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● **Daniel Vázquez and Domitille Delaplace**

Public Policies from a Human Rights Perspective: A Developing Field

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Human Rights Education in Communities Recovering from Major Social Crisis: Lessons for Haiti

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Reasonable Accommodation: The New Concept from
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The Open Door: Five Foundational Films That Seeded the Representation
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● **Luis Gallegos Chiriboga**

Interview with Luis Gallegos Chiriboga, President (2002-2005)
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PRESENTATION



Sur Journal has the pleasure to release its issue number 14th, which focuses on the rights of persons with disabilities. The purpose of this issue is to promote a wide debate on the impacts of the adoption of the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol, and to evaluate the consequences of this normative evolution for national and regional systems in the Global South.

The final selection of articles presents a diverse approach to disability-rights, both in terms of regional representation and thematic scope. The dossier's opening article entitled **Analysis of Article 33 of the UN Convention: The Critical Importance of National Implementation and Monitoring**, by Luis Fernando Astorga Gatjens, discusses the role played by States Parties and civil society organizations, specially organizations of persons with disabilities (OPwDs), in implementing and monitoring the compliance with the convention, in accordance with the Article 33 of the Convention on the Rights of Persons with Disabilities.

From a comparative-law perspective, Letícia de Campos Velho Martel analyzes in **Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective** the incorporation of the Convention into the Brazilian legal-framework.

On sexuality-related rights, Marta Schaaf, in her article entitled **Negotiating Sexuality in the Convention on the Rights of Persons with Disabilities**, give us a critical account on the dynamics of power and discourse related to disabled sexuality, pointing out the remaining silence on the matter even after the adoption of the Convention.

The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 Years, by Tobias Pieter and Hélène Combrinck, presents a review of the Convention's potential impact on African regional human rights normative framework and on implementation of disability-related rights in selected domestic legal systems (South Africa, Ethiopia, Uganda, and Tanzania).

Based on a critical account of theories of justice, **Human Diversity and Asymmetries: A Reinterpretation of the Social Contract under the Capabilities Approach**, by Stella C. Reicher, critically examines political participation of persons with disabilities, inclusion and diversity in contemporary societies.

Peter Lucas's **The Open Door: Five Foundational Films that Seeded the Representation of Human Rights for Persons with Disabilities** presents a careful description of five landmark disability rights-related films and suggests an original approach on the role of filmmakers in

advancing poetical strategies to represent disability; merging art and political will to break the silence and promote change.

Closing the dossier, we also included an exclusive **Interview with Luis Gallegos Chiriboga, President (2002-2005) of the Ad Hoc Committee that Drew Up the Convention on the Rights of Persons with Disabilities**. The interview was made by Regina Atalla, President of the Latin American Network of Non-Governmental Organizations of Persons with Disabilities and their Families (RIADIS).

Apart from our thematic articles, we have also included the article named **Social Movements and the Constitutional Court: Legal Recognition of the Rights of Same-Sex Couples in Colombia**, by Mauricio Albarracín Caballero, which explores how rights-mobilization by social movements have influenced the approach by the Colombian Constitutional Court to this issue.

Daniel Vázquez and Domitille Delaplace in **Public Policies from a Human Rights Perspective: A Developing Field**, expose a critical view on how to use the tools of the New Public Management in order to include human rights into public policies, bringing particularly the experience of Mexico.

The article by J. Paul Martin on **Human Rights Education in Communities Recovering from Major Social Crisis: Lessons**

for Haiti, discusses Haiti after the 2009 earthquake and elucidates the main challenges facing human rights education in a situation of post-conflict and national reconstruction.

Concepts expressed in the articles are exclusive responsibility of the authors.

We would like to thank the experts who reviewed the articles for this issue. We are especially grateful to Diana Samarasan and Regina Atalla for their involvement in the call for papers and the selection of articles related to rights of persons with disabilities for the current issue. In addition, we would like to stress our appreciation to Matheus Hernandez, who assisted in the elaboration of this issue in the first semester of 2011.

Sur Journal is glad to inform that the table of contents of this special edition on the rights of people with disabilities is also printed in braille, with the link to our website.

Exceptionally, the present issue, dated June of 2011, was printed in the second semester of 2011.

Finally, Sur Journal would like to remind our readers that the next issue will discuss implementation at the national level of the decisions of the regional and international human rights systems and civil society's monitoring role in regard to this process.

The Editors.



MAURICIO ALBARRACÍN CABALLERO

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ABSTRACT

This article reconstructs the mobilization process carried out by the organization Colombia Diversa in order to gain recognition in the Colombian Constitutional Court for the rights of same-sex couples. In particular, it identifies three factors that contributed to this change in the law. First, the organization reframed their demands using the language of constitutional rights. Second, the existence of an activist organization brought together a large number of resources and used a particular set of protest actions. Third, a structure of political opportunities was generated by the existence of a progressive court, an undemocratic congress, and a public that was inclined to support the demands of the activists. These three factors allowed the activists to channel their demands for rights into a progressive judicial decision. Throughout, this article argues for two intimately linked points: the first is proof of the centrality of a rights-based discourse in Colombian political activism, and the second is the strong role that political activism played in defining constitutional rights within the Court.

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KEYWORDS

Colombia – Constitutional Court – Rights of same-sex couples – Social movements – Homosexuality



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SOCIAL MOVEMENTS AND THE CONSTITUTIONAL COURT: LEGAL RECOGNITION OF THE RIGHTS OF SAME-SEX COUPLES IN COLOMBIA¹

Mauricio Albarracín Caballero

1 Introduction

On December 23, 2009, the Colombian government declared a “social state of emergency” in order to confront the financial crisis in the health system. The decreed set of measures motivated patients, doctors, students, political parties, the media, and the general population to mobilize. All of these parties, including the national government, used the same terminology: “the right to health.” During the protests, two images grabbed my attention. The first was a banner held up by two patients, which read “*TUTELA*:² WE ARE ALIVE THANKS TO YOU.” The other was a poster, reproduced by the thousands on flyers distributed in downtown Bogota during the protests, which read: “Health is not a favor, it is a right.”³ In both cases, citizens ascribed personal significance to a legal action or a constitutional right and used a common language to channel their discontent.

Using the language of rights is not unique to social movements in Colombia, nor to countries in the Global South. Such terminology has also been used in the Global North, such as in the civil rights movement in the United States, or in recent cases like the “Right to Work” campaign carried out by unions in the United Kingdom to protest budget cuts made by David Cameron’s administration.⁴ The use of terminology around rights is also not exclusive to progressive movements. Conservative movements that oppose a woman’s freedom to have an abortion use language based on the “right to life,” and those who oppose the right of same-sex parents to adopt children formulate their arguments around “children’s right to have a father and a mother.”

During the last decade, many of the political demonstrations and social mobilizations in Colombia have been mediated by the language of rights. Furthermore,

Notes to this text start on page 29.

many of these debates have revolved around the Constitutional Court, currently the most prestigious and most visible judicial institution. This phenomenon can be attributed to the 1991 Constitution, which establishes an extensive set of fundamental social rights as well as concrete, expedient mechanisms for filing complaints in court.

Nevertheless, we know very little about this phenomenon, which could be called the *constitutionalization of social movements*,⁵ drawing on Esteban Restrepo's use of the expression *constitutionalization of daily life* (RESTREPO, 2002). The constitutionalization of social movements is characterized by the growing, massive, and expansive use of rights-based language and the courts by citizens, human rights organizations, social movements, community organizations, etc. Organized and unorganized citizens "go to court full of hope"⁶ that it will take care of their needs or address their concerns.

In fact, in the past two decades, the Colombian Constitutional Court has issued a large number of decisions, including ones that recognize most of the rights of same-sex couples. This article analyzes the process carried out by the organization Colombia Diversa, which sought to acquire legal recognition for the rights of these couples. This analysis is based on elements of social movement theory, including mobilization frameworks, political opportunity structures, and resource mobilization (TARROW, 2004; McADAM; McCARTHY; ZALD, 1999).

Throughout this article, I identify the factors that led to the recognition of same-sex couples' rights. The first factor is the reframing of the claims within a constitutional rights framework. An example of this is the phrase "equal rights for all couples," coined by activists. Given the context of mobilization, the activists also opted to present a modest claim, leaving the issues of marriage and adoption out of the debate. The second factor analyzed here is the existence of an activist organization – Colombia Diversa – that brought together significant resources and forged alliances with academics, progressive networks, elite activists, grassroots activists, etc. This article also highlights the use of a large repertoire of legal, political, and media actions, such as claims of unconstitutionality, public interventions, bills, economic studies, letters and other means of communicating with the authorities, television commercials, etc. The third factor is the existence of a structure of political opportunities created from various aspects of the national context. These include the existence of a progressive Constitutional Court, a highly inefficient and corrupt Congress, and favorable public opinion.

This analysis allows one to argue for two closely linked theses: the first is proof of the centrality of rights-based language within political activism, and the second is the prominence of political activism in the definition of constitutional rights within the Court. These two ideas demonstrate the impact of social mobilizations on the progressive decisions made by the Constitutional Court and reflect on the relationship between political action and legal reform.

This article is divided into four sections. The first section presents a justification for this kind of study and briefly describes the research methodology. The second section presents some of the theoretical elements used to understand the case study, particularly the application of social movement theories to explain legal changes and strategies. The third section describes the process that led to recognition of the rights

of same-sex couples and analyzes the elements of this process, namely the frameworks of mobilization, the resources used by the activists, and the structure of the political opportunities. Finally, the fourth section offers some conclusions.

2 Activism and the creation of knowledge

Normally, studies done on constitutional rights are legal in nature, attempting to explain their dogma, structure, legal basis, and other characteristics that are relevant for making decisions on judicial and legislative issues. These studies are fundamental in building a technical understanding of constitutional law and human rights. However, this kind of research only explains one part of the phenomenon. Such inquiries can only look at the constitutional issue as it is laid out on paper and they do not capture the social forces that precede, surround, and give meaning to a judge's words. A more comprehensive look at the legal phenomenon requires research into the rights movement, keeping in mind that rights are above all a social and political creation, not just a collection of rules, institutions, and procedures.

At the same time, this article seeks to draw attention to lesbian, gay, bisexual and transgender (LGBT) people, who have had limited participation in the development of social and legal knowledge. Thus, this study aims to give a voice to those who have not had one or who have only had a small one. In the words of Charles Ragin, "this approach to social research asserts that every group in society has a 'story to tell'" (RAGIN, 2007). In this article, those who have fought for legal and social change tell us in their own words what they saw and did. As an openly gay, "out of the closet" lawyer who participated as an activist and lawyer for Colombia Diversa in these struggles for legal recognition, I am in a unique position to access a lot of information and analyze the issue. No doubt this vantage point is no less problematic for a traditional look at the relationship between the subject and the production of knowledge.

As a matter of fact, writing an academic piece from within a social movement could be considered biased and slanted. Several of my colleagues have expressed serious concerns regarding my role in this research study given my ongoing participation in many of these processes. These concerns are fascinating because they propose a dichotomy between the research subject and object, and lead to questions about reflexivity and objectivity in social science research. They are also relevant because they are evidence of a discussion on activists' roles in the production of knowledge and academics' relationships to social change. This last point helps us see the changes and the positions of both activists and academics in political action and the production of knowledge.

Despite the criticism, it is imperative that activists and lawyers participating in processes of social change, share their points of view, and do collaborative research on processes that they have witnessed or participated in. This work has thus been done "from the inside," and seeks to build appreciation for this kind of perspective. Doing this type of work has major benefits both for the advancement of legal understanding and for the very individuals who participate in the task.

The first benefit is the ability to access a certain kind of information and viewpoints that would be hard to obtain through other means. Historian Eric

Hobsbawn has noted the benefits of writing as a participant observer, both for research and for building knowledge of history (HOBSBAWN, 2003). Meanwhile, Julieta Lemaitre recalls that there is a tradition of these kinds of studies, including in particular the work of Williams and Susan Estrich, and argues that “in addition to these, there is a whole generation of legal studies texts that use first person to critique the right and analyze its impact on daily lives, using their own lives as the starting point in many cases, and extending in other cases to the private lives of vulnerable individuals and communities” (LEMAITRE, 2009, p. 163).

The second benefit is authorship by the protagonists themselves and the participation of citizens in the creation of knowledge—in other words, democratizing the production of ideas to include the participation of activists and citizens themselves. This benefit is related to the preservation of collective memory of legal and social changes.

The approach that I have described was also accompanied by a more traditional social science research methodology. This study was carried out with Colombia Diversa between September 2009 and October 2010 using collaborative research methods and with funding from the Latin American Studies Association’s (LASA) “Other Americas” project. Information was collected through interviews with the protagonists of the events, reviewing press, radio and television coverage (2006-2010), and piecing together the judicial process in the Constitutional Court.

3 Social movement theory and mobilization around the right

In *The Politics of Rights*, Stuart Sheingold recognizes that even though the courts are generally conservative and limited in their ability to implement their legal decisions, rights can still be an important political tool. He believes that it is possible to capitalize on perceptions related to rights in order to achieve a variety of political benefits (SHEINGOLD, 1974). Thus, rights-based litigation has three positive effects on social change: rousing citizens, organizing them into effective groups, and realigning political forces. Connecting these kinds of outcomes with social action leads us to consider the analyses of scholars who are interested in social movements.

Therefore, to analyze the mobilization carried out by Colombia Diversa, this article will keep in mind Sidney Tarrow’s work on social movements, which includes the study of political opportunities, resources for mobilization, and frameworks of meaning (TARROW, 2004). This author develops what has been called the *synthesis theory of social movements*, which brings together the different perspectives in the literature on social movements.

According to Tarrow, social movements should have a common goal, as illustrated by Marxist analyses of capitalism, but this alone is not enough. Social movements use external resources to achieve their objectives. Even movements with minimal resources can be successful if they can take full advantage of different outside opportunities. Tarrow argues that the most important factor is the structure of political opportunities, characterized by resources that are external to the group and generated in the political environment: “Social movements form when ordinary citizens, sometimes encouraged by leaders, respond to changes in opportunities

that lower the costs of collective action, reveal potential allies and show where elites and authorities are vulnerable” (TARROW, 2004). The most important changes in political opportunities are increased access to power, changes in government, the availability of influential allies, and divisions between elites.

Another structural element of this theory relates to resource mobilization, which is comprised of two things: repertoires of contention and structures of mobilization. All societies have learned customs when it comes to social mobilization—what Tarrow calls a memory of collective action or repertoires of contention—which become habitual forms of interaction. These routine forms of mobilization may be actions like marches, strikes, petitions, etc. These repertoires are invented, adapted, and combined by movement leaders, and their relative usage depends on the context and on the tactical decisions made by each group of citizens. However, these repertoires should continue to be used over time in order to become movements in the strict sense; otherwise, they would be isolated campaigns that generate little social change. In general, movements are only successful when they are well organized and when they are maintained over time. The most well-known structures of mobilization are social networks, which may be networks of friends, interest groups, and organizations involved in the movement. Pre-existing social networks reduce the social costs of mobilization and help maintain the momentum of collective action even after the initial enthusiasm has worn off.

Finally, mobilization frames refer to shared ideological assumptions that drive people to collective action. Social movements must “frame” their demands based on their ideological backgrounds, cognitive frameworks, and cultural discourses. The media is then used to disseminate these framed demands and to mobilize followers (McADAM; McCARTHY; ZALD, 1999).

These elements will be kept in mind as we analyze the case at hand, the recognition of the rights of same-sex couples, because they are useful for obtaining a more detailed view of the different characteristics of Colombia Diversa’s legal and social actions. Meanwhile, for the purposes of this article, I will use a broad definition of social movements, as proposed by Colombian researcher Mauricio Archila: “permanent, collective social actions, aimed at addressing conditions of inequality, exclusion, or injustice, that tend to arise in certain spatiotemporal contexts” (ARCHILA, 2008).

Several studies have been conducted on the relationships between social movements and the Constitutional Court in Colombia. These include the book by Isabel Cristina Jaramillo and Tatiana Alfonso on the process to partially decriminalize abortion (JARAMILLO; ALFONSO, 2008), the study by César Rodríguez and Diana Rodríguez on decision T-025 from 2004 and the prosecution process related to forced displacement (RODRÍGUEZ; RODRÍGUEZ, 2010), the work of Julieta Lemaitre on violence, the law, and social movements (LEMAITRE, 2009), and the work of Rodrigo Uprimny and Mauricio García on the Constitutional Court and social emancipation (UPRIMNY; GARCÍA, 2004). Each of these has sought to analyze the participation and the significance of social actors and the Constitutional Court in the political definition of constitutional law.

Keeping in mind the aforementioned theoretical elements, I believe that social movements can have a leading role in the Constitutional Court’s body of law. The Court’s decisions are not made outside of cultural and political contexts.

On the contrary, external factors and circumstances shape and influence the formulation of progressive or conservative decisions. This study is particularly interested in showing how “progressive decisions” are made with the participation of social actors who apply a repertoire of legal actions in the context of particular political opportunities using the language of constitutional rights as a cognitive framework for mobilization. Shifting our gaze this way helps us to understand both a court’s thematic and temporal variations and exactly how judicial decisions are made. When it is said that a court is “progressive,” it sounds like society is not participating in its decisions but this is far from reality.

While progressive judges do indeed take part in these decisions, they are not the only actors involved with legal or social change. This study also tries to show that “progressive decisions,” made with the participation of social movements, lead to what Charles Tilly has called a cycle of protest—that is to say, a historic moment in which movements initiate broader struggles that involve various social demands and actors over a long period of time (TILLY, 2004). I believe that these legal decisions have created a cycle of legal protest in the LGBT movement for the full recognition of their rights. As I try to show, participation in constitutional litigation leads to the creation of new social networks and new political opportunities and transforms the mobilization framework used to strengthen and sustain political action.

4 Anatomy of a legal change: recognizing the rights of same-sex couples

4.1 *The protective Court*

On September 1, 1998 at 8:30 a.m., the Constitutional Court held a public hearing where experts, gay rights organizations, teachers’ unions, and public authorities spoke regarding the alleged unconstitutionality of a policy that punished a teacher’s “homosexuality” as a disciplinary offense.

The newspaper *El Tiempo* published an article entitled, “Gay teachers defend themselves in a public hearing.” Here is how the paper reported the event:

Her face covered with a black mask, a lesbian professor spoke before the Constitutional Court yesterday to defend her right to teach and not to suffer retaliation due to her sexual preference. “I cover my face out of fear that I will be punished for my sexual orientation, and because of the discrimination I could face from the education community,” she said at the beginning of her speech. Likewise, a group of gay individuals spoke out yesterday against the norm of the Teachers Statute, which considers homosexuality to be a form of misconduct, using all kinds of psychological, legal, anthropological arguments and quotes from historical figures like Mahatma Gandhi and Winston Churchill. “Your Honors: I am sure that you would like to have people like Socrates, Oscar Wilde, Leonardo Da Vinci or Martina Navratilova teach your children subjects like philosophy, literature, art, or sports. Well, they were all homosexuals,” said a representative of one of the gay-rights organizations.

(EL TIEMPO, 1998).

The hearing was significant because the Constitutional Court blazed a new trail by giving voice to those subjected to discrimination and violence. The Constitutional Court resolved this claim of unconstitutionality in decision C-481 of 1998, taking up the arguments of the plaintiff, and declaring that calling homosexuality a form of misconduct violated the rights to the free development of personality and sexual orientation. Further, it stated that “norms like the one contested here come from ... the existence of old, ingrained prejudices against homosexuality, which hinder the development of a pluralist, tolerant democracy in our country” (COLOMBIA, 1998b).

This statement is a roadmap for the defense of free sexual choice and the fight against discrimination based on sexual orientation. Several lines of argument support this approach. First, in this decision, the Court decided that sexual orientation should be constitutionally protected regardless of whether it is biological in nature, a learned behavior, or based on personal choice. The Court therefore considered that sexual orientation had two constitutional protections, one stemming from the right to equality and non-discrimination based on sex, and one from the right to a free development of one’s personality. In its decision, the Court pulled from the scientific literature on homosexuality in a comprehensive and illustrated way, implicitly drawing on an old idea of the Scientific Humanitarian Committee (*Wissenschaftlich-Humanitäre Comite*), led by 19th century German scientist Magnus Hirschfeld. This idea, *Per scientiam ad justitiam* (“Through science to justice”), suggested using scientific knowledge to work towards the decriminalization of homosexuality (HIRSCHFELD 2007). Second, the Court’s decision brought international law into the Colombian debate on the legal protections for sexual orientation, especially through the use of the Human Rights Committee’s decision in *Toonen v. Australia*. Third, the Court explicitly recognized that sexual orientation is a suspect classification and, therefore, any distinction made based on sexual orientation should be subjected to strict constitutional scrutiny.

This ruling also brought up the core themes of later debates that would take place in the Court regarding the rights of the LGBT population, particularly the discussion of the kinds of constitutional protection that should be given to people based on their sexual orientation and gender identity, as well as the type of scrutiny that should be applied when controversies arise regarding discrimination against this population.

In the last ten years, the Colombian LGBT movement has grown exponentially in various dimensions, territorial and thematic, and with increased specialization and capacity for advocacy. Regarding the territorial dimension, it should be mentioned that the capital cities of almost all departments in the country now have local groups that have formed roundtables and local networks that plan and carry out political advocacy activities at the local and national levels.

With regard to local advocacy processes, the cases of Cali, Medellín, and Bogotá stand out, along with many other local initiatives that emerge daily, particularly in intermediate cities. In addition to a greater degree of organization, there has also been more local action through advocacy or cultural and political activities like marches expressing pride or LGBT citizenship. The issues covered by the different organizations—which include independent activists, human rights groups, political groups, grassroots groups, and cultural associations—vary greatly (SERRANO, 2010).

Litigation that has been instrumental includes the work of Germán Humberto Rincón Perfetti, a lawyer who has led important cases heard by the Constitutional Court (Decisions C-481 from 1998, T-725 from 2004, T-152 from 2007, COLOMBIA, 1998b, 2004e, 2007b), and a decision made by the United Nations Human Rights Committee, among others. He has skillfully incorporated his work as a lawyer into his work as a leader of the LGBT movement. The activists who have presented *tutelas*—or writs for the protection of constitutional rights—also stand out, such as the case of Edgar Robles versus the Colombian Scout Association (Decision T-808 from 2003, COLOMBIA, 2003b) and Juan Pablo Noguera versus the Santa Marta police (Decision T-301 from 2004, COLOMBIA, 2004b).

In other cases, partnerships have been formed with lawyers from the feminist movement, who have helped with cases like that of Martha Lucía Álvarez, who demanded the right to have a conjugal visit with her partner in prison (Decision T-499 from 2003, COLOMBIA, 2003a). Local LGBT organizations like *El Otro* in Medellín and *Provida* in Cúcuta have also filed *tutelas* against police abuse suffered by transvestites.

