2011).

Disability Inclusion in Legal Reform Assistance

The provisions and motivations under Article 32, which covers international cooperation, promote the potential for state parties to assist one another with challenges in crafting required innovations and facilitating access to resources as an aid in implementation (Guersey et al., 2007). Promoting the international exchange of technical knowledge and best practices, while providing resources for capacity building, is intended to aid government workers and development practitioners in their efforts to ushering in improvements to and reforms of policies, programs, and practices. Addressing disability in international aid and development funding and support will assist low- and middle-income states parties to provide far-reaching and inclusive programs that meet their goals and obligations under the CRPD.

The barriers faced by persons with disabilities in developing countries restrict their access to information and awareness of their rights, a situation also faced by persons living in poverty and other disadvantaged groups in these countries. As emphasized in the World Report on Disability, persons with disabilities are likely to live in poverty and are often restricted in their access to education, employment, transportation, and health care; and often live in isolation from the wider community (World Health Organization and World Bank, 2011: p. 39). The social determinants of legal empowerment, therefore, are severely restricted for persons with disabilities. The need for awareness building initiatives, including legal literacy programs, 500 Law and People with Disabilities 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.

Legislating Disability Rights

Many of the concepts set forth in the CRPD require states parties to bring about law and policy reforms (or the development of disability law and policy) to align with the shift to the human rights model required by the CRPD. This shift in framework presents challenges whilst creating opportunities for progressive change and legal innovation (Kanter, 2007). The requirements for legal reform to align with CRPD obligations hinge on the application of treaties with the domestic legal system of a country. It also depends upon the general state of the domestic legal framework in relation to its recognition of disability rights.

Some legal systems mandate legislative enactment to incorporate an international treaty into the domestic legal order (e.g., United Kingdom, New Zealand). In some countries, however, treaty

obligations assume legislative supremacy and are automatically part of the national legal order on ratification (e.g., Argentina, the Netherlands). In other countries, elements of both approaches are evident in that some standards are self-executing and do not require additional domestic action to be enforceable, while other standards require legislative action or need clarification to be domestically enforceable.

Law review and reform play a significant role in all these systems. The CRPD requires states to undertake the following actions in the context of law reform: (1) states parties must adopt all appropriate legislative, administrative, and other measures for the implementation of the CRPD; and (2) states parties must adopt all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices that constitute discrimination against persons with disabilities ([CRPD, 2006](#): art. 4).

The general obligation in the CRPD to give effect to its provisions in the domestic legal order implies the undertaking of comprehensive legal review in order to assess alignment with the treaty. Where gaps or inconsistencies appear, such review exercises identify areas requiring corrective measures in the form of legal development or amendment ([Lord and Stein, 2008](#)). That is to say, treaty implementation requires amendment of laws that are inconsistent as well as measures to put into place additional laws to advance implementation. The starting point for such review generally is an assessment of (1) the Constitution; (2) existing antidiscrimination legislation, whether disability-specific or general in scope; (3) existing comprehensive disability rights legislation, such as a national disability law; and (4) human rights acts.

The CRPD does not specify the precise format of implementation and thus allows an amount of flexibility, given the variation in legal systems and legislative frameworks among state parties. There are options that states may consider; for example, comprehensive nondiscrimination legislation that includes protection from discrimination on the basis of disability in one or many spheres, or a comprehensive disability rights law that addresses protection from disability discrimination as well as other types of measures. Equally, a state might introduce reforms and additional measures in discrete areas; for instance, reforming electoral codes and employment law together with new legislation to address gaps in education, transportation, or other areas to bring about wholesale change. In most instances, a combined approach will be necessary to produce full compliance and alignment with the obligations of the CRPD.

In view of the fact that the CRPD is a far reaching instrument and given that disability is a cross-cutting issue with relevance across a legal framework, a legal review will entail an assessment of a range of legislation, beyond disability-specific legislation or human rights legislation ([Lord and Stein, 2008](#)). Legislation may be usefully grouped into three categories of particular relevance for disability rights assessment: (1) Legislation of a disability-specific nature, such as a comprehensive national law on disability or an inclusive education statute or a mental health law; (2) legislation that relates to all persons or general groups of persons, but which may make particular reference to or provision for disability, such as antidiscrimination law, social security law, guardianship laws, education laws, criminal codes, or electoral codes; and (3) legislation that does not address persons with disabilities, but which is relevant to persons with disabilities, such as tax laws, construction laws, family laws, intellectual property laws, and banking and contract laws.

Finally, legal assessment for the purpose of disability law reform requires the participation of persons with disabilities and their representative organizations, as recognized in the CRPD (CRPD, 2006: art. 4(3)). In this sense, the process of law reform is fundamental to its outcome. The lived experience of persons with disabilities provides a sound basis for law and policy reform that is responsive to the specific needs of individuals and offers the best chance for human rights implementation (Blanck, 2014).

Conclusion

The first decade of the twenty-first century marked a transformative period in the progressive development of disability law, both at the international level as a consequence of the drafting and adoption of the CRPD, and at the national level, as the result of significant reforms in domestic disability law. This period has witnessed a number of notable changes at the domestic level, where disability is emerging as a salient human rights issue and the rights of persons with disabilities are increasingly understood as worthy of attention and protection. Notable are constitutional law developments in countries where disability is a prohibited ground of discrimination and efforts across the world to adopt comprehensive disability antidiscrimination laws. The drafters of the CRPD recognized that, throughout the world, national disability law and policy frameworks were underdeveloped or, worse, contained explicitly discriminatory provisions that strip persons with disabilities of their rights. Several countries have focused their attention on adopting sign language as a national language in legislation. Others are working to modify guardianship laws to comply with the supported decision-making framework and legal capacity provisions of the CRPD. Still other countries are reviewing electoral codes and Internet usage, implementing regulations to enhance their accessibility for persons with disabilities. Advocates are likewise challenging outmoded national laws before domestic and regional courts, making claims about discriminatory educational systems that segregate students with disabilities and provide them with inferior education or challenging policies of institutionalization that inhibit the social inclusion of persons with disabilities. In the light of these recent progressive developments and growing adoption of the CRPD, the dynamic pace of disability law reform and legal development shows little sign of slowing.

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Relevant Websites

<http://globalforumljd.org> – Bringing Together Distinguished Legal Scholars, Practitioners, and Advocates

on Current Issues in Disability Law and Policy, Global Forum on Law, Justice and Development,

Community of Practice on Access to Justice for Persons with Disabilities.

<http://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx> – Committee on the Rights of Persons

with Disabilities.

<http://https://nfb.org/law-symposium> – Official UN Website on Persons with Disabilities.

Jacobus tenBroek Disability Law Symposium.

<http://www.un.org/disabilities> – Official Website for the Conference of States Parties.

United Nations Enable.

<http://www.un.org/disabilities/default.asp?id=1433> – Official Website for the CRPD Committee.

Conference of States Parties to the CRPD.