The public institution that has been most engaged with this litigation is the Ombudsman's Office; its regional offices have advised and represented victims in various human rights cases. It bears reminding that cases filed by citizens whose rights have been violated, and who hope to find effective legal remedies, play a fundamental role in building precedent, even when these citizens are not affiliated with activist organizations. Their actions are courageous and very useful for efforts to claim rights.

This work by different activists, citizens, and institutions has created a tradition of defending rights and fighting against discrimination and homophobia, especially through public actions concerning the unconstitutionality of laws and the use of *tutelas* to demand the immediate protection of fundamental rights. In response to these claims, the Constitutional Court has produced a precedent that recognizes the right to free sexual choice and the right to equality and non-discrimination based on sexual orientation or gender identity. This has been applied in different arenas including the right to education—with regard to gay professors (COLOMBIA, 1998c) and students (COLOMBIA, 1998b, 2002c), the right to serve in the armed forces (COLOMBIA, 1994, 1999a), non-discrimination in holding public office (COLOMBIA, 2002b), non-discrimination by private actors in employment situations (COLOMBIA, 2007b), the right to receive a conjugal visit in prison from a same-sex partner (COLOMBIA, 2003a), sexual freedom of gay prisoners (COLOMBIA, 2004g), respect by prison authorities for sexual diversity and its public expression (COLOMBIA, 2005b, 2006d), and the right to the use of public space (COLOMBIA, 2004b).

According to this case law, homosexuals are a group that has been traditionally excluded and is socially vulnerable⁷ and, consequently, sexual orientation has been deemed a suspect classification. Thus, whenever a law or behavior differentiates between sexual orientations, a strict test of equality should be applied. The Court has said that “*all differential treatment based on a person's homosexuality is presumed to be unconstitutional, and it shall be subjected to strict constitutional control*” (COLOMBIA, 1998c).

Despite this important protection for individuals, the Constitutional Court initially refused to recognize the rights of same-sex couples (Decisions C-098 from 1996, SU-623 from 2001 and C-814 from 2001, COLOMBIA, 1996a, 2001d, 2001f). At that time, the Constitutional Court ruled that homosexuals could not be discriminated against in any situation if they were requesting individual protection but that there was no legal protection for couples. Particularly surprising is the overlap between this legal discourse and that of the Catholic Church, which states that one should love homosexuals because they are children of God but hate the sin—that is, homosexual acts. This kind of language implies that there is a difference between “being” and “doing.” The “being” should be respected but the “doing” can be restricted or disallowed.

4.2 The legislative vacuum and the founding of Colombia Diversa

When the doors of the Court closed on the rights of same-sex couples, the LGBT movement turned to legislative battle. The full Senate debated a 2003 bill that sought recognition for the rights of same-sex couples. Senator Piedad Córdoba presented the bill, and former judge and Senator Carlos Gaviria Díaz spoke in support. From the beginning, conservative senators went on the offensive against homosexuals in Colombia. This strategy was led by José Galat, who, together with other organizations, paid for the placement of slanderous ads against the LGBT community in the country’s largest newspapers. The bill did not get enough support in Congress to pass.

As a result, the rights of same-sex couples were politically blocked at the same time that it was a closed legal issue due to the Court’s case law. The situation in the Constitutional Court appeared nearly hopeless, given that the constitutional precedent that failed to give protection to same-sex couples seemed increasingly solid, and the majority within the Court would not change until 2009 (CÉSPEDES, 2004; LEMAITRE, 2005; MONCADA, 2002; MOTTA, 1998; ESTRADA, 2003).

In this context, after the legislative defeat, a group of LGBT activists decided to establish a human rights organization that could rise to the challenges posed by such a difficult debate. After a series of discussions and consultations, Colombia Diversa was created, with the goal of changing the situation of same-sex couples. It proposed to frame the injustices committed against the LGBT population in terms of human rights (LEMAITRE, 2009).

Colombia Diversa was founded in March 2004, with the participation of a large group of activists who got to know each other in 2003 while advocating for the approval of a bill to recognize the rights of same-sex couples. The organization was created against the backdrop of the legislative defeat and it was at least an indirect consequence of the campaign waged by conservatives against the rights of same-sex couples. Colombia Diversa brought together activists who had a variety of experiences, including standouts like Germán Rincón Perffeti who had worked on legal issues for the gay community, activists like Marcela Sánchez who lobbied for sexual and reproductive rights, and academics like Carlos Iván García, María Mercedes Gómez, and others who were very familiar with LGBT activism in other countries such as the United States. This diverse group was able to recruit activists who had previously

worked on legal and academic issues, as well as people who had no experience with activism but who had cultural or financial capital that could be used to strengthen the organization. The organization was able to bring together resources and people who had many years of experience, as well as new people and resources, all of which was channeled through a single organization aimed at coherent, continuous action.

Colombia Diversa was heir to three previous manifestations of LGBT activism: Proyecto Agenda, the Planeta Paz initiative, and the committee that pushed for the bill on the rights of same-sex couples. Proyecto Agenda was an initiative led by Germán Rincón Perffetti in the 1990s, which organized the gay pride march and Bogotá's Sexual Diversity Week. Although Rincón was a lawyer who had filed various lawsuits to appeal for gay rights, he had not—at least consciously—made a clear link between the legal claim and social protest.⁸ In 1999, Daniel García Peña got in touch with Germán Rincón to propose a project related to then-president Andrés Pastrana's peace process with the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, or FARC). García Peña was concerned that the national government was entering into negotiations with FARC without the participation of civil society or social movements. He decided to found Sectores Sociales y Populares por la Paz – Planeta Paz – an initiative that sought to get all sectors of society involved with the formulation of a comprehensive peace proposal.

Organizations and activists throughout the country got involved in this initiative, including Proyecto Agenda's contacts and organizations that worked in the fight against HIV/AIDS. This platform not only allowed for the creation of a space in which proposals directed at the state were articulated in terms of rights but it went even further than this. During the second national meeting of LGBT organizations, committees were formed around topics like health, politics and human rights, organizational processes, training, communication, and economic welfare.⁹ Rights were one part of the effort but they were central. The slogan at the time was, "The body as the first territory for peace," a concept that denounced the violence in the country while also seeking recognition for the right to personal autonomy.¹⁰

Over time, rights became an increasingly important part of the discourse, especially when work began on the rights of same-sex couples. Planeta Paz helped build the capacity of activists on two fronts: making contacts in the political arena, especially in progressive and left-leaning sectors, and reaching out to the media. In this context, Senator Piedad Córdoba approached Germán Rincón with the idea of a new bill on the rights of same-sex couples. This new bill led to the founding of a Support Committee that followed the legislative effort. The committee was critical in building knowledge and skills for lobbying.

Some of the aforementioned resources and expertise were shifted to Colombia Diversa. Formal and informal networks of activists, particularly the Support Committee, were key to the creation of Colombia Diversa. The organization was built on previous mobilizing structures but it took steps to "adopt, adapt, and invent" those pre-existing resources. New resources from the elites and access to new networks of progressive lawyers were used to build on the pre-existing structures of mobilization. Elites' resources—especially social networks and strong cultural capital—were

accessed thanks to the participation of Virgilio Barco, son of former liberal president Virgilio Barco Vargas (1986-1990). There is no question that he was an important catalyst to accessing the resources of Colombian elites. He initially joined the Support Committee for the bill on same-sex couples and his participation was critical for the creation and continuity of a new organization that could keep up the activism permanently. In the meantime, Colombia Diversa was also making connections with legal scholars through its legal committee, which played an important role in building partnerships with law professors and progressive lawyers.

The organization started its activities in 2004. In 2005, it began to study the possibility of presenting a new bill to achieve recognition of the rights of same-sex couples. However, this time they would aim for a text that would recognize both economic rights and the right to social security as well as use stronger supporting arguments. The organization also launched an intensive communications and lobbying strategy targeting audiences that had shown themselves to be open to such appeals.

An important aspect of Colombia Diversa's strategy was that the text of the bill focused on assuring basic rights of same-sex couples in order to resolve their most urgent problems: a lack of economic protection in the case of death or separation, lack of access to health care, and the non-recognition of a same-sex partner's pension in case of death. It was believed that a minimalist text, with two basic demands, allowed for more solid arguments and had more potential to gain political support. The bill also had two important technical legs on which to stand. First, there was a strong constitutional argument to be made using the Court's case law on LGBT rights. Second, Colombia Diversa and a group of volunteers had done a high quality, technically sound economic impact study on the affiliation of same-sex couples to the social security system. The study was done in anticipation of an argument that was frequently used by those who opposed the previous bill. The ability to build strong arguments and anticipate counter-arguments strengthened the lobbying strategy around this bill.

These factors started to generate consensus among most political parties and institutions that same-sex couples deserved at least minimal constitutional protections. These actors included members of the government and opposition parties, institutions like the Attorney General's Office and the Ombudsman, and a number of opinion leaders and citizens.

As part of its communications strategy, Colombia Diversa monitors what happens in the press and it has stated, "in general, it appears that the media reflects the agenda developed by the LGBT movement." The organization has shown that in years which were particularly significant for constitutional jurisprudence on these topics, such as 2007, the media was to be commended for

the journalistic coverage of the Constitutional Court's ruling on the economic rights of same-sex couples, and the different debates in Congress on these rights and on the possibility that a same-sex partner could be the beneficiary of social security, [which] put LGBT issues on the public agenda, not only in specialized contexts, but also in the political and academic arenas, and in society in general.

(ALBARRACÍN; NOGUERA, 2008, p. 277).

Colombia Diversa also highlights the large number of columnists and cartoonists who have supported equality and non-discrimination against the LGBT population.

This increase in news coverage has been complemented by editorial positions taken by various publications in support of LGBT rights. These include *El Tiempo*, *El Espectador*, *Semana* magazine, and *Cambio* magazine. Just to illustrate the importance of these discussions in the Colombian press, it is enough to note that in June 2010, the Sunday edition of the *El Espectador* newspaper had the LGBT theme on the front page with the title “Proudly gay.” That same month, *Arcadia* magazine, a publication of *Semana* magazine dedicated to cultural issues, published a special edition on gay men in the arts and letters.

News station CM& holds a prominent place for running a commercial that Colombia Diversa organized to raise awareness about the consequences of a lack of legal protections for same-sex couples. The video shows a woman sitting alone in an empty house, looking at a photograph. The narrator says:

They lived together for thirty years, they paid for the house, they paid for food every day, and they paid for cable, clothing, and the stereo. They paid for some books with cash and they paid for evenings out with credit. Now she is alone, and the only thing she inherited were some pending credit card bills for the evenings out. All this because her partner was another woman. The law does not give them any rights. There is no right. CM& Televisión for the rights of the people.¹¹

This is the context within which the Constitutional Court made its decisions in recent years. While it is difficult to establish a causal link between social pressure around a case and the Court’s decisions, it is clear that the opinions and information disseminated by the media must have had some influence on the judges.

4.3 The dual strategy and return to the Court

In parallel to these legislative efforts, in June 2005, Colombia Diversa and the Public Interest Law Group (*Grupo de Derecho de Interés Público*) began looking into the possibility of filing a complaint regarding the unconstitutionality of Law 54 from 1990, which regulates *de facto* marital unions and on which the Constitutional Court had also already ruled. The suit was presented one year later, on May 31, 2006, while a bill for the rights of same-sex couples was under consideration (BONILLA, 2008).

The suit was put together by a group of law students under the guidance of Professor Daniel Bonilla of the Universidad de los Andes law school. The students studied the constitutional question and the different legal opportunities and obstacles to reopening the debate in the Court. After intense study, the students drafted a complaint that they discussed with both other professors at the law school and the activists of Colombia Diversa. The complaint centered on the principle of human dignity and argued that the refusal to give legal recognition to same-sex couples affected multiple components of dignity, as defined by the Court’s case law: to live well, to live as one wants, and to live without humiliation.

Alongside this demand, an effort was made to seek citizen interventions that would strengthen the arguments made in the case, especially those that, for technical reasons, could not be presented directly (BONILLA, 2008).

Given that the bill in Congress was about to pass, some activists thought that it was not a good time to file the complaint before the Court. However, after several internal discussions, Colombia Diversa decided to carry out a “two-pronged strategy”: to initiate a minimalist bill in Congress and a more ambitious lawsuit in court.

The strategy planned by the activists and their allies ended up following another course. First of all, on June 19, 2007, Congress voted down the bill. This was a controversial move given that they had held the four debates required for the bill to become law; the bill was defeated in a very close vote—34 to 29—on the last day of a legislative session during the final reconciliation of the different texts. Thus, the political route was blocked and it remains so to this day, with no way of moving forward.

Meanwhile, the Constitutional Court started to make a series of quick decisions in favor of same-sex couples. The media pressure, the legal arguments put before the Court by the Public Interest Law Group (GDIP) and other allies, and the intense social debate led the judges to agree amongst themselves to move forward with the discussion and the protection same-sex couples’ rights. In a solution based on ideological balance, they decided that the rights of same-sex couples would be examined successively—in other words, each right would be studied as citizens raised it. On that basis, the Constitutional Court, with a statement by Judge Rodrigo Escobar Gil, issued decision C-075 on February 7, 2007 stating that same-sex couples would have economic rights if they complied with the requirements and conditions established in Law 54 from 1990 for the *de facto* marital unions of heterosexual couples. This decision opened the door for new constitutional litigation because it changed the existing legal precedent and recognized, for the first time, the existence of same-sex couples as well as the state’s responsibility to protect their rights. The activists, therefore, decided to choose a path that was less hostile and slow moving than that of Congress.

Just one month later, on March 5, 2007, two students from the Universidad Pedagógica y Tecnológica de Tunja filed a complaint against Article 163 from Law 100 of 1993, asking that the right to access health care under the social security system be broadened to include same-sex couples. On August 30, 2007, Colombia Diversa, the Public Interest Law Group at the Universidad de los Andes, and the Centro de Investigaciones Derecho, Justicia y Sociedad–Dejusticia¹² filed a new constitutional claim seeking recognition for the right to social security, both in terms of health care coverage and in terms of survivors’ pensions.

On May 14, 2007, something unexpected occurred that gave greater support to the activists and to the constitutional precedent. The Human Rights Committee issued its decision in the case of *X vs. Colombia* (COMITÉ DE DERECHOS HUMANOS, 2007) regarding discrimination against a citizen who lived with his partner and who was refused a survivor’s pension. The Committee determined that Colombia had violated the Covenant on Civil and Political Rights and ordered the state to restore the rights of the affected individual as well as resolve this situation of discrimination more generally.

The constitutional cases that were underway led to decisions C-811 in 2007 and C-336 in 2008 (COLOMBIA, 2007c, 2008a). These rulings recognized the rights of same-sex couples to social security coverage and survivors' pensions. Later, a woman filed suit regarding part of the penal code that excluded same-sex couples from requirements that domestic partners make maintenance payments. In decision C-798 from 2008 (COLOMBIA, 2008c), the Court ruled that this norm was discriminatory and that the obligation to pay maintenance should be extended to same-sex couples.

We can use the events recounted up to this point to analyze the political and ideological elements of this mobilization. Four events stand out that help show the change in the structure of political opportunities. The first is the defeat of the bill in Congress on same-sex couples. This bill had significant political and social support but Congress voted it through a procedural maneuver. While this was a defeat, it also contributed to the Constitutional Court's development of case law on the rights of same-sex couples.

A second political event occurred during the 2006 presidential elections, when then-president Álvaro Uribe, known for his conservative positions, decided to support the rights of same-sex couples during his campaign for reelection. The President's line was: "marriage, no; adoption, no; economic rights, yes; social security, yes." This action shook the entire political spectrum and garnered significant social support. In addition, this formulation also summarizes the doctrinal agreement reached by the Constitutional Court.

A third event occurred in May of 2007 when the aforementioned decision by the United Nations Human Rights Committee found that Colombia was violating the Covenant on Civil and Political Rights by not recognizing a person's right to the pension of his/her same-sex partner.

The structure of political opportunities that affected the Court's decisions can be explained by looking at the legislative failure, accompanying socio-political changes, and the new approach to the relevant legal sources used to resolve cases of same-sex couples. It was in this context that the legal mobilization developed.

Another set of factors that affected the structure of political opportunities relates to changes within the legal field, particularly in Colombian constitutional law. The Constitutional Court developed different theories, concepts, and tools that were essential to strengthening this precedent. In particular, these included the development of strong precedents in terms of human dignity, equality and non-discrimination, the duty to protect groups who are subject to discrimination and exclusion, the incorporation of international human rights law in constitutional debates, and a greater awareness and use of fundamental rights by all of the judges in the Court when they address the issues put before them. Important decisions regarding rights were also issued during this period, indicating that the decisions on LGBT rights were part of a trend in which the Court was taking rights and social conflicts in Colombia more seriously.

The Constitutional Court has played a lead role in recent years due to the combination of several regulatory, political, and institutional factors (UPRIMNY; GARCÍA, 2004; UPRIMNY, 2007). The factors that are frequently identified as contributing to this role include the relative judicial independence that exists in

Colombia; the broad set of rights recognized in the Constitution; the existence of legal mechanisms that help citizens access the courts; and the crisis of democratic representation in Colombia today.

Second, it is worth highlighting that the Court has also developed constitutional doctrine and methodologies to guarantee the right to equality¹³ and the protection of historically marginalized communities.¹⁴

Third, it is notable that the Court has repeatedly used international human rights law to determine the meaning and scope of the basic rights recognized in the Constitution. The Court has frequently turned to international human rights law using reference clauses in the Constitution (Articles 44, 53, 93, 94 and 214). In some cases, it has stated that there are international treaties that have the same standing as the Constitution. In other cases, it has simply used the statements of international organizations to help interpret domestic legislation.¹⁵

All of these factors led to the Constitutional Court's recent adoption of important decisions on fundamental rights, both in the context of *tutelas* and in cases of constitutionality disputes. To illustrate this phenomenon, we can cite the following rulings: decision T-025 from 2004, on the rights of displaced persons (COLOMBIA, 2004a); T-760, from 2008, on the Colombian health system (COLOMBIA, 2008b); C-355, from 2006, on the decriminalization of abortion in three specific cases (COLOMBIA, 2006b); C-370, from 2006, on the rights to truth, justice, and reparations for the victims of serious human rights violations (COLOMBIA, 2006c); C-070, from 2009, on limitations to the authority to declare states of emergency (COLOMBIA, 2009b); C-175, from 2009, on the right to prior consultation (COLOMBIA, 2009d); and C-728, from 2009, on conscientious objectors' right to refuse to serve in the military (COLOMBIA, 2009f).

All of these factors directly or indirectly influenced the creation and strengthening of constitutional precedent on LGBT rights. Case law is not generated in a vacuum; it is always surrounded by collective action, the work of the media, and political and institutional contexts.

Now, with regard to the ideological factors, a number of scholars have referred to five elements of cultural framing. The first is the cultural background of the demonstrators; the second is the set of framing strategies that groups choose; the third is the fight to frame the issue; the fourth relates to the media as communicators of this fight; and the fifth is the cultural impact of the movement when it succeeds in changing the cultural context (McADAM; McCARTHY; ZALD, 1999, p. 44). For our purposes, we will look briefly at each element in turn.

In this case, the activists had significant cultural background in homosexuality and in the difficulties they had already encountered in trying to advance the recognition of equal rights for the LGBT population. Therefore, to increase their chances of success, the activists chose to frame their demands in the language of human rights and, in particular, to present their claims using constitutional law. In fact, as part of this strategy, they used the Constitutional Court's own statements to persuade their listeners.

A crucial element that can be observed in this period is the important role played by lawyers, law professors, and other professionals who acted as allies and participants in this strategy. The legal professionals acted as intermediaries, helping to translate

social demands into the language of constitutional law. Universities, research centers, and human rights organizations also participated in this process by bringing citizen interventions to bear on the movement's legal arguments. This is related to how the activists and their allies framed their claims: constitutional law was used to more effectively understand and communicate the injustices suffered by same-sex couples. The process of framing injustices in the context of constitutional rights was not only used for presenting legal claims before the Court; this same language was also incorporated into the speeches that activists gave to the press and at protests that they carried out in later years. This strategy of translating messages into constitutional language not only worked when directed towards the Court, but also as a way of educating the public.

The second strategy was the moderate approach taken to frame the claim and the exclusion of the right to have a family. "There is a tacit agreement between the Constitutional Court and the activist to avoid any talk of family," explained Esteban Restrepo. Elizabeth Castillo, of the Lesbian Mothers group, agreed with this decision because she thought it was strategic not to speak of that issue at the time though she said that there was an understanding that this was a temporary position being taken in the judicial debate.

The media provided important channels for presenting and disseminating the message. In fact, the groups that opposed this movement expressed their unhappiness with this information asymmetry. As has already been stated, the support from the media—particularly from newspapers and magazines—was key to building awareness of the problem and turning the discussion into one of fundamental rights.

4.4 When the balance comes to an end: family, marriage, and adoption by same-sex couples

Despite this important progress, the Court used a strategy that left the situation of same-sex couples uncertain and did not guarantee all of the rights of *de facto* marital unions. The Court argued that the issues should be considered one at a time, in each area of regulation. As a result, it was necessary to clarify what constitutional criteria would be used to define the rights and obligations of same-sex couples given that there were other rights and obligations that the Court had not yet addressed. Consequently, Colombia Diversa, Dejusticia, and the Public Interest Law Group (GDIP) filed suit against provisions in 26 laws that recognized the rights, benefits, and obligations of heterosexual couples while excluding same-sex couples. This suit resulted in decision C-029 (COLOMBIA, 2009a), which was issued on January 28, 2009.

This process was quite participatory and it generated important knowledge and opportunities for discussion on the rights of same sex couples. Seventy organizations participated in the last case filed before the Court; these included the three organizations that drafted the complaint, 32 plaintiffs, and 45 other organizations that were involved. In sum, it could be said that the LGBT movement, as a whole, was the plaintiff in this process, enabling the movement to have a collective and consistent voice.

This process also enjoyed strong support from opinion leaders and generated few conservative reactions. This phenomenon may be explained by the methodology used

by the Court, which led to decisions that had moderated stances and large majorities.

The recognition of rights was progressive. The Constitutional Court, prodded by activists, quickly issued eight decisions (C-075 from 2007,¹⁶ T-856 from 2006,¹⁷ C-811 from 2007,¹⁸ C-336 from 2008,¹⁹ C-798 from 2008,²⁰ T-1241 from 2008,²¹ C-029 from 2009,²² T-051 from 2011,²³ COLOMBIA, 2007a, 2006e, 2007c, 2008a, 2008c, 2008d, 2009a, 2011) that transformed the legal status of same-sex couples and recognized these rights and obligations. The methodology that the Court chose to use has made it necessary to present each situation for separate consideration by the Court, without having formulated a general rule on the equality of same-sex couples. Furthermore, there is a lack of clarity on the legal definition of *de facto* marital unions because the Constitutional Court has not expressed, clearly and unequivocally, that same-sex couples can have this status (ALBARRACÍN, 2010).

A few days after the issuance of decision C-029 of 2009, Professor Rodrigo Uprimny referred to it in his opinion column, writing, “these legal victories, as important as they are, are insufficient. It is possible that, despite these changes in the law, discrimination against homosexuals in daily life will continue or become more subtle. There may even be proposals aimed at annulling or blocking these legal advances” (UPRIMNY, 2009). This insightful warning should also be applied to the Constitutional Court’s more recent rulings on same-sex couples.

The legal precedent that recognized the rights of same-sex couples has been essential to granting these couples access to civil and social rights. It constituted a breakthrough in the guarantee of basic rights and it brought same-sex couples greater respect in society. Nevertheless, this precedent has major limitations, particularly because it fails to recognize the right to build a family, an exception that was made in order to achieve progress in the recognition of rights. In other words, the balance between the ideological positions was short-lived.

It was Judge (E) Catalina Botero who pinpointed this tension when she clarified her vote in decision C-811 of 2007:

Although I agree with the Court’s decision (...), and I celebrate the extension of social security benefits (...) to same-sex couples, I have decided to clarify my vote in order to speak to an issue that seems to resist being taken up by the Court with the democratic openness that it deserves: the nature of family in Colombian constitutional law.” She goes on: “These decisions represent a decisive step in the guarantee and enforcement of the constitutional principles of human dignity, freedom, equality, and solidarity, and in the consolidation of a truly democratic, pluralist, and inclusive regime. However, they consistently avoid reference to the same-sex couple as a nuclear family that deserves respect and constitutional protection equal to that given to the heterosexual family. In this area, then, there is a lack of protection that the legal system will have to correct.

(COLOMBIA, 2007c).²⁴

The evasion of this issue was due to the framing used by both activists and the Constitutional Court. The constitutional case law was based on a doctrine that tried to find balance between different political positions within the Court. Thus, the precedent can have both conservative and progressive interpretations.

Although the Court made progress towards the protection of the rights of same-sex couples, the rulings have not all been progressive, nor have they eliminated all of the legal inequalities or the treatment of gay and lesbian individuals as second-class citizens. At the heart of the legal precedent, there is a growing and unsustainable tension that hinders the realization of equality and the full rights of these couples. The precedent protects the rights of same-sex couples to the extent that they are comparable to heterosexual couples; however, at the same time, it does not recognize that both types of couples deserve the same immediate protection and respect, especially regarding constitutional protection for the families of same-sex couples. The Constitutional Court has not stated clearly and convincingly that same-sex couples are equal to and have the same rights as heterosexual couples. On the contrary, it has created case law that protects same-sex couples but with an inferior protective status. These limitations are clear in recent cases looking at same-sex couples' right to marry (C-886 de 2010, COLOMBIA, 2010b) and adopt (C-802 de 2009, COLOMBIA, 2009g); in these cases, the Court decided not to issue rulings, arguing that there were technical deficiencies in the cases that citizens presented.

5 Conclusion

This article has recounted the process leading to the recognition of the rights of same-sex couples through actions carried out by Colombia Diversa. As has been argued throughout this article, this type of rights-based mobilization can be analyzed by considering three aspects of social movements. First, there are ideological elements of mobilization, related to the frames used to interpret and communicate the problem. Regarding this point, the moderate approach to demands of same-sex couples and the translation of situations of injustice into terms related to constitutional rights were key elements that help explain how this debate has evolved. Second, there are organizational elements that especially concern the availability of resources. In this regard, Colombia Diversa was able to bring together different pre-existing resources and build the capacity to create networks and access new resources. In particular, there was the combination of different forms of activism, partnerships with legal scholars, and access to elite resources. Third, the external political factors—or the structure of political opportunities—reveal the contingencies that influence the debate and can be cleverly exploited by activists. These include situations related to elections, institutions, international law, or even divisions within the Court, which make up the socio-political context in which social movement actions unfold.

Finally, I would like to raise two ideas that came out of this work, one related to methodology and the other to the relationship between the creation of law and its implementation. First, I want to highlight the importance of empirical work and disciplined, methodological dialogue in understanding the judges' work and society's demands for justice. We can't keep reading constitutional case law without considering people and power relations. In the same way, it is essential for actors who are directly involved with changing the law to also take part in academic work and reflect on social change. Without the involvement of the protagonists, research on legal and social change runs the risk of missing out on key parts of the story.

Second, regarding the creation of law and assurance of its implementation, I believe that these two phases are intimately connected. The courts are not an endpoint for political disputes; they usually represent one stage in a much longer discussion—sometimes even a stage that is repeated multiple times. Thus, in order to understand the implementation of a ruling, it is also necessary to understand how it was arrived at, as well as the opposing political forces and underlying political debates. In fact, if the political forces that helped generate legal change begin to weaken, it is possible that ground will be lost with respect to the legal change that was achieved.

Studying the relationship between social movements and the law helps us better understand the political aspects of the law, as well as its symbolism. At least three outcomes can be linked to the issuance of the rulings in this case: 1) it strengthened a movement that kept up its efforts of collective action; 2) it launched a cycle of protest (TILLY, 2004) for the rights of the LGBT population and for real equality in all rights; and 3) it created new political opportunities—both progressive and conservative.

This article has tried to describe the external factors and circumstances that shape and influence progressive decisions. Social actors set in motion a repertoire of legal actions, in the context of certain political opportunities, and they use the language of constitutional law as a cognitive framework of mobilization. Progressive judges participate in these decisions but they are not the only actors involved in legal change. The courts are actors in a much larger cast and they are often not even the leads. Social movements also play an important role in the creation of progressive legal decisions. Depending on the setting, social movements may play a leading role or a more minor part; therefore, it is crucial to understand these variations well in order to take more effective action to strengthen social movements and build an understanding of constitutional democracy. In the case of the LGBT movement, Colombia Diversa was a central actor. Without considering Colombia Diversa, it would be impossible to understand the legal changes or the progressive character of the Court when it considered the rights of same-sex couples.

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NOTES

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Americas II Project, particularly to the director of the initiative, Rachel Sieder, and to Professors Angelina Snodgrass Godoy and César Rodríguez Garavito, who provided very wise feedback on the methodology and relevance of this research.

2. The *tutela* is a writ for the protection of constitutional rights. These cases can be heard by any judge in Colombia, and they must be resolved within 10 days after filing (Colombian Constitution, Article 86).

3. The Constitutional Court later declared that

the exception in question was unconstitutional; see decision C-252 from 2010 (COLOMBIA, 2010a).

4. Information about the campaign can be found at <http://righttework.org.uk/>.

5. Interview with Juanita Durán, formerly in the office of Manuel José Cepeda, April 30, 2010.

6. Interview with Jack Smith, an official from the Constitutional Court's General Secretariat, May 12, 2010.

7. Regarding the classification of the gay community as a group that has been traditionally discriminated against, the Court has said: "So... most people socially condemn homosexual behavior (...) The prejudices and misconceptions that have historically been used to anathematize homosexuals do not legitimize the laws that turn them into an object of public humiliation" (COLOMBIA, 1996a).

8. Interview with Germán Rincón Perffetti, March 20, 2010.

9. Personal meeting notes, August 18, 2001.

10. Interviews with José Fernando Serrano, Marcela Sánchez, and Elizabeth Castillo, April 2010.

11. The commercial can be seen on YouTube at: <http://www.youtube.com/watch?v=qt6MOzBu1q0> and <http://www.youtube.com/watch?v=WdvNn5KcMuM>. Last accessed on: May 5, 2010.

12. The *Centro de Estudios Derecho, Justicia y Sociedad* (Dejusticia) intervened in the judicial process that led to decision C-075 in 2007 and was later a plaintiff in the lawsuits that led to decisions C-336 in 2008 and C-029 in 2009.

13. This doctrine generally asserts that four additional aspects must be evaluated in order to determine if differential treatment can be considered discriminatory. These include whether or not the measure seeks an end that is constitutionally admissible or imperative; whether the measure is adequate to achieve that end; whether it is necessary in order to achieve that end; and whether the means used are in proportion to the end that is sought. The constitutional judge may vary the degree of scrutiny given to each of these elements depending on the level of intensity (light, medium or strict) that he or she decides to apply.

14. The Constitutional Court has referred to this topic in numerous decisions. These include decision C-271 from 1996; C-002 from 1998; T-823 from 1999; T-1210 from 2000; C-088 from 2001; C-093 from 2001; T-427 from 2001; C-921 from 2001; C-673 from 2001; C-064 from 2002; T-610 from 2002; T-301 from 2004; C-1054 from 2004; C-194 from 2005; C-042 from 2006; C-029 from 2009; T-140 from 2009; C-242 from 2009 (COLOMBIA,

1996b, 1998a, 1999b, 2000d, 2001a, 2001b, 2001c, 2001g, 2001e, 2002a, 2002d, 2004b, 2004f, 2005a, 2006a, 2009a, 2009c, 2009e).

15. For instance, it has looked to rulings from the Inter-American Court of Human Rights (decision C-010 from 2000) and the Inter-American Commission on Human Rights (decisions T-1319 from 2001 and T-391 from 2007), from the European Court of Human Rights (decisions C-673 from 2001, C-291 from 2007, C-203 from 2005), from the Committee on Economic, Social, and Cultural Rights (decision T-025 from 2004), and from the Committee on Civil and Political Rights (decisions T-566 from 1992; T-567 from 1992; T-597 from 1992; SU-1300 from 2001; C-248 from 2004; C-576 from 2004; C-591 from 2005; T-058 from 2006; and T-436 from 2008). It has also looked to international human rights instruments that have traditionally been considered as "soft law." So, for example, it has turned to the Guiding Principles on Forced Displacement (Colombia, Constitutional Court decisions T-602 from 2003; C-278 from 2007, M.P.: Nilson Pinilla Pinilla; and T-821 from 2007), and the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (Colombia, Constitutional Court decision T-821 from 2007).

16. Recognition of economic rights.

17. Case on the right to health care coverage.

18. Recognition of the right to health care coverage.

19. Recognition of the right to a survivor's pension.

20. Recognition of the right to maintenance payments.

21. Case on the right to a survivor's pension.

22. Recognition of the following rights and obligations: indefeasible family property and the protection of property categorized as a family home; maintenance obligations; migratory rights for same-sex partners and the right to live in San Andrés and Providencia; a guarantee of non-discrimination in criminal cases; the ability to avoid a criminal sanction; aggravating circumstances; the rights to truth, justice, and reparations for the victims of heinous crimes; civil protection for the victims of heinous crimes; benefits from the police pension and health system; family allowances for services; family allowances for housing; the ability to own property; beneficiaries of SOAT compensation in cases of death in traffic accidents; and obligations related to being in the civil service and having state contracts.

23. Case on the implementation of the right to a survivor's pension.

24. Clarification of the vote of Judge (E) Catalina Botero.

RESUMO

Neste artigo reconstrói-se o processo de mobilização conduzido pela organização Colombia Diversa, a fim de conseguir o reconhecimento dos direitos de casais do mesmo sexo na Corte Constitucional colombiana. Em particular, identificam-se três elementos que contribuíram para essa mudança jurídica. Em primeiro plano, a reformulação das demandas num marco de direitos constitucionais; em segundo plano, a existência de uma organização ativista que aglutinou um conjunto significativo de recursos e a utilização de um repertório particular de reivindicações; em terceiro plano, a criação de uma estrutura de oportunidades políticas gerada pela existência de uma Corte progressista, um Congresso pouco democrático, e a presença de uma opinião pública favorável às demandas dos ativistas. Estes três elementos permitiram que os ativistas pudessem canalizar suas demandas por direitos numa decisão judicial progressista. Em geral, argumenta-se a favor de duas teses que estão intimamente vinculadas: a primeira é a evidência da centralidade do discurso sobre os direitos no ativismo político colombiano; a segunda é o protagonismo do ativismo político na definição dos direitos constitucionais no interior da própria Corte.

PALAVRAS-CHAVE

Colômbia – Corte Constitucional – Direitos de casais do mesmo sexo – Movimentos sociais – Mudança social – Homossexualidade

RESUMEN

En este artículo se reconstruye el proceso de movilización llevado a cabo por la organización Colombia Diversa, con el fin de lograr el reconocimiento de los derechos de las parejas del mismo sexo en la Corte Constitucional de Colombia. En particular se identifican tres elementos que contribuyeron a este cambio legal. En primer término, la reformulación de las reclamaciones en un marco de derechos constitucionales; en segundo término, la existencia de una organización activista que aglutinó un número importante de recursos y el uso de un repertorio particular de protesta; en tercer término, la creación de una estructura de oportunidades políticas generada por la existencia de una Corte progresista, un Congreso poco democrático, y la presencia de una opinión pública favorable a las reclamaciones de los activistas. Estos tres elementos permitieron que los activistas pudieran canalizar sus reclamaciones de derechos en una decisión judicial progresista. En general, se argumenta a favor de dos tesis que están íntimamente vinculadas: la primera es la evidencia de la centralidad del discurso sobre los derechos en el activismo político colombiano; la segunda es el protagonismo del activismo político en la definición de los derechos constitucionales al interior de la Corte.

PALABRAS CLAVE

Colombia – Corte Constitucional – Derechos parejas del mismo sexo – Movimientos sociales – Cambio social – Homossexualidad



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ABSTRACT

The human rights discourse is accepted by practically every government. A state can hardly portray itself openly as a violator of human rights. But how do we turn this discourse into public policy? We propose using the tools developed by New Public Management and applying them to the public policy cycle, which can be given additional substance by unpacking the obligations, essential elements, and cross-cutting principles of human rights.

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KEYWORDS

Public policies – Human rights – New Public Management – Empowerment



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PUBLIC POLICIES FROM A HUMAN RIGHTS PERSPECTIVE: A DEVELOPING FIELD

Daniel Vázquez and Domitille Delaplace

1 Public policies, new public administration, and human rights

1.1 *What is public policy?*

The study and formulation of public policy is a recent discipline.¹ It began with the well-known piece by Harold D. Lasswell, *La orientación hacia las políticas*, published in 1951 (LASSWELL, 1992). The date is important for understanding the objective of public policy, given that World War II had ended, the socialist bloc in the middle of Europe had been consolidated, and 1950 marked the first military conflict that initiated the Cold War: the Korean War. The challenge that emerged was far from trivial; there was a new military and economic power that presented various challenges to the democratic capitalism of the United States, one of which was the efficiency of public administration through a centralized state model that controlled all means of production and then distributed goods to the population. In the face of this challenge arose the question: What is the best and most efficient system of government? For American analysts, it was imperative to develop new and efficient public policies that were built on scientific/causal theory and complemented by creativity. This was the challenge that Harold Lasswell took on to create what he called the “policy sciences of democracy”.² It is no coincidence to read in his text:

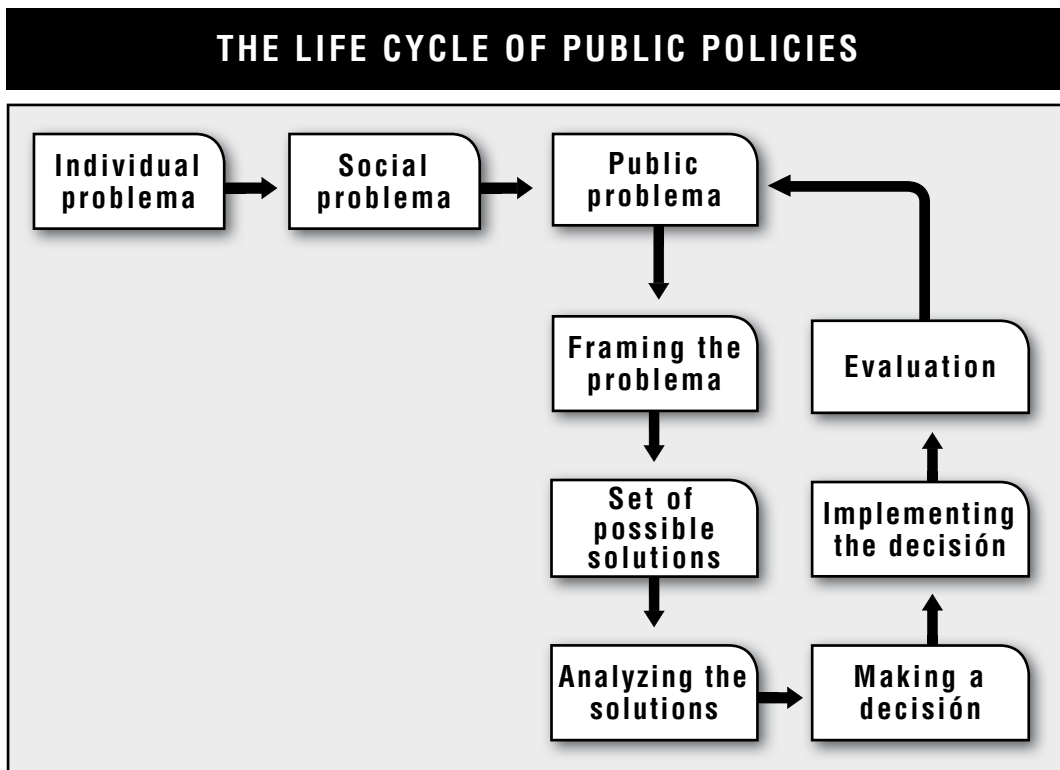
The dominant American tradition defends the dignity of man, not the superiority of a class of man. Hence it is to be foreseen that the emphasis will be upon the development of knowledge pertinent to the fuller realization of human rights. Let us for convenience call this the evolution of the policy sciences of democracy.

(LASSWELL, 1992, p. 93).

Notes to this text start on page 58.

Beyond the ideological dispute that gave rise to the discipline of public policy, the important point to highlight is the final objective: to rationalize government actions. This is the main goal of analyzing public policy. One might ask oneself, “Why should I be concerned with the rationality of government action?” The answer at the time was political: capitalist democracies should surpass socialist means of production. Today, the answer is found elsewhere: state action should be guided by public welfare. When dealing with a public action that uses public resources, the objectives and the mechanisms or procedures used to determine government action should garner the greatest possible increase in welfare in the most efficient way. Thus, public policy aims to rationally address a public problem through a process of government action.

As part of this process of rationalization and analysis, the life cycle of public policy was created. From the outset, it must be emphasized that this is a process that never ends; it is a cycle that is constant and systematic. The cycle is comprised of seven processes: the entry of the problem into the public agenda, framing of the problem, designing possible solutions, analysis of the pros and cons, decision-making, implementation, and evaluation.



This figure illustrates the stages that connect the governmental decision-making process. It is not meant to be descriptive, although it does aspire to have regulatory impact. Today we know that the public policy process can follow these steps, but that it is not always and not necessarily the case. Not uncommonly, the links can merge together and the step-by-step process can become less clear.

It all begins with the appearance of a problem – but not just any problem, rather one considered to be a “public” problem. This is an essential point because social problems, or those that may affect many people, cannot always be considered public problems. For example, for a long time, the subordinate status of women was not considered a public problem. Violence against women was not considered a public problem either, but rather one that had to be resolved in the private sphere, where the state would not intervene. What is considered a public problem today was probably not considered as such before and possibly may not be considered as such later: the public agenda is always changing. When is a problem a public problem? This occurs when it is addressed by one of the many³ governmental institutions.⁴

Once the problem has been established, the next steps are to frame the problem and put forth various possible solutions. Framing the problem involves diagnosing the causes of the problem and identifying possible solutions. The set of solutions will depend on how the problem is framed: there is no single solution to a given problem. The framing of the problem and the design of multiple solutions, together with the decision-making phase, are the most “political” parts of the public policy cycle. This is where conflicting or competing ideologies, interests, and knowledge meet. Finally, at the decision-making stage, it is determined which of the possible solutions presents the greatest degree of technical certainty based on the available evidence. However, the political backing enjoyed by the winner of an election can be as important as technical evidence.

Once the problem has been framed and a decision has been made on how to resolve it, the public policy is implemented. This stage in the cycle is just as significant as the previous ones; there is no hierarchy of importance between the stages. Frequently, the public problem that is framed and the decision made by the government is not only the most politically viable option, but also the most appropriate to resolve the problem. However, the desired results may not be achieved. This may be largely due to the fact that reality is complex and it is difficult to anticipate all of the factors that will affect a public policy. It can also be a case of poor implementation; for example, the implementers may have disagreed with the objectives of the public policy. This can happen particularly with controversial policies, like the legalization of abortion in places with a high number of religious doctors who refuse to perform the procedure. Alternatively, while there may be agreement with the objective and goals of the public policy, the public administration may be so complex in its operations that it creates serious information problems, whereby the goals and procedures are not clearly communicated between upper-level management and the implementers.

Finally, once the public policy has been implemented, we move to evaluation. This stage may be the most technical and the one that has undergone the most development in the last 20 years. Previously, it was thought that evaluation should be done once the public policy was complete. Today, there are different kinds of evaluation for each of the stages in the cycle: evaluation of policy design; evaluation of management to analyze the implementation process; evaluation of results to verify fulfillment of the objectives; and, finally, an evaluation of impact that analyzes the achievement of the goals – in other words, whether or not the public policy had any impact on the original problem.

We now turn to a human rights perspective on public policy. A key date to remember is 1989: the fall of the Berlin Wall. At that moment, there was a significant development in international human rights law, the fall of the Wall was followed by the spectacular fall of the socialist bloc and economic conversion, social democrats replaced the parties of the right in various countries (particularly Margaret Thatcher in England from 1979 to 1990, and Ronald Reagan and George Bush between 1981 and 1992), and, by that time, various Latin American military dictatorships had ceded power to representative governments. The decade of the 1990s seemed promising due to a triumvirate of neoliberal capitalism, representative government, and human rights.⁵ In this process, human rights took on two discursive possibilities: they continued to be used as a discourse of protest against governments, but also, due to the success of this triumvirate, governments could not easily oppose them publically. On the contrary, governments often present their platforms in terms of rights. The new question is, “How can we implement them from within the government?” It was in this context that the World Conference on Human Rights was held in Vienna from June 14-25, 1993.

One of the central elements of the conference’s Declaration and Program of Action was the need to establish public policies that address human rights. For example, paragraph 69 recommends the establishment of a global program within the United Nations that provides technical and financial assistance to States to reinforce their national structures, enabling them to be in observance of human rights. Similarly, paragraph 71 recommends that States develop national action plans to improve the promotion and protection of human rights. Finally, paragraph 98 establishes the need to create a system of indicators to measure progress in the realization of economic, social, and cultural rights (ESCR). The mandate to carry out these three actions was given to an institution that was also proposed in this conference: the Office of the High Commissioner for Human Rights (OHCHR).

1.2 What role do human rights play in public policy?

Dialogue between New Public Management and a perspective of human rights

A critical juncture in the development of public policy analysis in the last quarter of the 20th century was the creation of the concept of New Public Management (NPM). The birth and development of NPM coincided with the neoconservative process of the 1970s and 1980s. NPM is concerned with improving the efficiency of public administration, evaluating processes and results, and providing high quality public services, but its ideology asserts that all of this is best achieved with less state intervention and a greater role for markets. Some of the measures that have been applied globally since the late 1970s and early 1980s to reduce the role of the state include the elimination of government programs, the privatization of companies and public institutions, cuts to public expenditures, the opening of markets through deregulation and reduced tariffs, the creation of new autonomous institutions, innovative ways to allocate public resources, decentralization, and shared responsibility in the provision of public services.

To achieve greater efficiency, the state should increasingly resemble a private firm. The key to understanding this model rests in the well-known book by David

Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector*, (OSBORNE; GAEBLER, 1994), which traces the trend of public policy throughout the 1990s to apply business and economics principles of efficiency through competition. The suggestion to make private schools compete with public schools, or private clinics with public clinics, through vouchers that the state would provide to citizens to use with the service provider of their choice, was first made by Milton Friedman in *Capitalism and Freedom* and *Free to Choose* (FRIEDMAN, 1966), and it established the principles for this new kind of management.

One of the key phrases for understanding this stance is “steering, not rowing.” The state can privatize all public services deemed unnecessary to be provided by government entities. Furthermore, transferring these services to the market guarantees a greater level of efficiency and a better cost-benefit ratio. The critical point is that the state must have the capacity to steer the boat, establish criteria, and regulate companies in order to ensure the quality of services provided.

While there had been serious criticism made of the neoliberal model since its early implementation, the outcomes at the end of the 20th century brought into question many of the premises that bound NPM to the neoliberal revolution. For example, the disastrous consequences of the rapid mobilization of capital on the quality of life of the population were evident in the Tequila Crisis of 1995, the Asian financial crisis in 1997, the Russian financial crisis in 1998, the Samba effect in 1999, and the Tango effect in 2001. However, the most serious questions were raised during the global economic crisis that began on Wall Street in December 2008.⁶ During that time, specialists on ESCR found it more and more difficult to reconcile the neoliberal model with the ability to plan and implement ESCR. This was evident in the reports of the Special Rapporteurs of the United Nations on the rights to life and health and the impact of extreme poverty on human rights.

The question is, can we separate the neoliberal reforms from NPM now that they have been fused? We should at least try because one of the primary objectives of NPM is worthwhile: to make public administration function efficiently and put in place mechanisms to determine if that is the case. NPM:

sets itself up as a new way to understand government action and legitimacy, not based on a vision of strictly following legal procedures, or maintaining a bureaucracy guided by an ethic of responsibility, but rather based on creating systems of incentives and measurement that make a positive impact on the behavior of public servants, so that efficient and worthwhile results can be obtained for the population.

(GESOC, 2009, p. 4).

The primary objective of public policy is to rationalize the use of scarce resources in the state’s fulfillment of activities in each of the stages of the cycle. It does not seem to matter what the state has to do; rather, what matters is that the state does it well and efficiently. These principles are about form more than substance: they do not tell us anything about which activities correspond to the state, which activities should be left to the market, or which are fundamental values that should be realized through state action. In contrast, a human rights perspective emphasizes that the

international obligations that the state has assumed should be clearly expressed and implemented through its public policy...without concern for exactly how it is done. From this point of view, the relationship is clear: the human rights perspective determines the objectives and NPM determines the means.

Earlier, we stated that public policy is concerned with reviewing the decision-making process used by state actors and analyzing and perfecting the rationality of these processes. By ‘rationality,’ we mean a series of attributes that one would like to see in any public policy: efficiency, efficacy, economy, productivity, and timeliness.⁷ If the principal objective of public policies is to lend rationality to state action, this means that public administration should be guided by these principles. Thus, public policy is a collection of procedures that includes government allocation of inputs (financial, human, information, etc.), obtained under the principle of economy and processed with an eye to productivity, in order to obtain products that generate certain results in the short term. Between the provision of inputs and the realization of the outcome, we expect to observe an efficient logic. Furthermore, these short-term results should contribute to increased effectiveness in the realization of medium- and long-term impacts. This whole process should also be cost-effective in terms of inputs, processes, and impacts (GESOC, 2010).

Ensuring that the state uses its available resources in the best possible manner should not be seen as contrary to a human rights perspective. All human rights require dos and don'ts by all the various government entities, budgets, and planning processes. Therefore, it is important to have a human rights perspective but also to have mechanisms to evaluate implementation, management, results, and impact. The objectives derive from human rights and the procedures come from NPM.

2 People's empowerment and international human rights standards

Two of the main characteristics of a human rights-focused public policy are people's empowerment and compliance with international human rights standards. Both aspects are guided by the central element of human rights: human dignity. In this sense, freedom—in the form of self-determination—is one of the key aspects in the development of the idea of human dignity. It is the foundation for empowerment. Likewise, international standards carry a set of rights that appeal to superior, higher needs like freedom, equality, peace, etc. (FERRAJOLI, 1999, 2006). This collection of higher needs constitutes universal morality, which supposes, again, that human dignity is the ultimate goal of human rights (SERRANO; VÁZQUEZ, 2011). We will start with the first characteristic, people's empowerment.

2.1 *People's empowerment*

One of the main elements in the recognition of human rights is the construction of a rights-holder. This is linked to the liberal roots of human rights. It is taken as given that the creator of public power is the subject: the subject is the beginning and the end of the political system.⁸

Most of the discussion around the construction of the rights-holder has centered on the right to development and the right not to be poor. This seems fitting if we consider that poverty implies being deprived of multiple things and various rights, that together limit the right-holder's capacity for self-determination and the ability to exercise power. It is important to clarify that this capacity for self-determination depends on economic factors, but also on cultural, social, and political factors. Thus, limitations on self-determination are not just economic; there are multiple deprivations that arise from cultural, social, and political contexts. A lack of self-determination has multiple causes. Part of the strategy of human rights is to weaken that cycle of powerlessness and promote enhanced skills (NACIONES UNIDAS, 2004). This is where empowerment of the individual is linked to rights to equality and freedom from discrimination, to affirmative action and gender, to the identification of both vulnerable groups and the elements that generate conditions of structural oppression and the modification of those structures (not just through affirmative action but also through transformative action). It is clear that human rights are interdependent, comprehensive, and therefore indivisible.

We can think about empowerment by considering an essential question: How can a channel of communication be built between the government and the people? If the population continues to be treated as subjects—in other words, a right is granted as a favor through the magnanimity of the monarch using policies of patronage—then there is no empowerment; there is no public policy based on human rights.⁹ One could ask, “How does the human rights perspective propose to create rights-holders?” The primary and most well known way, though not the only way, is through recognition of the right. That implies identifying the core and the extremes of the right, to determine, through public policy and with evaluation indicators, how to progressively fulfill the right; it assumes that there are information campaigns to make people aware of their rights; it also assumes that there are enforcement mechanisms (jurisdictional and non-jurisdictional) to implement the rights, both in general and within specific public policy programs. Here, the language of rights is extremely important, because it creates a logic of responsibility through accounting mechanisms and legally binding obligations. Seen through this lens, the objective and the essence of public policy is not to solve specific problems or to respond to unsatisfied demands but, rather, to fulfill rights.

Finally, the concept of empowerment as a basic element in the creation of a human rights perspective will have a major impact in the course of public policy planning because it will lead to the consideration of two criteria: acceptability, and the overarching principle of participation. Both of these will be reviewed in the next section.

2.2 International human rights standards: obligations, basic elements, and principles of application

Since the release of the American Declaration of the Rights and Duties of Man under the Inter-American human rights system and the Universal Declaration of Human Rights under the United Nations in 1948, we have experienced a “boom” in international legislation¹⁰ that has been complemented by the general observations and resolutions of

United Nations committees,¹¹ and by the resolutions issued by different courts of human rights,¹² as well as by UN rapporteurs who have different thematic or country mandates.

The development of international human rights law in the second half of the 20th century generated diverse international obligations for States at all levels (federal, local, and municipal) and relative to all of their functions (executive, legislative, and judicial), which can be grouped into four categories:¹³

- The obligation to respect: No State entity may violate human rights, through either action or omission.
- The obligation to protect: State entities should prevent private entities (companies, unions, individuals, religious groups, associations, or any other non-state institution) from violating human rights.
- The obligation to guarantee: States are required to organize the government in a way that allows people to exercise their rights. It can be sub-divided into four obligations: the obligation to prevent human rights violations, the obligation to investigate human rights violations, the obligation to punish the intellectual and material authors of human rights violations, and the obligation to make amends for infringement on victims' rights.¹⁴
- The obligation to fulfill: State entities should take action to facilitate compliance with international human rights obligations.

In addition to human rights obligations, international standards also require adherence to a basic standard for each right, which are detailed by the United Nations Committees in their general observations. For example, compliance with obligations regarding primary education are not satisfied by establishing a certain number of schools, rather, the State is required to take action to fulfill certain standards guided by these basic principles:

- Availability: The means to guarantee sufficient services, facilities, mechanisms, procedures, or anything else needed to bring a right to fruition for the entire population.
- Accessibility: The means through which a right is realized should be accessible (physically and financially) to all persons, without discrimination.
- Quality: The means and content that bring a right to fruition must have the necessary requirements and properties to be able to fulfill that function.
- Adaptability: The means and the content chosen to bring a right to fruition should have the necessary flexibility so that they can be modified and adapted to the needs of changing societies and communities and respond to different social and cultural contexts.
- Acceptability: The means and the content chosen to bring a right to fruition should be accepted by the target beneficiaries. This is closely linked to adaptability, and to criteria like ownership and cultural adaptation, as well as citizen participation in the formulation of the policy in question.

The last set of principles that should be taken into account when “unpacking” how a right relates to application: identifying the core of the obligation, progressiveness, a prohibition on regression, and maximizing the use of available resources.

Identifying the core element of a right implies establishing the minimum requirements that the state should provide immediately, to anyone, without arguing that it cannot be done due to scarcity of resources or similar issues. The fact that the core of the obligation has been identified does not mean that the right cannot be expanded—one must remember that human rights establish a floor, not a ceiling on each right. Expansion happens based on the principle of progressivity and a prohibition on regression. Once progress has been made in the enjoyment of certain rights, the state cannot, except in certain circumstances, scale back what has been achieved. Now, one might ask, how can we observe and guarantee that? One useful tool is to look at the maximization of available resources. A budget analysis can reveal, first, what quantities were available, and second, how they were used. For example, if a good year leads to greater income than was anticipated, and that extra amount is spent on ordinary expenditures—cell phones, vehicles, etc.—then we can legitimately argue that the principle of maximizing available resources was violated.

The specific content of each of these obligations, essential elements, and principles of application will vary depending on the right to which they are applied. For example, for obligations relating to respect for, protection, guarantee, and fulfillment of the right to health—taking into account the criteria of availability, accessibility, quality, adaptability and acceptability—their content will be different than that used to realize the right to education, the right to water, or the right to vote and be elected (although the categories of obligations would remain the same). Thus, when using a human rights perspective, the first course of action before doing a diagnosis and planning a public policy is to generate a “map” of the right, or to “unpack” the right. This map, likely comprised of a number of obligations, will provide the content for the public policy.

When thinking about international standards, it is important to identify the central element that will provide a foundation for public policies that have a human rights perspective. We are referring to the need to turn to the treaties and declarations that generate obligations, to the *jus cogens*, to international custom—in other words, to all of the sources of international human rights law, including general observations, rulings, rapporteurs’ reports, programs and plans of action resulting from human rights conferences, and other documents that help establish the content and extremes of international human rights obligations. In this way, if we were, for example, doing an analysis of a public policy related to health, we would need to review all of the aforementioned documents in order to establish the obligations to respect, protect, guarantee, and fulfill the responsibility by the state in the area of health. With these elements in place, we will have created the international normative standards with which we would expect the State to comply for the topic in question.

2.3 Cross-cutting principles for public policies using a human rights perspective

International treaties, general observations of UN committees, and reports and case law from regional and international human rights courts establish other fundamental principles that decision-makers should observe in a cross-cutting manner when formulating and implementing public policies. Among these minimum standards, we find rights and principles like equality, non-discrimination, participation, coordination between different levels of government, a culture of human rights, access to information, transparency and accounting, and access to enforcement mechanisms. We elaborate on these themes below.¹⁵

2.3.1 Equality and non-discrimination

Equality and non-discrimination are two principles that are established in numerous international instruments¹⁶ emphasizing equality in the enjoyment of all human rights. These instruments require that States Parties guarantee the exercise of rights free from any discrimination based on race, color, sex, language, political or other opinion, national or social origin, economic status, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, marital status, or any other condition of a political, social, or other nature. This set of norms, as well as the case law relating to them, provides clear concepts and useful parameters to define and evaluate public policies.

The principles of equality and non-discrimination oblige States not to discriminate, in other words, not to implement policies and measures that are discriminatory or that have discriminatory effects, and it also obligates them to protect people from discriminatory practices or behavior by third parties, whether these are public agents or non-state actors. Similarly, it implies that States give attention to the particular circumstances of persons and groups who are excluded or discriminated against in order to ensure that they are treated on the basis of equality and non-discrimination, and that they are not neglected.

The Inter-American human rights system uses the concept of material or structural equality, emphasizing that:

certain sectors of the population require special measures of equality. This implies the need to provide differentiated treatment when the circumstances affecting a disadvantaged group mean that equal treatment can only be achieved by restricting or worsening access to a service or good, or the exercise of a right.

(ABRAMOVICH, 2006, p. 44).

The intended beneficiaries of these kinds of measures are the victims of historical processes of discrimination and exclusion. These include indigenous populations and women, as well as those who are in situations of vulnerability as a result of structural inequalities. The latter include children, undocumented migrants, displaced persons, and persons with HIV/AIDS, among others.

One of the primary obligations of the State is to identify the groups within its territory that need special or priority attention to be able to exercise their rights. It must then approve laws that protect these groups from such discrimination and, within its policies, plans of action, actions, and budget, incorporate concrete measures to protect them, compensate them, or strengthen their access to rights.

2.3.2 Participation

One of the central elements related to the construction of the rights-holder and the empowerment of the individual is the belief that that the individual is best placed to make his or her own life decisions. In theories of democracy, there is a moral equality that follows from the categorical principle of equality: people's desires for goods, their moral demands, and the sorting of their preferences are equally valid despite their differences. At the same time, without evidence to the contrary, each individual is best placed to determine those desires and preferences, to define one's own good life. Using this logic, the individual not only can but *should* participate in making political decisions as part of his or her self-determination.

Participation is another element related to the construction of the rights-holder that generally garners agreement. However, problems emerge in determining the various procedural elements: What forms will participation take? How do we get the ruling class to internalize public concerns? What criteria will determine the participation of republicans, communitarians, "deliberativists," and liberals? To what extent will we maintain a representative democracy—or will we change to a direct democratic system? If we stick with the former, are NGOs good representatives of civil society? If we go with direct democracy, what would be the optimal design of regional or national decisions?

International human rights law documents have established some parameters. The right to participation and consultation in public matters, established in various international instruments,¹⁷ implies the active, documented participation of all persons who are interested in the formulation, application, and monitoring of public policies. International instruments relating to indigenous populations also establish their right to be consulted and to participate in the formulation, application, and evaluation of national and regional development plans and programs that may directly affect them.¹⁸

The capacity of civil society to engage in public policy will depend on the institutional context. This institutional context must be conducive to the creation and institutionalization of effective mechanisms to allow for the participation of social, community, and civil society organizations in the oversight, decision-making, and evaluation processes related to public policies, programs, and actions, ensuring that there are adequate, timely, accessible, and understandable consultation and information mechanisms. It will also depend on "the appropriation by social organizations of monitoring mechanisms, and the existence in civil society of actors with the desire and the resources to use them" (ABRAMOVICH, 2006, p. 47). Advocacy can occur through the filing of legal claims, the organization of campaigns to influence public opinion, or the organization of protests or mobilizations, among others.¹⁹

Public policy advocacy, is defined by Canto (2002, p. 264-265) as “a conscious, intentional process by citizens to influence, persuade, or affect the decisions of institutional elites,” which clearly includes the government, “in order to generate a change or transformation in the courses of action aimed at solving particular public problems.” Public policy advocacy requires civil society organizations to have specific capacities and skills, which vary according to the different stages of the public policy cycle. The author highlights organizational capacity, technical skills, political skills, and social tradition.

2.3.3 Coordination between different levels and branches of government

Human rights are indivisible, comprehensive, and interdependent. This means that there is no hierarchy between them. Fulfillment of a right entails the fulfillment of others, and the violation of one right can lead to the violation of others. Therefore, their realization requires action that is coherent, planned, and coordinated through permanent forums and mechanisms for exchange between all branches and at all levels of government. The direct consequence of this is that when a human rights perspective is applied to public policy, it tends to be holistic.

Human rights policies should include actions, plans, and budgets for different sectors and public entities, which should act in a coordinated way to break the paradigm of departmental competition (inter-departmentalism). Likewise, they should facilitate coordination between the different territorial levels of government: national, provincial, and municipal (inter-governmentalism).

As a result, there is a need for ongoing coordination between public officials at the different levels of government, respecting autonomy and in accordance with the principles of concurrence, coordination, and the subsidiarity of government action. Likewise, de-concentration, delegation, and decentralization should be used within each level of government, together with high levels of social and political responsibility.

(JIMÉNEZ BENÍTEZ, 2007, p. 43).

This is one of the primary differences between traditional public policy and policy that uses a human rights perspective. The former is much more focused on specific problems, whereas the latter is much more holistic, viewing barriers to the exercise of rights as a “public problem.” These differences will be taken up again later.

2.3.4 A culture of human rights

The 1993 Vienna Declaration and Program of Action establishes that:

(...) education on human rights and the dissemination of proper information, both theoretical and practical, play an important role in the promotion and respect of human rights with regard to all individuals without distinction of any kind such as race, sex, language or religion.

(NACIONES UNIDAS, 1993, Art. 33).

The United Nations Educational, Scientific and Cultural Organization (UNESCO) has made significant progress in promoting strategies and producing information and materials on this topic. In Mexico, education for peace and human rights, promoted by civil society organizations decades ago, has gradually been integrated into the public sector's regular set of responsibilities, falling first to some autonomous organizations and more recently to public institutions.

The consolidation of a culture of respect for human rights implies, on the one hand, raising the public's awareness of human rights through campaigns and other dissemination activities and promoting a culture among citizens of the enforceability of rights. On the other hand, it includes training public servants at all levels and in all government entities on human rights in general and on human rights as they relate to public policies and budgets.

To build this human rights culture, we must make use of both formal and informal education, taking into account that we must educate *about* human rights as well as *for* human rights. Finally, it is essential that human rights education directed at public servants be accompanied by institutional change that allows for new incentives and disincentives that promote compliance with human rights obligations. Training alone will not change the state of inertia if it is not complemented by adequate institutional incentives. Here we arrive at another point: while education on human rights is important, developing a set of values around human rights is a long-term process, which surely will not be achieved in a first or second generation; hence, institutional design is key.

2.3.5 Access to enforcement mechanisms: access to information, transparency, accounting, and other political and jurisdictional mechanisms

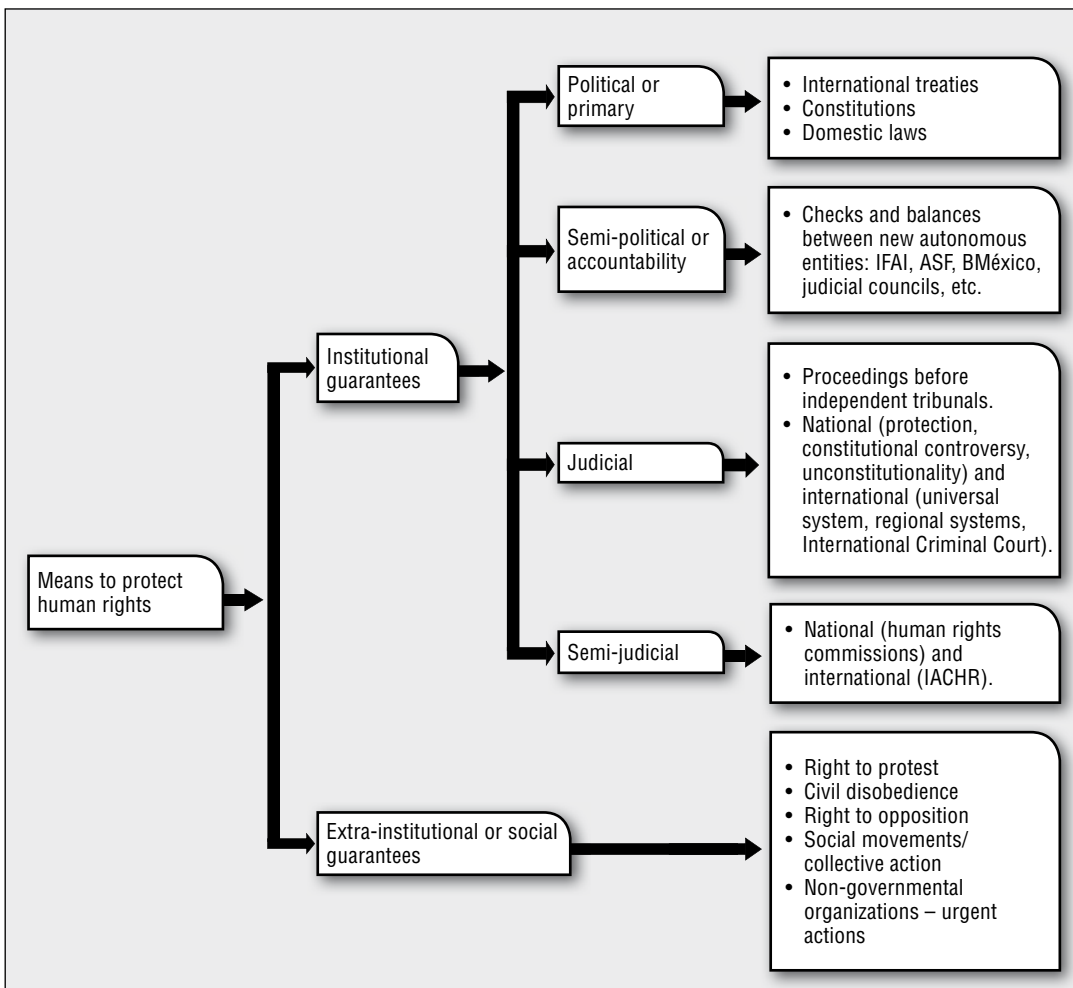
The last of the cross-cutting principles is the establishment of enforcement mechanisms. As with the concept of people's empowerment, the starting point for formulating a policy is no longer the existence of certain social sectors that should be "helped" through the provision of welfare or discretionary benefits, but rather, as Abramovich emphasizes (2006, p. 40), "the existence of people who have enforceable rights, i.e., entitlements that give rise to legal obligations for others and, consequently, to the establishment of safeguard, guarantee or accountability mechanisms." According to Gerardo Pisarello (2007) and Luigi Ferrajoli (1999, 2006), a first distinction can be made between institutional and extra-institutional or social guarantees. The former includes what Pisarello calls political guarantees, or what Ferrajoli calls primary guarantees. These guarantees are constituted through processes of positivization of rights, which can happen at the national or international level.

Semi-political mechanisms come from the already classic mechanism of checks and balances, which is now referred to as horizontal accountability, complemented by new autonomous organizations. All of the transparency and accountability mechanisms largely enter here. The right of access to information includes the right of individuals to request and receive public information, allowing them to evaluate and supervise the policies and public decisions that affect them. The State has a corresponding obligation to provide the requested information, and

generally to guarantee transparency of public functions and to publicize the actions taken by the government. A human rights perspective helps to formulate policies, laws, regulations, and budgets that are based on the definition of reference points, priorities, goals, indicators, those responsible, and resources. This can ensure that the process of policy formulation is more transparent, and that those who have the duty to act are held accountable (NACIONES UNIDAS, 2006c, p. 17).

Pisarello’s jurisdictional guarantees, and Ferrajoli’s secondary guarantees, are the proceedings in independent courts at the national or international level. Here, it is critical to stress that “it is not impossible either in theory or in practice to also design enforceable rights in the field of ESCR” (ABRAMOVICH, 2006, p. 48). By virtue of international human rights law, all persons have the right of access to justice; that is to say, to be able to count on effective, simple, and quick judicial resources or to appeal to a judge in order to seek protection against any violation of their human rights.

Finally, we have semi-judicial mechanisms, which refer to human rights bodies like commissions or ombudsmen. Extra-institutional guarantees, in turn, refer to the whole set of collective actions used to demand rights.



This summary of cross-cutting human rights principles does not aim to be exhaustive, but rather to detail the principles that we consider most relevant and most developed. As international human rights law continues to develop, the principles become increasingly detailed and are complemented by new rights and principles. In particular, it is worth highlighting the recently developed concept of sustainability, which emphasizes the need to incorporate the concept of sustainability into the design, implementation, and evaluation of public policies and programs in order to ensure that conditions are in place to satisfy the needs and fulfill the human rights of current generations without compromising those of future generations.

We have come halfway. Now that we have clarified what international standards are, and how they are constructed, we turn to the most interesting challenge: How do we turn these international standards into public policy?

3 How can a human rights perspective be integrated into public policies?

We proceed by identifying the international human rights obligations that are applied to existing public policy tools. Various tools were developed as a result of the need to rationalize public policy; these include public policy plans and programs that include both logical frameworks and different evaluations that are done throughout the public policy cycle. The objective is to have the human rights perspective permeate the entire public policy cycle, and therefore each of the processes that make up this cycle should be equipped with a human rights perspective.

3.1 Framing the problem: forming a committee and carrying out the diagnostic study

The main objective of public policies that utilize a human rights perspective is the fulfillment of the rights of all persons; this is one of the primary characteristics distinguishing them from traditional public policies. When thinking about framing a public problem for a policy, one should keep in mind that the ultimate objective of the policy is the effective exercise of the right that is related to the problem. That is the goal of public policy according to this perspective. For example, if there is a problem with a woman's personal integrity being violated through domestic violence, the structural logic does not arise solely from the solution to that individual problem, but rather, from respect for the right for all individuals to a life free from violence.

There is a second important difference: to the extent that human rights are comprehensive, interdependent, and indivisible, public policies that use a human rights perspective are necessarily holistic. The human rights perspective does not refer to a specific field, or to the actions assigned to human rights institutions or to some specific right such as personal integrity. Rather, it means giving *all* state policy a human rights perspective: giving a human rights perspective to the National Development Plan, the environment program, agricultural policy, programs on social policy, water, security, fiscal policy, youth, senior citizens, indigenous populations, migrants, the administration of justice, and so on. In this sense, it is

a kind of cross-cutting “umbrella,” leading to a normative standard that looks at all public policy to verify that it complies with a human rights perspective.

These two differences between traditional public policy and that done with a human rights perspective will have a major impact on the whole lifecycle of public policy, including the creation of a committee to facilitate intersectoral coordination and framing of the problem through a diagnostic study. This coordinating committee should be broad and participatory, and should include the multiple branches of government (executive, legislative, and judicial) as well as autonomous organizations, civil society organizations, and academic institutions. The participation of specialized international organizations is also advantageous and enriching. Given that public policy that uses a human rights perspective is openly holistic, many of its objectives entail actions by all three branches at the different levels of government (federal, local, and municipal). Additionally, if power is strongly divided between different parties, it is worth thinking about having those major parties represented on the coordinating committee. As the reader can imagine, this kind of combination is complicated; getting so many actors with different—and even contradictory—agendas and principles to participate could be doomed to failure. While it is true that a participatory process of this nature seems very complicated, it is also true that a committee that is not participatory and that does not represent a country’s main political powers (broadly defined) may be able to come up with a plan but is unlikely to implement it.

The first step to take in applying a human rights perspective to public policy is to unpack the right in question, using the elements analyzed in the previous section. Once the right has been unpacked, a mapping of the institutional design of the entity (national, local, a specific branch or area, etc.) to be analyzed will be done. Who is responsible for which human rights obligation? It is best to map it out up to three levels (secretary, sub-secretary, and department head). This mapping can help to identify which entities are directly responsible for the obligations arising from international human rights law, what they are doing about it, how they are doing it, and what remains to be done. This feeds into the diagnostic study, which ultimately aims to identify the structural causes of a right not being exercised. The study is fundamental for the process of rationalizing public policy, because it allows for the framing of problems and the design of solutions that are based on empirical evidence (evidence-based policy). A key point is that the development of the diagnostic study necessitates the use of official information, but also information from other sources. Furthermore, a common problem is a lack of available information for diagnosing an obligation of a certain right.²⁰

In recent decades, documentation, complaints, and lawsuits (including individual and collective cases of human rights violations before national courts and regional and international protection bodies), and reports and evaluations on compliance with human rights have demonstrated the growing interest of the international community. In processes where States appear before United Nations committees, civil society organizations play an important role by presenting an alternative to the official information on the status of human rights in their respective countries. Examples include the official and “shadow” reports presented to United Nations bodies that supervise the application of international human rights treaties in different countries; national and state surveys are also useful

sources of information for the drafting of the diagnostic study. In addition, international non-governmental organizations like Amnesty International, Human Rights Watch, the International Federation of Human Rights Leagues, and the World Organization Against Torture publish annual reports on human rights practices around the world, particularly on those countries that have the greatest number of cases of human rights violations and abuses committed against human rights activists.

These research reports are primarily composed of qualitative narratives, which aim to provide a more or less broad and detailed panorama of the empirical reality on human rights in a given country, mobilizing two differentiated but complementary approaches. One approach favors an assessment of the human rights situation of the population in general or of specific groups (women, children, persons with disabilities, indigenous groups, etc.). The other approach seeks to measure the extent to which the State has fulfilled its obligations. In the first case, the intent is to give a broad perspective on the degree to which rights are enforced and satisfied in practice; to accomplish this, statistical information is used to illustrate aspects of the right and identify red flags. The second approach analyzes the legislative, administrative, programmatic, or budgetary efforts that the State has made in order to generate suitable conditions for the fulfillment of human rights in the country.

3.2 Public policy design: the Logical Framework Matrix

Planning is a central component of public policy. Regardless of whether we are talking about the short, medium, or long term, citizens' future aspirations—interpreted by governments—tend to become expressed in public policy plans with objectives that will later be subject to evaluation. This is a critical characteristic of public policy: it is not made up of disjointed events but, rather, by a series of moments and steps that form a continuum. Even public policies formulated with the specific objective of solving a given problem need to have a plan to frame, address, and solve it. In terms of human rights, UNHCHR published a Handbook on National Human Rights Plans of Action that explains the importance of creating national human rights plans and describes the main stages in plan development and some strategies that can help planning processes come to a satisfactory conclusion.

For a time, it was thought that public policies that referred to human rights were constrained to the activities and obligations of human rights institutions, like commissions or ombudsmen. When considering human rights plans or budgets, for example, the discussion was limited to the sums given to those institutions to finance their activities. However, just as women's rights are not synonymous with a gender perspective, the activities of human rights institutions are not the same as public policy formulated under a human rights perspective. The intent is to incorporate a human rights perspective into all state policies; in other words, to make human rights the end goal of public policy.

The climax of the programmatic structuring of public policy supposes that, once the human rights diagnostic survey has been done, the rights that will inform the plans are identified, a map of the State's relevant international obligations is drawn, which obligations have not been fulfilled and the structural causes of the lack of enjoyment of the right are analyzed, and the strategic approach and the actions that

will be undertaken to remove those causes are discussed and planned. Only then does the most complicated part begin: executing, verifying, and evaluating the plan.

One last notable point: although, according to international human rights law, aspects of the federal organization of a state are not sufficient justification for municipal, provincial, or federal authorities to fail to carry out any of their obligations—though they may claim that doing so is impossible due to their different purviews—it is also true that distribution and coordination by different government entities required to fulfill human rights obligations is far from simple. The UNHCHR office in Mexico has made an interesting shift in their public policy planning with a human rights perspective by moving from national plans to provincial plans or plans to be implemented by federal entities. After a first set of plans was created at the national level, it became clear that some problems had to be resolved through local strategies, hence the importance of these new kinds of planning.

3.2.1 The Logical Framework Matrix

A process of administrative reform and modernization was conceived based on the notions of NPM. From this emerged the use of the Logical Framework Matrix (LFM), promoted by the U.S. Agency for International Development in the early 1970s and taken up in the 1990s by international financial institutions like the Inter-American Development Bank and the World Bank. Domínguez and Zermeño (2008) explain that the logical framework used in project planning, monitoring and evaluation processes tries to synthesize, in a single matrix or table, the key aspects of a project—in other words, the objectives, products, activities, and indicators—as well as the external conditions that affect the project and the realization of its objectives.

GESOC (2010) explains that a logical framework functions by using two logics: vertical and horizontal. The vertical is a narrative summary that presents the causal logic linking the objectives of the program. It is comprised of four elements, which are read from bottom to top:

Activities: The tasks or key actions required to produce each of the components sought by the program.

Components: The program strategies and the outputs of the interventions.

Purpose: The program's desired result, and how the situation will change based on the program's outcome.

Goal: The broadest objective to which the program contributes (its impact). This establishes how the program will help solve a given public problem (GESOC, 2010, p. 7).

The horizontal logic is comprised of three columns that describe how achievements will be measured, sources of information, and preconditions for the success of the policy in question. These columns are conceptualized as follows:

Indicators: These measure the performance of the program and are critical for effectively monitoring the fulfillment of objectives at each level.

Means of Verification: These identify the source of information used to measure performance indicator data at each level.

Assumptions and Risks: These are conditions beyond the control of the program, but their presence or absence affects the realization of the program's objectives (GESOC, 2010, p. 7).

The following is an example of a logical framework matrix:

	Narrative Summary	Indicators	Means of Verification	Assumptions and Risks
GOAL				
PURPOSE				
COMPONENTS				
ACTIVITIES				

The diagram includes two large arrows: a horizontal arrow pointing right across the top row labeled "HORIZONTAL LOGIC", and a vertical arrow pointing up along the left column labeled "VERTICAL LOGIC".

Source: Gesoc (2010, p. 7).

The key to giving the matrix a human rights perspective is that the end goal, or the desired impact of the public policy, is always the effective exercise of a right. Thus, the rest of the boxes (purpose, components, and activities) will automatically take on a human rights perspective, and human rights indicators will be established.

The results-based focus promoted by NPM brings with it a series of problems, including the very definition of the objectives sought with this type of tool. Generally, these reforms are motivated by the government's own objectives—such as saving and efficiently spending public resources, or strengthening managerial control measures and accountability—which do not necessarily imply the creation of public value that will be appreciated by citizens (GESOC, 2009, p. 23). For example, in Mexico, the federal government has implemented NPM from a managerial perspective with a clear results-oriented vision, using a strategy that integrates indicators to measure and evaluate performance and has a double objective: “to rationalize the resource allocation process, and to modernize public management” (ZABALETA SOLIS, 2008, p. 44).

For its part, in recent years the government of the Federal District of Mexico City has taken initial steps to build an integrated results-oriented strategy.

The intent, again, is to improve the efficiency and efficacy of public spending. However, it introduces a new element: a willingness to align the objectives and results of government action with the satisfaction of people's political, civil, social, cultural and environmental rights, and with a gender focus that seeks to remove inequalities between men and women.²¹ The Federal District government's intention is to build a model for planning, programming, budgeting, and evaluation that has a focus on creating public value, beginning with a recognition of the state's international obligation to respect, protect, guarantee and satisfy human rights, with a gender perspective.²² Still, the Federal District's efforts are new and have a number of limitations.²³

3.3 Evaluation and developing indicators

Each of the stages of the public policy cycle can be evaluated. We can evaluate decisions, program design, program management, results, and impact. If international human rights standards are used to inform the goals and objectives of the public policy, using an LFM, then the indicators proposed for those evaluations (perhaps with the exception of an evaluation of program management) automatically refer to the fulfillment of rights.

Developing indicators is key to being able to carry out an evaluation. In recent years, the topic of indicators has been at the center of debates around measuring progress or deterioration in the realization of human rights. The idea is to be able to add a quantitative angle to the evaluation and to define more systematic measurement methodologies and criteria. Among other things, the discussion revolves around the possibility of creating a set of comprehensive and reliable indicators, which, given the indivisible and interdependent nature of human rights, are applicable for the fulfillment of civil and political rights as well as economic, social, and cultural rights.

In its recent report, *Using Indicators to Promote and Monitor the Implementation of Human Rights*, the Office of the United Nations High Commissioner for Human Rights (NACIONES UNIDAS, 2008) identifies three types of indicators:

1. *Structural indicators:* These reflect the ratification and adoption of legal instruments in accordance with international human rights standards and the existence of basic institutional mechanisms (institutions, strategies, policies, plans, programs, etc.) to facilitate the realization of a given right. They measure the State's commitment to organizing the legal system and institutional apparatus in a way that allows it to fulfill its obligations.
2. *Process indicators:* These measure the reach, scope, and content of strategies, policies, plans, programs, or other specific interventions that aim at having an impact on the exercise of one or more human rights. These indicators seek to measure the quality and magnitude of the State's efforts to implement rights.
3. *Result indicators:* These reflect the real impact of the State's interventions on the status of rights. They describe individual and collective achievements that reflect the degree to which a human right has been fulfilled in a given context.

In addition to these three categories of indicators, there are others that relate to cross-cutting norms or principles that may not be connected to the realization of a given human right, but that show the extent to which the process to apply and make human rights effective is, for example, participatory, non-discriminatory, transparent, and so on—that is to say, that it complies with the cross-cutting principles of application.

For an indicator to be useful, it must first be clear and directly linked to something that interests us and is explicitly mentioned in one of the tools to rationalize public policy, ideally the LFM. The creation of a useful indicator should be related to an activity, component, goal, or result of the public policy.

A separate challenge arises from the impact evaluation of the implemented public policy. To address this topic, it is worth distinguishing between the different levels of public administration. We can consider three levels: the macro level, which deals with the long-term impacts of the public policy; the meso level, which includes short- and medium-term results; and the micro level, which refers to particular administrative units and, in some cases, to particular public officials, where administrative management can be analyzed (GONZÁLEZ, s.d.).

LEVELS OF DEPTH OF PUBLIC ADMINISTRATION AND TYPES OF EVALUATION

Level of depth	Scope	Monitoring and evaluation outputs
MACRO	Impact indicators (fulfillment of rights).	Impact evaluations; reports every three to five years on progress made on each right.
MESO	Indicators of the results of government programs related to each right.	Annual monitoring reports.
MICRO	Management indicators (inputs, processes, and products) of the units that make the expenditures related to each result and impact.	Semiannual monitoring reports on progress made on financial aspects, coverage, the targeting of beneficiaries, etc.

Source: González (s.d.).

The final stage, before the public policy cycle begins anew, is the impact evaluation. Here there is an interesting point to highlight: unlike the indicators established in the logical framework, this evaluation includes a different set of indicators to measure the different obligations and components for each of the rights.

Following the methodology proposed by Anaya Nuñez (2008), the first step in defining human rights indicators is the development of a clear and detailed definition of the content of each right, identifying its distinct components or attributes; this could be done using the “unpacking” process described above. The next step is to operationalize each component or attribute—that is to say, to select various indicators for each component and define how each indicator will be measured. The set of indicators comes from the “unpacked” right. Each of the obligations and essential elements of a right should have at least one indicator. Just

as there can be dozens of obligations, there can also be dozens of indicators. The set of indicators should make up an index, which will show us the situation of the right in question at a given moment prior to program implementation. This index serves as a baseline, and it should be reapplied at least once per year to determine the status of the right in the long term. After the implementation of the public policy, and after an evaluation has been done of the design, management, and results, an impact evaluation should be done. The expectation is that performance on the index in general (or some of the obligations or essential elements in particular) has improved relative to the baseline measurement, as a result of program implementation.

If implementation was done correctly, with acceptable results for the micro- and meso-level indicators, but there is no change at the macro level—meaning that the plan was applied correctly but it did not generate any impact—then the problem lies with the initial diagnostic. Most likely, a poor analysis was done of the different causal relationships that make up the problem, and therefore, despite completion of the program, no improvements were achieved. Alternatively, the problem may not lie with the diagnostic study but, rather, in the fact that some preconditions were not met or the context has changed since the policy was designed.

The indicators are a fundamental tool for monitoring and supervision but they present a series of theoretical and methodological obstacles. The former has to do with the conceptual richness of each right. Operationalization would require too many indicators, so it is necessary to limit the definition of the right to its basic content and select a reasonable number of indicators based on solid theoretical criteria. Along these lines, the UNHCHR (NACIONES UNIDAS, 2008) estimates that an average of four attributes can pull together, with a medium degree of precision, the essence of the normative content of each right. It is also important to build indices of indicators for each right, otherwise there would simply be long lists of indicators that, together, do not manage to tell us anything with respect to a specific object. Returning to the statement of Anaya Nuñez (2008), defining an index leads to another difficulty: aggregation. Creating an index means adding up indicators defined by each component of each right. This entails determining whether all indicators have the same importance, so that they can be linearly aggregated or whether, in contrast, they should be assigned different weights.

Measuring the status of human rights presents one additional challenge. It requires dealing with subjective aspects, like an evaluation of the propriety of a law in light of international standards, the suitability of a public policy, the relevance of existing judicial resources, the recurrence of violations, etc. Typically, this information is not systematized much less codified. This information calls for special treatment, in order to be able to give it quantitative expression. These cases call for a rating system. By reviewing secondary sources (official reports, reports from autonomous human rights organizations, complaints and urgent actions presented by civil society organizations, etc.), a group of trained and qualified evaluators assesses and assigns points on an ordinal scale, thereby rating a given aspect of the right. The challenge here is to define the rating guidelines in a clear and transparent manner before the exercise begins in order to reduce the opportunities for subjectivity.²⁴

The most relevant work done along these lines are the Freedom House and Terror Scale indices, which emphasize civil and political rights, and the index built by Cingranelli and Richards, which also includes some economic and social rights.

4 Conclusion: the end and restarting of the public policy cycle

Once we have completed all of the steps above, we will have accomplished our task:

- We will have clearly “unpacked” the right; in other words, we will know the obligations and components that make up international human rights standards.
- Using tools like human rights plans and programs and the LFM, we will have been able to establish those international standards as goals and objectives of the public policy.
- We will have the necessary indicators to be able to evaluate the program in question, based on international human rights standards, at the micro-, meso-, and macro-levels.
- We will have evidence from an impact evaluation that tell us whether the policy is leading to an improvement in compliance with human rights or whether it is necessary to reformulate certain aspects of the structuring of the problem and the design of the policy.

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NOTES

1. It is important to stress that public policy is being studied here as a discipline—a body of theoretical/ analytical knowledge with practical applications whose primary aim is that of rationalizing public functions. In this sense, it is important to differentiate public policy analysis from public administration. The latter has been around longer and has different theoretical objectives.
2. Public policy analysis arrived in Mexico in the 1980s as a result of the serious economic crisis that Latin America suffered in those years, which obligated all countries to establish mechanisms to rationalize the use of increasingly scarce resources.
3. We refer here both to governmental bodies that compose the Executive, Legislative or Judicial branches, and those at the federal, local and municipal levels as well as independent institutions such as the Mexican National Bank, the Federal Institute For Access to Information and the Electoral Federal Institute.
4. It is important to distinguish between the public sphere and the public agenda. These are two different concepts. There may be issues that belong to the public sphere that are not necessarily part of the public agenda. The public sphere is one of social dialogue with multiple discursive nodes: the media, public plazas, collective interest, etc. However, there may be issues discussed in the public sphere that are not necessarily part of the government agenda. For an issue to become a public problem, it must be put on the public agenda and taken up by government offices so that it can motivate the analysis of public policy and jump-start the public policy cycle.
5. Certainly the triumvirate formed in 1989 never stopped having serious tensions. Contradictions stemmed from the conflicts between ESCR and the neoliberal economic model during the 1990s and, in the first decade of the 21st century, the prioritization of the economic model over human rights. Worse, after the September 2001 attack on the twin towers in New York, democratically elected governments made security one of the key issues on their political agendas. Faced with the tension between many of the mechanisms that arise from security policy and those that stem from human rights, the former was given priority. Thus, the happy triumvirate of 1989 has disintegrated.
6. The political capacity of developing countries to “steer the boat” was also cast into doubt when they had to go up against greater economic powers, like large transnational corporations or other states that were defending the interests of their domestic companies. Furthermore, it is clear today that the market can be just as inefficient (and just as corrupt) as a state in the provision of public services.
7. Timeliness refers to the anticipated products of a public policy arriving at an appropriate time. For example, in the context of the right to health, if the medicine needed to cure an urgent illness arrives at the hospital a week after the patient dies, then the public policy was not timely.
8. The construction of the rights-holder can be seen in the history of constitutional movements. In the formulation of the Magna Carta of 1215, in the Petition of Rights and the Bill of Rights from the English Revolution in the 17th century, in the Declaration of Virginia from the American War for Independence, in the Declaration of the Rights of Man and the Citizen of 1789, and in the French Constitution of 1791, we can see recognition of rights wrenched from political powers through insurrectionist

social movements. The construction of the rights-holder can thus occur in the middle of conflict.

9. In English, the key concept for understanding this process of empowerment is the word *rights-holder*, which, literally translated into Spanish, would be *derechohabiente*. However, the word *derechohabiente* does not have the impact or the power that comes with being a *rights-holder*—the capacity of self-determination, the power to move from being a subject to being a citizen. The word “citizen” is also not the most apt, because it would leave out people who do not fulfill requirements for citizenship but that of course are still entitled to rights; this includes illegal immigrants, legal immigrants or residents, or children and adolescents that are not old enough to be considered full citizens. It seems that the best way to think about empowerment is through the concept of a rights-holder; however, the reader should keep in mind that this is not a legal term, but rather a political term. It not only deals with the legislative provision of a set of rights, but also the possibility and capacity to exercise powers that let one effectively exercise self-determination. It is not only about encapsulating rights within a law; it is also about establishing conditions for those rights to be exercised and for the individual to be empowered. On that point, the debates between Rawls, Dworkin and Amartya Sen on the theory of justice are fundamental to understanding the idea of primary goods, resources or capacities.

10. In the Inter-American human rights system, besides the Declaration there is also the American Convention on Human Rights (OAS, 1969) and its protocol on Economic, Social, and Cultural Rights, also known as the “Protocol of San Salvador” (OAS, 1988), the Inter-American Convention to Prevent and Punish Torture (OAS, 1985), the Inter-American Convention on the Forced Disappearance of Persons (OAS, 1994a), the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (OAS, 1994b), the Inter-American Convention for the Elimination of All Forms of Discrimination Against Persons with Disabilities (OAS, 1999), the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Democratic Charter, and the Declaration of Principles on Freedom of Expression.

In the United Nations human rights system, besides the Declaration there are various international human rights treaties, including the International Covenant on Civil and Political Rights (NACIONES UNIDAS, 2006a), the International Covenant on Economic, Social, and Cultural Rights (NACIONES UNIDAS, 1966); the Convention on the Elimination of All Forms of Racial Discrimination (NACIONES UNIDAS, 2005), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women (NACIONES UNIDAS, 1979), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

11. Many international human rights treaties under the United Nations have a committee that is in charge of monitoring compliance with the international obligations established in these treaties. Most do so through two mechanisms: reviewing reports presented by countries and reviewing the resolution of individual complaints presented by presumed victims of human rights violations in a particular country. In carrying out their responsibilities, these bodies issue resolutions that serve as inputs to identify the bounds of international human rights obligations.

12. There are three international, jurisdictional entities that cover human rights issues: the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court of Human Rights. These bodies issue rulings as observations when there are requests from countries to clarify the interpretation and the scope of human rights obligations.

13. It should be noted that the theory of obligations under international human rights law is not only recent, but it is also still under construction. It is largely developed by human rights courts and tribunals and by United Nations Committees through their general observations. To the extent that the conceptualization and specification of international human rights obligations is done simultaneously by different entities, they are not given a single definition; rather, different conceptual advancements are made that have points of convergence and divergence. For example, in its General Observations, the ESCR Committee addresses the obligation to *comply*, which requires the State to adopt appropriate legislative, administrative, budgetary, judicial, or other measures with an eye to achieving full realization of rights. This obligation is subdivided into the obligations to *facilitate*, to *guarantee*, and to *promote*. The obligation to *facilitate* means that the State should adopt proactive measures to permit and help individuals and communities to enjoy their rights. The State is also obliged to *guarantee* a right whenever an individual or a group can not—for reasons other than their own willingness—put into practice a right for themselves using the resources at their disposition. The obligation to *promote* requires that the State must adopt measures to disseminate adequate information about the rights. The concepts laid out on the table are those determined to be most helpful for the purposes of this section.

14. Making amends implies restitution of the right where possible; for example, if the violation consisted of the illegal privation of someone’s liberty, restitution would mean setting the person free. Making amends also entails trying to compensate for both material and moral damages. Making amends often also means taking steps to guarantee that the violation will not happen again, building collective historical memory through the constructions of parks or commemorative monuments, or governments offering public recognition of the human rights violations along with an apology.

15. These cross-cutting principles were identified by the working group on methodology of the Coordinating Committee for the Development of a Human Rights Program in the Federal District of Mexico City; both authors participated actively in this working group.

16. The principles of equality and non-discrimination are included in almost all international human rights instruments. They are established in Articles 1 and 2 of the Universal Declaration of Human Rights (NACIONES UNIDAS, 1948); in Articles 1, 2, and 26 of the International Covenant on Civil and Political Rights (NACIONES UNIDAS, 2006a); in Articles 1 and 2 of the International Covenant on Economic, Social, and Cultural Rights (NACIONES UNIDAS, 1966); in Article 2 of the American Declaration of the Rights and Duties of Man (OAS, 1948) and in Articles 1 and 24 of the American Convention on Human Rights (OAS, 1969). Two international conventions establish these principles even more specifically, namely the Convention on the Elimination of All Forms of Racial Discrimination (NACIONES UNIDAS, 2005) and the Convention on the Elimination of All Forms of Discrimination Against Women (NACIONES UNIDAS, 1979).

17. See, for example, Article 21 of the Universal Declaration of Human Rights (NACIONES UNIDAS, 1948), Article 25 of the International Covenant on Civil and Political Rights (NACIONES UNIDAS, 2006a) and Article 13.1 of the International Covenant on Economic, Social, and Cultural Rights (NACIONES UNIDAS, 1966).

18. See, for example, Articles 2, 5, 6, and 7 of International Labor Organization (ILO) Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (OIT, 1989) and Articles 5, 18, 23, 27 and 43 of the United Nations Declaration on the Rights of Indigenous Peoples (NACIONES UNIDAS, 2007).

19. Abramovich (2006) alerts us to the practice of some countries in imposing limits on public demonstrations, thereby infringing on the rights to assembly and freedom of expression; he also recalls that the Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights affirmed that criminalization—understood to mean categorizing actions of social protest as criminal offenses—should only be used as a last resort, and only if a compelling public interest has been demonstrated.

20. For example, in the drafting of the *Diagnóstico de Derechos Humanos del Distrito Federal (2007-2008)* (MÉXICO, 2008a) one of the rights under analysis was that of due process. One of the basic components of this right is that the person being subjected to a judicial process must have an interpreter. When trying to answer the question, “How many people need an interpreter in their legal cases and how many of them have had one?”, there was no data—official or unofficial—available, and so the status of this obligation could not even be studied.

21. The integration of a human rights perspective into the budget constitutes one of 16 recommendations in the *Diagnóstico de Derechos Humanos del Distrito Federal* (MÉXICO, 2008a). It is worth mentioning that the Coordinating Committee for the Development of the Diagnostic and Program in the Federal District of Mexico City, through its budgetary working group, played an important role in the promotion of and attention to this recommendation, by accompanying and advising the Federal District government, and especially the Finance Secretariat, in the first phase of this process, and by implementing a pilot project in 2008 and 2009 with the Federal District Health Secretariat, the Federal District Attorney General for Environment and Land Use Planning, and the Mexico City Water System.

22. This paradigm shift was affirmed in the *Manual de programación y resupuestación para la formulación del anteproyecto de egresos de 2009*, drafted by the Finance Secretariat to support the different authorities in the public administration of the Federal District in their development and integration of the 2009 Fiscal Exercise (MÉXICO, 2008b). As a result, the 2009 budget structure was revised and regrouped around major “results” and “sub-results” that were formulated in terms of human rights and gender. Furthermore, the LFM methodology was introduced through a simplified matrix known as a “Public Policy Framework” which had to be filled out to justify each institutional activity programmed by the different units. Each activity also had to be linked to the meta-objectives, that is to say, the aforementioned “results” and “sub-results.” This approach was certainly new, and it is presented here as a relevant and appropriate way to merge the management focus with gender and human rights perspectives.

23. The methodology needs to be improved, making full use of the LFM to help order and give greater consistency to the budget planning and programming process. Similarly, it is critical to push for the dissemination and spread of knowledge on international human rights law—particularly the obligations of the State—as well as the use of these tools within the units that are responsible for carrying out actions and programs, especially to allow both perspectives to be captured. As GESOC concludes, “learning and feedback on this kind of tool, combined with a process of awareness raising and socialization of the power that the appropriate use of this type of integrated methodology can confer, are vital to ensure adequate implementation of this kind of strategy” (GESOC, 2010, p. 30).

24. Anaya Nuñez gives the following example: to rate a situation related to torture, the evaluators decide to give a 0 if, according to the secondary sources that they consult, it is determined that torture is a frequent practice (50 or more registered cases), a 1 if it is occasional (1 to 49 cases), and a 2 if it is not occasional (zero registered cases) (ANAYA NUÑOZ, 2008, p. 45-52).

RESUMO

O discurso dos direitos humanos é praticamente aceito por qualquer governo. Dificilmente um Estado seria concebido abertamente como violador dos direitos humanos. No entanto, como transformamos esse discurso em política pública? Propomos o uso das ferramentas elaboradas pela Nova Gestão Pública e sua aplicação ao ciclo de vida da política pública; elas podem ser dotadas de conteúdo por meio das obrigações, elementos essenciais e princípios transversais dos direitos humanos.

PALAVRAS-CHAVE

Políticas públicas – Direitos humanos – Nova Gestão Pública – Empoderamento

RESUMEN

El discurso de derechos humanos es prácticamente aceptado por cualquier gobierno. Dificilmente un Estado se concebiría abiertamente como violador de derechos humanos. Sin embargo ¿cómo convertimos ese discurso en política pública? Proponemos utilizar las herramientas elaboradas por la Nueva Gestión Pública y aplicarlas al ciclo de vida de las políticas públicas que pueden ser dotadas de contenido por medio del desempaque de las obligaciones, elementos esenciales y principios transversales de los derechos humanos.

PALABRAS CLAVE

Políticas públicas – Derechos humanos – Nueva Gestión Pública – Empoderamiento



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ABSTRACT

Based on lessons learned through research on human rights education in post-conflict communities in Africa and Latin America, this paper argues that (a) Haiti must begin immediately to lay the foundations for a society that will improve significantly on that of the last two hundred years, that (b) two of the critical groups in that process will be women and young professionals, and therefore that, inter alia, (c) high quality human rights education is needed to assure their political, economic and professional empowerment.

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Haiti – Human rights – Human rights education – Sustainable education – Teacher training



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HUMAN RIGHTS EDUCATION IN COMMUNITIES RECOVERING FROM MAJOR SOCIAL CRISIS: LESSONS FOR HAITI*

J. Paul Martin

For the past ten years I have been participating in a study of the role of human rights education in post-conflict societies, primarily but not exclusively in Africa and Latin America. Given that many of the effects of the earthquake in Haiti are comparable to the devastation caused by civil conflict, it is useful to examine whether there are lessons applicable to Haiti.

The research project evaluated the importance, role and factors governing the success of human rights education programs following a major social crises caused by civil conflicts. It drew especially on the opinions of domestic and international actors, notably public officials, administrators, teachers and local human rights leaders.

Because the content and formats of these programs vary considerably, we defined human rights education broadly, namely as **learning that promotes the knowledge, skills, behaviors and attitudes needed to promote human rights and social justice**. Our evaluation focused on the impact of such education, namely results outside the classroom. This definition deliberately excludes any theory of priorities among rights or of the relationship between individual and society. It also excludes any linkage with theories of democracy or other political structures, nation or state building, political identity, the principles and practices underpinning economic development, as well as with international relations or foreign affairs. These latter categories were used rather as optics and criteria to distinguish between different models and approaches to human rights education.

The findings are still tentative but a number of them are relevant to the current situation in Haiti.

*While these conclusions are my own, I am indebted to many exchanges with Prof. Tracey Holland of Vassar College who led the recent research project with funding primarily from the U.S. Institute of Peace.

We found **strong support** for human rights education on the part of the local people, local leaders and local teachers seeking to build a better society. We also found that support on the part of many local and international government officials was mostly in principle, not in practice, namely when it came to enforcing policies and making the necessary budget allocations.

Human rights education works **best when it addresses the real life problems** of the particular target population. During major emergencies, for example, most local populations suffer from a sense of powerlessness. In these cases human rights education must show how domestic and international human rights principles and institutions are a source of empowerment, notably with respect to public officials, the military and local police, as well as others who control access to the resources needed to re-build their lives. In this case, if nothing else, human rights education should convince the target population that they have rights and that the government and government officials are legally bound by both domestic and international law to protect those rights.

Our research also showed that the **idea of their having rights was not strange to villagers**. Local leaders, for example, had little difficulty identifying as unjust activities that others would readily call human rights violations. The leaders also had little difficulty identifying the causes of the violations, tracing many to patterns of discrimination and the use of violence and fear-mongering. While perhaps using other words, they attributed the continuing violations to a lack of accountability on the part of the government officials and to a lack of protection from the hostile actions of private armed groups. These are, however, just some examples of their sense of injustice. The important point is that to be successful, human rights education needs to respond to the real-life problems of the target population.

The human rights education programs we studied took **many forms**, ranging from studying documents such as the Universal Declaration of Human Rights to training in the skills needed to document and report human rights abuses. In most poorer or developing countries, however, few such programs last longer than week or two. Most were much shorter. Hardly any were integrated into public school curricula or reinforced by subsequent trainings or other support systems. Only a few tried to come to grips with the causes and circumstances of the problems faced outside the classroom on a day-to-day basis. Their effectiveness was governed principally by three factors: the design of the program, the training of teaching personnel and access to adequate physical resources.

Our analysis of the roots of conflict identified **discrimination and its associated social constructs as well as economic interests as the most common causes** of human rights violations. The social constructs were based on one or more forms of difference and diversity, typically constructions based on such more or less objective phenomena as skin color, religion or language. The constructions are used to define relationships between “us” and “them,” typically as negative or adversarial. In turn, such constructs generated political responses and strategies based on powerful but implicit premises such as

“dominate or be dominated.” This leads to social hierarchies where certain groups develop the power to act on behalf of their own interests without considering those of others. While economic benefits, the other major cause of human rights abuses, may be a source of discrimination on their own, they often overlap with social constructs associated with biological and cultural sources. On the other hand, we found that mutual economic benefits can also bring together formerly competing groups. The finding relevant for human rights education is the importance of strategies to redress the most serious patterns of discrimination, two of the most pervasive of which are frequently those based on gender and ethnic identity.

A further conclusion is that human rights education is not an add-on, but at the **core of the education of citizens** because it provides necessary tools to avoid violent conflict both in the family (domestic violence) and in the society at large. In other words, to reduce and hopefully avoid abuses, every society needs values and institutions that effectively mediate its inevitable, multi-faceted conflicts among its social, political, economic, cultural, ethnic, religious and other interests and groups. Peaceful societies are those which possess effective institutions. Formal and informal educational institutions, including families and other social organs that acculturate members to function within a whole social system. cultivate the knowledge, attitudes, behaviors and skills needed to resolve public and private conflicts without resort to violence. This, however, is not to say that human rights and a formal education system are the only ways to obtain these outcomes. Many societies have developed other institutions to reduce violence. However, these have often been rendered ineffective due to major social upheavals ranging from competition for land to civil wars and climate change.

Effective human rights education is **not a stand-alone activity**. It works best when coordinated with other supportive political and economic inputs, especially those that build **self reliant, participatory local communities**. Coordinated action to examine and identify prior and continuing causes of discrimination and inequity is a crucial, although an extremely difficult, step towards eliminating them. In this regard participants in human rights education programs underlined the value of training in such skills as critical thinking and conflict management in both family and public spheres. At the same time human rights education needs to emphasize political and economic emancipation, to encourage and enable people to participate in the decisions that affect their lives. Enabling the targets of human rights education to move from seeing themselves as victims to seeing themselves as agents was a common goal of most of the programs we studied.

Educational institutions are on the frontline of these endeavors. Unfortunately education, on account of either its absence or the biases that were taught, can also often contribute to ongoing social divisions and the lack of preparedness on the part of the population to deal with major crises. Thus, after a major crisis like the Haitian earthquake, when the schools were even more bereft of teaching materials and classrooms, teachers are all the more needed to

interpret and deal with the social problems that surround them. Human rights education is needed if the people are to feel empowered to respond to the major challenges that face them, that is to move from victimhood to agents. They can only do this if they do not feel powerless and unable to engender positive responses from the powers that be. Our research also found that human rights education needs to begin as soon as possible before the system settles down to life as before. Human rights educators also recommend that human rights education leads immediately to activities outside the classroom.

One of the growing problems during and after civil war is the growth of violence against women, especially as a weapon of war. As part of their responses we found that women were organizing themselves to prevent such violence. They are increasingly adopting strategies that use a language of empowerment, mobilization and agency. They are usually the loudest voices seeking local and international actions to prevent these forms of violence.

Using these as criteria, recent developments in Haiti receive a **mixed report**.

On the positive side, there is the huge international response, resulting according to some in 10,000 NGOs operating in the country. There are also many reports of individual re-building projects and collaboration among NGOs with respect to child-welfare. Equally significant is the common report of experienced aid-workers that in spite of the tragedy Haitian citizens as a whole are remarkably resilient and optimistic, compared with citizens they have seen elsewhere in similar circumstances.

On the negative side there is little evidence of activities that have the capacity to change the overall social patterns that have been established over the last two hundred years of Haiti's independence. There is no dominant vision of how the future can be different from the past. Politicians offer short-term benefits. There is no discussion of reducing the ongoing patterns of discrimination, nor of the type of education, training and capacity building needed to promote a different future. Understandably the conversations focus on the enormous immediate needs such as re-building the basic institutions of the state, including all the education institutions devastated by the earthquake. Missing is any social analysis that pin-points the goals and especially the detailed strategies needed to assure a different future for the nation.

Two of the central concerns of human rights education are political and economic emancipation. Together they encompass many individual rights. In the case of Haiti, both political and economic emancipation call for government to implement more structures that reward citizens for contributing to the rebuilding. They also call for overcoming the social cleavages that have long privileged one group over another, as well as activities that encourage communities to discuss and to address the problems they face on a daily basis. These problems include access to freshwater and food, AIDS and other diseases, sanitation, health, community relations and especially access to employment. Economic emancipation and political emancipation go hand in hand. Both call for new ideas that enable heads of household to provide for their families. Our research elsewhere found many ways through which poor communities

were addressing these and other common problems cooperatively and in self-reliant ways. Political emancipation is especially called for in societies with deep social cleavages like Haiti where sizeable segments of the citizenry see others as privileged and they themselves as disenfranchised and subordinate. The degree and the impact of such dissatisfaction in Haiti, however, have yet to be assessed.

In the eyes of the educators one of the main purposes of human rights education, whether in a crisis or not, is to help a society to address and solve its problems without resort to violence. In a situation such as Haiti after the earthquake, where public institutions hardly function, the purpose is still to reduce violence and to solve problems peacefully. How are this and the other objectives of human rights education to be achieved?

Moving Ahead: How to Respond

Our research on Africa and Latin America showed that the critical initial decision in promoting capacity building to improve human rights is the choice of the target group or groups. This choice is critical because the available resources are limited and they are in danger of being spread too thin to assure sustainability. The choice of target group is generally based on utilitarian principles, that is how best to assure the greatest benefit for the greatest number, and long-term sustainability. The content and methodology must then be made relevant to the day-to-day lives of the target group. In Haiti the potential target groups are numerous: police, government officials, local NGOs and health workers, UN military forces, teachers, aid agencies, clergy etc, as well as the public at large. A case can be made for each.

Given the myriad of other programs designed to help Haiti, in its search for long term benefits and to break the cycles of the past, Haiti must look to itself and to its own resources that have not yet been well mobilized as leaders, notably its women. This means not just one project here or there, but a broad effort to increase the political and economic emancipation of women. There is every indication that many women in Haiti are able and willing to meet that challenge, missing are the knowledge, skills and institutional structures needed. Such efforts to emancipate women are not to be seen as a stand-alone project, rather as bringing to bear new resources to the much larger project of building a new Haiti. Another key constituency are Haiti's young professionals who are moving out into the society from its police academies, universities, religious seminaries, nursing and medical schools. Properly designed human rights education is one of the ingredients necessary to build the women's and these young professionals' leadership capabilities, which in turn will lead to new social visions for Haiti.

With these goals in mind for human rights education, the immediate recommendation is modest but urgent: to train teachers with the needed knowledge and skills. One of the essential pre-conditions for human rights teaching is a corps of teachers able to develop in their students, old and young, the basic knowledge and skills needed to assure social justice and

equity in their various communities. In fact many otherwise excellent education programs have failed because the trainers and the teachers were inadequately prepared to understand and implement advanced educational processes such as critical thinking and conflict management. Trained teachers are the essential source of sustainability. Projects to train trainers and teachers need to offer training and practice in critical thinking and conflict management as well as in the knowledge and the practical application of human rights principles and practices. Thus in the case of Haiti, the sooner such training for teachers and trainers begins the better. Our research showed that without teachers prepared specifically to teach human rights, that is *learning that promotes the knowledge, skills, behaviors and attitudes needed to promote human rights and social justice outside the classroom*, simply teaching about human rights had little impact. On the other hand, other research on human rights education has shown that it can empower women and other target groups outside the classroom and lead to their political, economic and professional emancipation in the society at large. In the case of Haiti, this is a long-term project, growing slowly but steadily as women and other young professionals move out into their communities and create a large enough constituency to promote human rights in the society at large.

RESUMO

Com base em lições aprendidas a partir de pesquisas sobre educação em direitos humanos em comunidades pós-conflito na África e na América Latina, este artigo defende que (a) o Haiti deve começar imediatamente a lançar as bases de uma sociedade que irá aperfeiçoar substantivamente aquela dos últimos duzentos anos, (b) dois dos grupos críticos neste processo serão as mulheres e os jovens profissionais e, portanto, (c) uma educação em direitos humanos de alta qualidade é necessária para assegurar sua autonomia política, econômica e profissional.

PALAVRAS-CHAVE

Haiti – Direitos humanos – Educação em direitos humanos – Educação sustentável – Formação de professores

RESUMEN

En base a lo aprendido en un trabajo de investigación sobre la educación en derechos humanos en comunidades africanas y latinoamericanas que atravesaron situaciones de conflicto, el presente trabajo postula (a) que Haití debe comenzar de inmediato a sentar las bases para una sociedad que mejore significativamente respecto de los últimos doscientos años, (b) que dos de los grupos cruciales en tal proceso serán las mujeres y los jóvenes profesionales y (c) que, por lo tanto, se necesita, entre otras cosas, una educación en derechos humanos de alta calidad para asegurar el empoderamiento político, económico y profesional.

PALABRAS CLAVE

Haití – Derechos humanos – Educación en derechos humanos – Educación sostenible – Formación docente



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ABSTRACT

This paper seeks to highlight the value and scope of Article 33 of the Convention on the Rights of Persons with Disabilities (United Nations, December 2006) by analyzing the three provisions it contains: 1) designation of an entity within government to which the State Party should assign the task of promoting implementation of the convention and ensuring inter-institutional coordination for effective conduct of such task; 2) identification of an independent mechanism or institution (compliant with the Paris Principles), which will monitor, on behalf of the State, implementation of the convention and will promote and protect the rights of persons with disabilities; and 3) promotion and organization of civil society monitoring of convention implementation, emphasizing the actions that organizations of persons with disabilities should take and the leading role they should play to do so.

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Convention – Rights – Disabilities – Implementation – Monitoring



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ANALYSIS OF ARTICLE 33 OF THE UN CONVENTION: THE CRITICAL IMPORTANCE OF NATIONAL IMPLEMENTATION AND MONITORING

Luis Fernando Astorga Gatjens

1 Introduction

Generally speaking, one might expect that upon ratification of the Convention on the Rights of Persons with Disabilities (CRPD), the states of Latin America would start planning policies, programs, and actions to implement its provisions. Unfortunately, this has not been the case. The CRPD tends to be regarded as a benchmark and remains an expression of intention and a rhetorical promise, with no robust action having been taken for effective implementation.

To implement the convention, States should start by complying with the valuable Article 33 of the United Nations Convention (UNITED NATIONS, 2006). This article provides for national implementation and monitoring by the state and civil society.

This is why some organizations of persons with disabilities (OPwDs) in Latin America involved in promoting implementation and monitoring of the CRPD have attached great importance to observance of Article 33. One could say of States and governments: “Tell me what you are doing about Article 33 on implementation and monitoring and I will tell you how committed you are to the convention and the advancement of the rights of persons with disabilities.”

The importance given to this article is reflected in the fact that, in 2009, the Office of the United Nations High Commissioner for Human Rights (UN-OHCHR)* prepared a thematic study on Article 33, after broad consultation with states, civil society organizations, and independent experts. This thematic report offers a series of recommendations on the actions and measures that countries should take for adequate implementation of the provisions of the above-mentioned article.

*Thematic study by the Office of the United Nations High Commissioner for Human Rights on the structure and role of national mechanisms for the implementation and monitoring of the Convention on the Rights of Persons with Disabilities (UNITED NATIONS, 2009, para. 17).

It is worth noting, before proceeding to our review, that this convention was the first to extensively refer to implementation and monitoring at the domestic level. No other previous treaty within the UN human rights framework includes such a provision with the sole exception of a partial one contained in the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), under which States shall ratify such Convention and establish, designate, or maintain a “national preventive mechanism.” The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and other thematic treaties focus on international monitoring.

It is fitting to remember what the UN-OHCHR pointed out in the thematic study when stressing the importance of monitoring:

In all human rights treaties, the implementation obligation is closely linked to a monitoring component. The monitoring of human rights treaties is needed to assess whether measures to implement the treaty are adopted and applied, but also to evaluate their results and therefore provide feedback for implementation. Monitoring mechanisms foster accountability and, over the long term, strengthen the capacity of parties to fulfill their commitments and obligations.

(UNITED NATIONS, 2009).

The CRPD strengthens monitoring by extending its scope to both national and international levels.

At the international level, there is no doubt that the International Committee established under Article 34 of the CRPD plays a key role in offering guidance to States Parties regarding the type of reports they should prepare and submit, reviewing the reports submitted, and subsequently making comments and recommendations to each state. It is worth noting that the agreed upon guidelines issued by the Committee for the first report that countries must submit are very stringent and seek to prevent the preparation of cursory, general reports that tend to depict favorable instances of compliance in the relevant state. We must remain vigilant so that governments and ministries of foreign affairs adhere to such guidelines; it appears that some countries that have already submitted reports have done so on their own terms and without the rigor required.

Another international monitoring procedure exercised by the Committee includes the essential condition that the state must have ratified the optional protocol. When this condition is met, it is possible to submit communications or complaints about violations to the rights of persons with disabilities after exhausting domestic remedies and, if the communication or complaint is admitted, the Committee may undertake an investigation. This monitoring mechanism may be quite effective since it puts strong international pressure on states that, in general, do not want to be subjected to such scrutiny.

Article 33 provides for national monitoring, which is the subject of our analysis below.

2 Article 33 and implementation of the convention

Generally speaking, Article 33 of the CRPD is divided into three parts and calls for:

- An implementation and coordination mechanism within the executive branch or government.
- A monitoring mechanism from one or more State entities that comply with the Paris Principles.
- Monitoring by civil society organizations (NGOs in general and organizations of persons with disabilities in particular).

2.1 An entity within government promoting implementation

Paragraph 1 of Article 33 of the CRPD establishes the following (UNITED NATIONS, 2006):

States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

The first thing we should note is that this paragraph seeks to ensure implementation of the treaty and has two components: one establishes the obligation of States Parties to designate one or more entities within the government for matters related to the implementation of the CRPD and another which primarily recommends the establishment or designation of a coordination mechanism to facilitate adoption of the measures.

With regard to the designation of an entity within government to promote implementation, there are two options: that it be a single agency or more than one. This will of course depend on the characteristics of the State Party, as indicated in paragraph 1, which states that the designation will be “in accordance with [the State Party’s] system of organization.” In the case of large, federal states, it may make sense to designate several agencies but for most countries in Latin America (where the majority of states are relatively small or medium-sized), it is advisable to designate one government entity for this purpose.

The following question immediately comes to mind: “What should such an entity within government be like to perform the task with which it was entrusted effectively and efficiently?”

Let us examine some of the conditions it should meet:

- First: The designated entity should be part of the government or the executive branch, which is primarily responsible for implementing the CRPD (even if we are aware that the legislative and judiciary branches also have to comply with

certain provisions under the treaty, like agreed-upon legislation in the case of the former and effective access to the justice system in the case of the latter). It is important to designate a specific entity within the executive branch “to avoid blurring of responsibility across government...,” as pointed out by the UN-OHCHR in its thematic study (UNITED NATIONS, 2009).

- Second: The designated entity should be close to the central authority (for example, a ministry, a secretariat, or the Office of the President) that issues instructions and policies that have an effect on the rest of the ministries and government institutions. In some countries, it is argued that this agency should have political and institutional force so it can really govern implementation of the rights of persons with disabilities. The entity should not be part of the Ministry of Health (which is typically a component of the medical model that treats persons with disabilities as patients), or of the Ministry of Social Welfare (which tends to consider persons with disabilities as objects in a government welfare system), and neither should it belong to the Ministry of Labor (which addresses only the labor aspect of the needs of persons with disabilities).
- Third: The designated entity should have the necessary human resources, equipment, and budget to perform its duties. It should not render services directly to persons with disabilities but create the right conditions and ensure that the relevant institutions offer the services required in a cross-cutting, inclusive manner, taking into consideration the specific needs of persons with disabilities. In this regard, we could say that the entity designated should promote inclusive development in the field of the rights of persons with disabilities.
- Fourth: The designated entity should play a very active role in coordinating with other government agencies that implement the treaty, developing policies, programs, projects, and actions that fall within their competence. It is advisable to have such inter-institutional coordination, since the designated entity will interact –providing expertise on the matter- with other government agencies, as recommended in the second part of paragraph 1.
- Fifth: In the performance of their functions, the directors and staff of the entity tasked with promoting implementation should be guided by the social model of disability; they should be very well versed in the rights of persons with disabilities (included in the CRPD and other national or international standards effective in the relevant State Party) and in the design of inclusive public policies typical of the social model, so that they can offer better guidance and advice to the institution.
- Sixth: The designated entity should be open to coordination and consultation with organizations of persons with disabilities and it is advisable for it to have among its leaders and staff persons with disabilities who are socially and politically empowered.
- Seventh: The entity should be willing to collaborate and receive criticism and comments from the monitoring institution or mechanism established under paragraph 2 of the same Article 33.

It would be possible to set other prerequisites or conditions that the designated government entity should meet but those indicated above already provide a basic outline. Each country, based on its own history and institutions, can offer different answers regarding the type of entity it will designate for the important task of promoting implementation of the convention.

Currently, many government agencies tend to undervalue and discriminate against persons with disabilities and develop actions that amount to charity or government welfare with very little impact on the living conditions of persons with disabilities. Or, from the human rights perspective, institutions develop activities that create the conditions for violations of the rights of persons with disabilities or violate them directly. This is due to widespread ignorance of the fact that persons with disabilities bear rights and obligations and should no longer be objects of public or private charity.

In this regard, the CRPD should act as a watershed in world history and in the history of each particular country. For this to be the case, it would require clear and responsible guidance, advice, and supervision. An entity like that referred to in paragraph 1 of Article 33, and which we tried to describe based on the conditions it should meet, ought to play such a role among all institutions. It should conduct its activities within the paradigmatic framework of human rights and social development to prevent implementation of the convention through purely cosmetic changes in which government welfare (or, even worse, charity) continues to be the guiding principle of public policies for disability.

The oversight role of this entity tasked with promoting and coordinating implementation of the convention should not be confused with the monitoring function of the national human rights institution or mechanism set forth in paragraph 2 of Article 33. In this case, monitoring aims to ensure that (cross-cutting and inclusive) public policies and programs are duly implemented as provided for under the convention. This operational monitoring and control from the expert body is designated to promote—in a coordinated manner—public policies and inclusive programs. As indicated in the UN-OHCHR thematic study (UNITED NATIONS, 2009):

National focal points on disability issues are already in place in most Governments, including as a result of the implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities. As such, implementation of Article 33, paragraph 1 might require a reconsideration of existing structures rather than the establishment of new entities.

In Latin America, this responsibility has usually rested with national disability councils (*Consejos Nacionales sobre Discapacidad*, referred to as CONADIS) or similar organizations.

Some Latin American countries, which are already starting to debate the designation of a public-sector entity, have proposed that this task be entrusted to national disability councils. The first thing to consider is whether the national disability council of the relevant country meets the conditions required to carry out the important mandate to promote implementation of the convention

effectively and efficiently. Most likely, the conclusion will be that it does not (in most cases) due to the limited political influence that these agencies have in the current structure of states in the region.

However, we should not dismiss the possibility of national disability councils becoming the entities designated for this task, provided that they are vested with greater political power and funding. Such a decision, however, should not come from the government or executive branch but should derive from an act of parliament clearly establishing the empowerment of these institutions.

It is worth reflecting upon how a State Party to the CRPD should designate the entity responsible “for matters relating to the implementation of the present Convention.” One possibility that immediately comes to mind is for the government to make the designation through an executive order or some other decision-making mechanism. This option poses a difficulty that warrants serious consideration: the administration that makes the decision may be replaced in the following elections by another with a very different view about how to address human rights of PwDs and which entity should be responsible for promoting implementation of the convention. This would create instability and may lead to the reversal of the decision made, affecting implementation of the CRPD. Therefore, it is advisable for the designation to result from an act of parliament, not only indicating the entity to be designated but also vesting it with the necessary political power and resources.

This is something that OPwDs and government institutions currently working on disability-related issues, in particular national disability councils, should analyze, since this is generally where initiatives related to the rights of PwDs are produced. Proposing legislation to parliament (be it unicameral or bicameral) offers greater certainty regarding the government entity to be designated and helps the issue of rights of PwDs gain ground not simply as an occasional policy of a given government but as state policy.

Another issue that warrants consideration is the fact that countries indefinitely postpone the designation. So far, this is what has occurred; there are States Parties in the region that, two or three years after ratifying the treaty, show no signs of intending to designate an entity. This is a negative and foreboding sign as it appears to indicate that there is a lack of awareness about violations of the rights of persons with disabilities or about what countries should immediately do to change this prevalent situation. States in the region in general have accumulated a huge debt to PwDs that they can only start to settle by firmly committing to implement the convention. A first essential step is designating the agency responsible for promoting such implementation.

A final issue to consider is the fact that states may start to take for granted that it falls to national disability councils to undertake such responsibility without any formal and serious designation. This would be very negative since such a situation would convey the message to PwDs and society in general that, despite the state ratification of the CRPD, things remain unchanged; after a few years of taking stock of the treaty’s implementation, the conclusion would be that it is yet another important instrument with limited or no effect at all.

2.2 Inter-institutional coordination for implementation of the convention

In the second sentence of Article 3 paragraph 1, the CRPD makes an intelligent recommendation: to establish or designate “a coordination mechanism within government to facilitate related action in different sectors and at different levels” (UNITED NATIONS, 2006). Such coordination among different agencies is necessary to implement the treaty in all sectors and at various levels of the state structure.

Implementing the convention necessarily involves the design and implementation of public policies and programs that are inclusive and which may have cross-cutting application in public institutions, with a particular focus on those that directly address the issue of persons with disabilities. These might include, for example, ministries of education, health, labor, housing, transportation, and communication or information, among others.

The entity within government designated to carry out a task as challenging as promoting implementation of the convention should serve as a “focal point” as defined in the UN-OHCHR thematic study (UNITED NATIONS, 2009). Obviously, the focal point from which inclusive public policies will emanate should have counterparts in the ministries or institutions that will develop and implement their specific public policies.

At this point, it is necessary to differentiate the political coordination needed in decision-making at the central level, which would be under the responsibility of the designated government entity, from the necessary inter-institutional operational coordination. Such coordination would involve the teams of the designated government entity and the focal points of each government body responsible for designing the programs through which the convention provisions will be implemented in the various areas of the state.

There is another issue to consider regarding the focal points of the institutions that make up the central (or federal) government. In small states, it is possible that coordination between focal points within ministries can be arranged, as long as the designated government entity also coordinates activities at the municipal level, where persons with disabilities reside. However, in “States with multiple levels of government” (as defined in the UN-OHCHR thematic study), it will probably be necessary to designate “disability focal points [...] at the local, regional and national/federal level” (UNITED NATIONS, 2009).

3 Monitoring by the State

Article 33 paragraph 2 of the CRPD contains two subparagraphs (UNITED NATIONS, 2006):

States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention.

When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

The fundamental precondition for the mechanism or state entity responsible for monitoring the status of human rights of PwDs and, specifically, implementation of the convention is that it be independent.

It would be a mistake for the same entity designated to promote implementation of the convention to also be responsible for monitoring state fulfillment of the rights of PwDs, including those established under the CRPD. If that were the case, such a government entity would become both judge and party.

The entity designated under Article 33 paragraph 1 will promote and coordinate all things related to implementation of the convention. This entails two key functions (among others): providing guidance and advice for the design and development of inclusive and cross-cutting public policies in government agencies, particularly to those that address the needs of PwDs, and overseeing compliance thereof at an operational level. This oversight function is different from the one to be performed by the institution(s) in charge of independent monitoring. This different perspective is focused on how the state and its institutions are performing with regard to the rights of PwDs, specifically as provided for under the CRPD.

The responsibility to protect, promote and monitor the rights of PwDs, as established under Article 33 paragraph 2 of the convention, should rest with one or more institutions operating on an independent basis. This is to which paragraph 2 refers when it stipulates that States Parties, when designating such a mechanism, should take into account “the principles relating to the status and functioning of national institutions for protection and promotion of human rights” (UNITED NATIONS, 2006).

Such principles are the “Paris Principles,” which were adopted by the UN General Assembly on December 20, 1992 and have become the main source of guidance for human rights institutions formed in various countries after their adoption.

They were drafted and proposed by national human rights institutions themselves, working together with representatives of the States, the UN, expert bodies, inter-governmental groups and non-governmental organizations. This diverse group met in Paris in October of 1991, at a conference organized by the Danish Center for Human Rights.

The Paris Principles are broad and general in nature. They were designed this way so that they could engender compliance by a broad spectrum of national human rights institutions, regardless of their different objectives, organizational structures, and action plans. The Principles define a series of minimum legal requirements that a national human rights institution should meet to be considered as such. They focus on three areas: (1) competence of and responsibilities given to these national institutions, (2) pluralism in their composition and independence in the performance of their functions, and (3) methods of operation and relations with other social actors, such as civil society organizations.

Regarding competence and responsibilities, there are some criteria that national human rights institutions must meet. We shall mention three: (1) their mandate should be as broad as possible (comprising both protection and promotion of human rights), (2) the mandate should be clearly set forth in a constitutional or legislative text, and (3) they should have the authority to prepare reports about the general human rights situation in their country or about issues of a more specific nature.

With regard to composition and degree of independence and plurality, the Paris Principles establish the following basic conditions: (1) members of national human rights institutions shall be elected according to a procedure that ensures a plural representation of the various social sectors; (2) the institutions should have an adequate infrastructure and the economic resources needed for the conduct of their activities; (3) their actions and decisions should be fully independent from the executive branch or government; and (4) they should not be subject to any financial control that may affect the performance of their functions.

To fulfill this set of requirements expected of national human rights institutions, when referring to methods of operation, the Paris Principles establish the following powers: (1) national human rights institutions may freely consider any questions falling within their purview; (2) they should have access to any information and any documents necessary to assess the human rights situation in their country; (3) they should have the freedom to address the general public regarding their opinions and recommendations; and (4) they may maintain consultations with public and civil society organizations involved in the protection and promotion of human rights.

In our countries [Latin American states], there are different types of entities that have been entrusted with protecting, promoting and monitoring human rights, such as offices of human rights attorneys, commissions, commissioners, and ombudsmen, among others. Regardless of the type of institution in each country, it is important to determine whether they are compliant with the Paris Principles, especially concerning the independence of the institution from the executive branch.

In sub-paragraph 1 of paragraph 2, reference is made to one or more independent mechanisms. Based on what we know about the Latin American region, we believe that this framework will preferably be composed of one mechanism and not two or more. In very large countries with a federal organization like Brazil, it may be suitable to establish or designate several institutions, which should operate in a coordinated manner.

It will be very important for OPwDs to find out whether the designated or established national human rights institution strictly complies with the Paris Principles. If the conclusion is that it does not, it will be necessary to coordinate actions with other civil society organizations to advocate for reform to the existing entity in order to meet such principles or to promote the creation by law of a new entity that complies with the principles from its inception.

If it is found that the national human rights institution does meet the Paris Principles, it will be necessary to determine if the institution has taken due note of the tasks with which it is entrusted under the CRPD, that is, “to promote, protect

and monitor implementation of the [...] Convention.” It will also be important to request information about the actions the institution intends to implement to perform its duties and if any special team has been or will be assigned such responsibility. Some institutions already have a person (or team) specialized in the rights of PwDs, in which case it would be useful to inquire as to whether the institution intends to reinforce or strengthen the team to optimize the performance of its tasks.

Another important point concerns coordination and joint initiatives that may be undertaken by national human rights institutions together with OPwDs, in terms of monitoring as well as protecting and promoting the rights of PwDs. A possible joint agenda could include, among others, the following features:

- (Desirable) coordination between the government entity designated to promote implementation of the convention and the national human rights institution. Is there such coordination? How does it work?
- Awareness of and follow-up to the reports that States Parties should submit to the International Committee. In this regard, it will be extremely valuable for the national institution to be aware of comments and recommendations made by the Committee in order to assess what is being done to follow such recommendations.
- Campaigns to advance the rights of PwDs, in accordance with Article 8 of the CRPD concerning awareness-raising throughout society.
- Coordination with OPwDs to guide them on how to encourage PwDs to report violations of their rights before the national human rights institution.
- Joint training initiatives for OPwDs on the rights of PwDs and the CRPD.
- Consultations with OPwDs when the national institution prepares general reports about the status of human rights in the country and especially when it prepares reports specifically concerning the status of the rights of PwDs.

4 Monitoring by OPwDs and civil society in general

We shall now consider the monitoring to be performed by civil society, in particular, OPwDs. Article 33 paragraph 3 of the CRPD establishes that “[c]ivil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process” (UNITED NATIONS, 2006).

OPwDs are expected to play a key role in this regard. They need to be trained in human rights so that they become fully proficient in promotion, protection and advocacy. They must be very acquainted with the CRPD and its optional protocol and they should be supported so that they can implement actions that can have a political impact in different scenarios. They should take the saying “without action there is no law” and put it into practice under the slogan *Without organized and politically meaningful action on the part of OPwDs and their allies, States will do little or nothing to comply with the CRPD.*

The monitoring role they have to play forces OPwDs to be informed of what is going on, especially with regard to the entity designated to promote and coordinate implementation of the convention. If such an entity has not yet been designated, OPwDs should be actively involved in demanding that such designation be made in compliance with all the conditions required to fulfill the task effectively.

In addition, they should also be vigilant when the time comes for states to submit reports to the Committee created under the convention. The OPwDs should demand to be informed and duly consulted during preparation of such reports. Once the reports have been completed, they should review them to assess their accuracy and objectivity. If it is found that the report does not reflect the real situation of PwDs in the country, the OPwDs should set themselves to prepare shadow reports, if possible with the assistance and support of human rights NGOs.

With regard to the follow-up of states' reports, it is not enough for the organizations to read the national report or send a shadow report to Geneva. They should in fact take successive action and exert political pressure, both in the country and in Geneva, in order to ensure that the Committee makes the most appropriate comments and recommendations based on the real situation of the rights of PwDs in the country and to publicize the issue in the national mass media.

Once the International Committee has made comments and recommendations based on the submitted report and after exchanges with representatives of States Parties, the OPwDs must have thorough knowledge of the document and publicize it widely as a first step in the effort to exert political pressure so that recommendations are followed.

Civil society monitoring includes that of human rights organizations or associations working on behalf of rights protection and promotion. OPwDs will have to establish relationships with such groups to introduce them to the rights of PwDs (if it is not already included on their agendas) or help them to develop a better approach to the issue, since neglect of disability rights also extends to NGOs. Additionally, OPwDs should collaborate with NGOs that have knowledge and experience working in international human rights protection systems, with a view to forming alliances that can strengthen them and developing joint activities, such as drafting shadow reports.

There are NGOs that work in the field of disability without having PwDs among their members. It would be advisable for OPwDs to work with such NGOs in order to bring them into the ranks of those organizations working for the promotion, protection and advocacy of the rights of PwDs, and so that they add these issues to their agendas, even if their activities are mainly focused on service rendering. It is always valuable to have more and more allies in the effort to advance the rights of PwDs.

It is worth remembering at this point that disability is an issue that cuts across various social sectors of the population. Persons with disabilities may be women, workers, boys, girls, African descendants, indigenous people, etc. That is why it is necessary for OPwDs to influence the agendas and activities of women's organizations, trade unions, children's rights organizations, indigenous organizations, organizations of African descendants, etc., to encourage them to

include the issue of the rights of PwDs on their agendas. It is unlikely that they will do so on their own initiative; therefore, the guidance of OPwDs will be very much needed in this process.

With the issue already on their agendas, these civil society organizations will be able to perform the monitoring role assigned to them under Article 33 paragraph 3 of the convention.

For all of the above reasons, we may conclude that the very heart of monitoring from civil society should be OPwDs, which should be socially and politically empowered and fully aware of their role in protecting, promoting and advocating for the rights of PwDs.

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RESUMO

O presente trabalho procura enfatizar a importância e o escopo do artigo 33 da Convenção sobre os Direitos das Pessoas com Deficiência (Nações Unidas, dezembro, 2006). Neste artigo, tal importância é analisada a partir dos três componentes contidos neste dispositivo: 1) a designação da instituição pública do Estado Parte encarregada de promover a implementação da Convenção e a coordenação interinstitucional necessária para fazê-lo de maneira eficaz; 2) a identificação do mecanismo ou instituição nacional independente (nos moldes dos “Princípios de Paris”), responsável por monitorar – a partir da perspectiva do Estado – o cumprimento da Convenção, bem como proteger e promover os direitos das pessoas com deficiência; e 3) a promoção e organização do monitoramento por parte da sociedade civil, com destaque à liderança e ao trabalho a ser desenvolvido por organizações de pessoas com deficiência.

PALAVRAS-CHAVE

Convenção – Direitos – Deficiência – Aplicação – Monitoramento

RESUMEN

El presente trabajo busca resaltar el valor y alcances del artículo 33 de la Convención sobre los Derechos de las Personas con Discapacidad (Naciones Unidas, diciembre, 2006). Tal valor es analizado en los tres planos que contiene ese artículo; a saber: 1) La designación de la institución pública a la cual el Estado Parte, le debe encargar la tarea de impulsar la aplicación del tratado y la necesaria coordinación interinstitucional, para cumplir eficazmente esa tarea; 2) La identificación del mecanismo o institución nacional independiente (que cumpla “Los principios de París”), que vigilará –desde el Estado– el cumplimiento de la Convención y protegerá y promoverá los derechos de las personas con discapacidad y 3) El impulso y organización del monitoreo desde la sociedad civil, destacando el liderazgo y la labor que deben desarrollar las organizaciones de personas con discapacidad.

PALABRAS CLAVE

Convención – Derechos – Discapacidad – Aplicación – Monitoreo

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ABSTRACT

The UN Convention on the Rights of Persons with Disabilities, now part of the Brazilian Constitution of 1988, introduced new concepts and approaches into Brazilian Law. This article intends to define and discuss the concepts of reasonable accommodation and undue burden, offering suggestions for a constitutionally adequate and useful interpretation of these new legal norms. Consequently, research was conducted regarding such concepts and their complexities as treated in other legal systems, particularly those that have featured them for some time. An interpretive proposal is then formulated, addressing conclusions and results primarily obtained by eliminating some interpretations adopted in other countries. The conclusion reached is that reasonable accommodation is made possible and effective through measures for the inclusion of people with disabilities, which are obtained through a process of dialogue between the parties involved. The duty to accommodate is limited by the concept of undue or disproportionate burden, comprised of various elements, for which the burden of proof lies with the party whose duty it is to accommodate.

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KEYWORDS

Disability – Discrimination – Reasonable accommodation – Undue burden



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REASONABLE ACCOMMODATION: THE NEW CONCEPT FROM AN INCLUSIVE CONSTITUTIONAL PERSPECTIVE¹

Letícia de Campos Velho Martel

*From the Perfection of Life
Why confine life in concepts and norms?
Beautiful and Ugly... Good and Bad... Pain and Pleasure...
These, after all, are forms
And not degrees of Being!*
(QUINTANA, 2007, p.142).

1 Introduction

He walked down the corridor and considered his achievement. He was attending law school at 17 years old. Upon entering the classroom, he could feel the tension in the air. Absolute silence. The room was confusing because the door was at the back. He continued on in need to find a seat by an electric socket to use his computer. As the silence persisted, someone approached him and offered to help. He explained that the room seemed back to front, and that he needed to sit down. The colleague kindly showed him the way. Although not visible, the awkwardness was palpable. The doubts too. In every colleague, every professor, he could sense the unspoken questions as to whether he would see it through to the end; but mainly whether he would be a burden to the rest of the class. Then there were the curious who thought he would read and write in Braille. “No, nothing of the sort! I can read Braille, but technology has evolved and these days there are specific programs for us, the blind.” More questions followed. “How are you going to read the texts on the reading list?” “Simple, the library digitalizes them and keeps them for me. All the professor has to do is submit the list.” Copyright is no longer an issue for this joint project between professors, libraries, and the blind. To the surprise of many, in their midst

Notes to this text start on page 110.

was a brilliant, well-organized and attentive student. The performance of the entire class was better than other classes. It is easy to understand why. The presence of a blind student meant that the reading list was available in advance, the students were quieter during class out of respect for their colleague who needed to pay close attention to hear, and the classes grew more informative. Everyone learned a valuable lesson. Sharing the classroom with a blind student taught inclusion, acceptance and tolerance. It brought out their good side. There is still a drawback, however, which he hopes to overcome by the end of the course. It is very difficult to access case law in some courts. The systems they use are not compatible with the programs available for the blind, who buy the software with state support. But there is the promise of total inclusion by 2012. He is counting on this. During the next vacation period, he is going to the museum since a colleague has discovered an art gallery in a nearby city that allows blind people touch the sculptures and some of the other art pieces. He'll be able to feel the art. The world is starting to adapt, he thinks.

The student's reasoning is spot on; a world that is adaptable, adjustable, able to accommodate and to receive people who are different, who have long been invisible. His vision is of a world built by human beings for all human beings, universally designed, without the need for integration or assimilation. A world that does not disregard people who do not fit the mold of the archetypal human that modern Western society expects and reveres; a world that has moved beyond accessibility and mobility; a world that recognizes, respects and offers a wide range of channels for participation and inclusion, ruled by a profound conception of equality and grounded in plural dignity.

The inspiration to write this article came from the need to explore the concept of *reasonable accommodation*, present in the UN Convention on the Rights of Persons with Disabilities (UN/CRPD). Together with *undue burden*,² the term *reasonable accommodation* confers new legal meaning to instances of discrimination against people with disabilities. Both enjoy constitutional status given one unprecedented aspect of Brazil's ratification of the UN/CRPD: it was the first international human rights treaty (IHRT) to be approved under the terms of Article 5, paragraph 3 of the Brazilian Constitution (BRASIL, 1988), making its legal norms fully part of the Constitution.

The objective, therefore, is to define and discuss the concepts of reasonable accommodation and undue burden, offering suggestions for a constitutionally adequate and useful interpretation of the new legal norm. Accordingly, this article shall first present an overview of the concepts and their complexities, with a focus on the legal systems that gave rise to them (sections 2 and 3). It shall then propose a line of reasoning for the interpretation and construction of the concepts in Brazilian law, within the framework of the rights of people with disabilities (section 4).

2 Brief notes about the UN Convention on the Rights of Persons with Disabilities

The UN/CRPD was approved in December 2006 and ratified by Brazil in March 2007 in New York. In 2008, it was incorporated into the Brazilian Constitution in the form of a constitutional amendment, under the terms of Article 5, paragraph

3 of the Constitution (Legislative Decree No. 186, BRASIL, 2008). As the first international convention to be approved in the new millennium, the UN/CRPD concerns itself with a portion of the population that has been, and still is, the subject of discrimination and oppression: people with disabilities. The cornerstones of the Convention are inclusion, parity of participation, full enjoyment of rights and dignity for people with disabilities, with additional attention given to the juxtaposition of other factors of exclusion and discrimination, such as combinations of gender, age, childhood, poverty and disability.

The UN/CRPD is noteworthy on many levels. It unifies in one international document a range of human rights recognized for a “creditor group” (FIGUEIREDO, 2010), people with disabilities, and reaffirms the “universality, indivisibility and interdependence” of human rights. In this respect, the UN/CRPD establishes a series of legal concepts, some of which are fairly innovative in some legal systems, such as the notions of (a) disability; (b) discrimination; (c) reasonable accommodation.

On disability, the UN/CRPD does not espouse a merely biomedical approach (i.e. one that “holds that there is a causal and dependent relationship between the bodily impairments and the social disadvantages experienced by persons with disabilities” in which “a body with impairments should be the subject of medical knowledge intervention” (DINIZ; BARBOSA; SANTOS, 2009, p. 66-68), but instead combines it with a more comprehensive and even combative approach than the exclusively biomedical one: the social model of disability. Within this social model, disability “has come to be understood as the experience of inequality shared by people with different types of [bodily or mental] impairments,” the cause of which is not their bodies but rather barriers, obstacles and social oppressions. Disability, therefore, has moved beyond the purely biomedical field, grounded in measurement, evidence, treatment and cure, and into a moral and cultural understanding that countless obstacles are found outside our bodies, in the material and moral environment that surrounds us (DINIZ; BARBOSA; SANTOS, 2009, p. 70). Nevertheless, the social model incorporated by the UN/CRPD does not completely discard elements of the biomedical model, particularly in regard to the fundamental rights of promotion, protection and access to health.

On discrimination, the UN/CRPD alters conventional thinking in two ways. First, the UN/CRPD expands the concept, defining it *also* in virtue of not offering reasonable accommodation. Therefore, in addition to the traditional forms of unequal and discriminatory treatment, the denial of reasonable accommodation that does not impose an undue burden constitutes discrimination against people with disabilities. This illustrates the singularity of the concept of reasonable accommodation, since, by modifying the content of discrimination, it “demonstrates the recognition of environmental barriers as a preventable cause of inequalities experienced by people with disabilities” (DINIZ; BARBOSA; SANTOS, 2009, p. 70; EMENS, 2008, p. 877). Second, the UN/CRPD expressly broadens the meaning of discrimination, including direct and indirect forms, such as adverse impact discrimination.

If there was ever any doubt about adverse impact discrimination figuring in Brazilian constitutionalism, it has now dissipated. The *doctrine of adverse or disproportionate impact discrimination* was developed by the U.S. Supreme Court in the case of *Griggs v. Duke Power Co.* (*apud* SARMENTO, 2006, p. 125; MARTEL, 2007), decided in 1971. This model of discrimination differs from *direct* discrimination, in which the legal norm or administrative practice is intentionally and on its face discriminatory. Adverse impact discrimination, in contrast, occurs when public or private measures that are neither discriminatory in their origin nor imbued with discriminatory intent, end up causing manifest harm, normally upon their application, to certain minority groups whose physical or mental characteristics or lifestyles distinguish them from the general group of people for which the policy was designed. Based on this doctrine, courts can invalidate or make exceptions to laws, administrative acts or even collective agreements and business policies, creating a barrier against indirect harm caused to minorities (SARMENTO, 2006, p. 125; MARTEL, 2007).

This concept of discrimination raises an important question: what is reasonable accommodation? The text of the UN/CRPD offers a definition:

Reasonable accommodation: means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

(NAÇÕES UNIDAS, 2006a).

Seemingly, reasonable accommodation is not a problematic or complex concept. It means using all available mechanisms to adjust practices, materials, environments, general rules, etc. to the differences between people in order to assure them equal opportunities. However, the term “reasonable” does create ambiguity since it is not clear what constitutes reasonable mechanisms. The existing ones? An ordinary one? The best possible ones? And what are we to understand by “undue burden”? Does this expression refer only to the cost? The subsequent sections are intended to provide an explanation of the concept in other legal systems, in order to develop an interpretive proposal for the case of Brazilian law.

3 Reasonable accommodation and undue burden – an overview of foreign and international law

The concept of reasonable accommodation originated in the United States following the approval of the Equal Employment Opportunity Act of 1972 (USA, 1972) that aimed to combat discrimination in the labor market. The term was originally used in reference to religious discrimination, requiring employers to demonstrate that they would be unable to reasonably accommodate the religious practices of their employees without undue hardship. Since then, the expressions reasonable accommodation and undue hardship have figured prominently in U.S. law. However, it was with the approval of the Americans with Disabilities

Act-ADA in 1990 that they took hold and became the subject of more intense discussions, both in doctrine and in case law (USA, 1990).

Canada may also be considered one of the birthplaces of reasonable accommodation. In the 1970s, while the U.S. was forging the concept, Canada had a conservative discrimination case law, primarily because it did not recognize doctrines such as adverse impact discrimination. Nevertheless, Canada ended up importing from the U.S. both the concept of adverse impact and of reasonable accommodation. Moreover, the development of the concept of reasonable accommodation flourished more in the Canadian system than in the U.S., converting Canada's legal rulings into a reference on the subject.

Over the past decade, a number of European countries and the EU have also incorporated the concepts of reasonable accommodation and undue burden into their legal systems. In more recent years, after the approval of the UN/CRPD, they have been adopted in the field of global human rights protection. The long history of these two concepts and their diffusion across various different countries and regional and global human rights protection systems would appear to indicate their suitability, borrowed from other legal systems after careful consideration and based on clear and stable legal structures. Nevertheless, Waddington demonstrates that the concepts were forged in a highly questionable manner in the U.S., meaning that the selected reference has proven to be complex and confusing. Moreover, European countries have not responded to the challenge of developing these concepts in identical ways, which has made their application even more challenging (WADDINGTON, 2008, p. 318-319).

To better understand the subject, an overview shall be presented of the concepts in the U.S., Canada, and some European countries as well as in the European Union. This survey will make it possible to draw some conclusions about the concepts and also identify the more controversial points, thereby allowing the Brazilian interpretation to avoid the same highs and lows, and rights and wrongs encountered elsewhere. An understanding of the concepts in other legal systems is the first step towards a fertile legal dialogue in times of "transconstitutionalism" (NEVES, 2009, p. 265) and intense exchanges between national, regional and international human rights protection systems. It is worth noting that Brazil has an advantage over most other States. Here, the concepts enjoy constitutional status, making superfluous many of the discussions that took place elsewhere on legislative interpretation, on correlation between international or community law documents and the internal legal system, on the constitutionality of the laws and on the differences between the administrative and legislative spheres.

3.1 The United States of America – on how not to read the convention

The narrative on reasonable accommodation and undue burden in United States law reads like a clear example of "judicial backlash" (KRIEGER, 2003, p. 340; MALHOTRA, 2007, p.9). Introduced legislatively in a socially and legally eventful period marked by an active civil rights movement, reasonable accommodation was the subject of timid interpretation by the judiciary, less assertive than expected,

particularly considering two decisions on matters of religion delivered by the Supreme Court prior to the adoption of the concept. In both cases, there is a recurrent allusion to the issue of reasonable accommodation, although obviously without being explicitly mentioned:

- (a) in the *Yoder* case, the Supreme Court decided in favor of families belonging to the religious Amish community who refused to send their children to high school, in breach of state laws mandating compulsory schooling until age 16. Despite claims by the state of the need for universal education of children and adolescents, the Court *accommodated* the interests at stake, making an exception to the law to allow the community to educate their adolescents (USA, *Wisconsin v. Yoder*, 1972);
- (b) in *Sherbert v. Verner* the Court decided that the denial of unemployment benefits unduly infringed on the exercise of the religious convictions of an Adventist woman who refused job offers that required her to work on Saturday, a day of rest and worship when members of her denomination are forbidden to work. In doing so, it accommodated the interests of a religious group, by making an exception to the general legal norm (USA, *Sherbert v. Verner*, 1963; MARTEL, 2007, p. 33).

Note that these two rulings, in spite of their being made prior to legislative adoption of the concept of reasonable accommodation, were imbued with its spirit. People belonging to minority religious groups who were adversely impacted by impartial laws or administrative acts had their rights asserted and exceptions were made to reconcile lifestyles and profound beliefs that differ from the mainstream, thereby avoiding discrimination and forced assimilation and integration by the state. It would be plausible to suppose, therefore, that the Supreme Court would follow the same path when interpreting reasonable accommodation and undue hardship after the legislation came into force.

This did not happen. The reasons are difficult to identify and though this is not the place for speculation, it is suspected that the Court was possibly apprehensive about the implications that reasonable accommodation involving religious matters in private labor relations might have on the separation of church and state. In this regard, the Court adopted remarkably restrictive positions, especially concerning: (a) the verification of the costs and burdens to be borne by the employers, which was carried out through application of the *de minimis* rule, i.e., any cost beyond the minimum constituted an undue burden; (b) the definition of the principle of equality, which was limited and formal; (c) the restrictive interpretation of parties with the duty to accommodate; (d) the distorted interpretation of legal texts, concerning both their wording and their legislative history (USA, *Trans World Airlines, Inc. v. Hardison*, 1977; USA, *Ansonia Board of Education v. Philbrook*, 1986).

One striking aspect of the Supreme Court's interpretation of legal texts is the fact that it separated the term "reasonable," the adjective qualifying accommodation, from undue hardship. An examination of undue hardship is only made if employers are unable to provide *any* accommodation *deemed* reasonable. This being the case,

any proposed accommodation, even if not accepted by the claimant – given its insufficiency, inefficiency or because it results in a loss of wages or employment benefits or even because it stigmatizes – is generically reasonable, and the accommodating party is not required to incur any additional costs to obtain a more adequate accommodation for those involved. And once considered reasonable, no proof of undue hardship is even required. Furthermore, an accommodation may be deemed not reasonable in and of itself, regardless of costs, as explained below.

Following the approval of the ADA (USA, 1990), a renewal of jurisprudence on reasonable accommodation might have been expected now that it was applicable to people with disabilities. Nevertheless, the courts understood that, since legislators had chosen terms previously defined in rulings on religious matters, the intention was to maintain the existing meaning. The restrictive interpretation persisted. Even worse, a new reading, grounded in elements of the law and economic schools of thought, constrained the scope of reasonable accommodation even further.

The heavily criticized decision was given by Chief Judge Posner, in a court of appeals, in the *Vande Zande* case. Mrs. Lori Vande Zande became paralyzed from the waist down. Confined to a wheelchair, she occasionally suffered from pressure ulcers that required her to take time off work. The first aspect analyzed in the case was whether these ulcers come within the legal concept of disability. Although they do not themselves constitute a disability, they were caused by the disability. Consequently, they were considered part of the disability, giving rise to a duty of reasonable accommodation to the point of undue hardship. With regard to accommodations, Vande Zande made two requests of her employer, the state of Wisconsin: (a) to lower a sink in the kitchenette so she could wash her coffee cup and get a glass of water, that is, use the services of the kitchenette like the other employees.³ She was only able to reach the sink in the bathroom, where she performed the activities she would prefer to do in the kitchenette. As far as she was concerned, while using the bathroom did not interfere directly with her work, it caused her moral damages and a degree of stigmatization in the workplace; (b) restoration of 16.5 hours of sick leave she took as a result of her employer's refusal to let her work full time at home for eight weeks (USA, *Vande Zande v. Wisconsin Dep't of Admin.*, 1995).

When interpreting the ADA, Posner understood that the legal norm provides a dual and broad definition of disability, including (a) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (b) the state of being regarded as weak, fragile or *defective* to the outside observer. To define reasonable accommodation and undue hardship, Posner drew on previous cases. For workplace accommodation, he understood that “the employer must be willing to consider making changes in its ordinary work rules, facilities, terms and conditions in order to enable a disabled individual to work” (USA, *Vande Zande v. Wisconsin Dep't of Admin.*, 1995).

According to Posner, the difficulty rested in defining the term “reasonable.” For the claimant, reasonable meant *effective* accommodation for the individual. Her case argued that costs should not be considered in the definition of “reasonable,” but rather in the examination of undue hardship. Posner disagreed. He suggested that

“reasonable” be interpreted as an adjective that weakens the term “accommodation,” that is, in the sense in which the word is applied in civil law (e.g., reasonable effort, reasonable care), indicating an ordinary attempt, and not the maximum possible or the maximum desirable (USA, *Vande Zande v. Wisconsin Dep’t of Admin.*, 1995).

The expression “undue hardship,” which had been interpreted by the trial court judge as that which unduly burdens an employer according to their financial condition, was defined by Posner as a combination of two elements: (a) the benefits to the disabled person; (b) the resources of the employer. In Posner’s opinion, the examination of costs comes into play for a second time, when the person requesting the accommodation must demonstrate that it is: (a) effective and (b) proportional to costs. Then the party with the duty to accommodate may present two defenses: (a) excessive costs in relation to the benefits of the accommodation and (b) the impossibility of the expense given its financial condition (USA, *Vande Zande v. Wisconsin Dep’t of Admin.*, 1995).

Concerning Mrs. Vande Zande’s request for the kitchenette sink to be lowered, Posner concluded that the accommodation was unnecessary since she already had use of another equally effective sink in the bathroom. Therefore, she already had a reasonable accommodation:

Her argument rather is that forcing her to use the bathroom sink for activities (such as washing out her coffee cup) for which the other employees could use the kitchenette sink stigmatized her as different and inferior; she seeks an award of compensatory damages for the resulting emotional distress. We may assume without having to decide that emotional as well as physical barriers to the integration of disabled persons into the workforce are relevant in determining the reasonableness of an accommodation. But we do not think an employer has a duty to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and nondisabled workers. The creation of such a duty would be the inevitable consequence of deeming a failure to achieve identical conditions “stigmatizing.” That is merely an epithet. We conclude that access to a particular sink, when access to an equivalent sink, conveniently located, is provided, is not a legal duty of an employer. The duty of reasonable accommodation is satisfied when the employer does what is necessary to enable the disabled worker to work in reasonable comfort.

(USA, *Vande Zande v. Wisconsin Dep’t of Admin.*, 1995).

Since the employer was the state of Wisconsin, which could hardly claim undue hardship in virtue of one hundred and fifty dollars, the relationship established between the concepts of reasonableness and undue hardship leads one to believe that even modest amounts of money can be denied if the accommodation is not reasonable (SUNSTEIN, 2007, p. 8).

Concerning the possibility that the claimant work at home if necessary, Posner refused, based on a series of preconceptions such as the difficulty of supervising the employee, the effect on teamwork, the impact on work colleagues, the reduction in the quality of the work performance. Furthermore, he questioned whether granting permission to work at home would not cause a reduction in the

duty to accommodate, since employers could adopt this option to avoid having to make changes to the workplace, thereby segregating people with disabilities (USA, *Vande Zande v. Wisconsin Dep't of Admin.*, 1995).

The ruling caused controversy on a number of points: (a) the lack of an effective cost-benefit analysis (SUNSTEIN, 2007); (b) the limited interpretation of the benefits, especially given moral damages and stigmatic harms (SUNSTEIN, 2007; EMENS, 2008; MINOW, 2008); (c) the restrictive reading of the underlying principles of the ADA (SUNSTEIN, 2007, 2008).

Cost-benefit analysis has some important virtues and vices. The former include: (a) exposure of the fact that a refusal to accommodate may stem from mere habit or prejudice; (b) demonstration of the potential benefits to the disabled person and the potential costs to the employer; (c) identification of assumptions or preconceptions that are not based on reality. The latter include (a) possible incorporation of unreliable assumptions, instead of basing analysis on reality; (b) possible oversight of a crucial aspect of discrimination and the costs of daily humiliation, inequality and stigmatization (SUNSTEIN, 2007). The ruling, as Sunstein asserts, features the vices of cost-benefit analysis, since it minimizes the significant costs of stigmatic harm to and daily humiliation of people with disabilities (SUNSTEIN, 2007, p. 2). Furthermore, the decision rests on assumptions about working from home. However, a serious cost-benefit analysis of reasonable accommodation includes more than just economic factors – necessarily proven or simulated according to credible calculations. It must also include the costs of stigma and the benefits of inclusion, not only to the person requesting the accommodation, but also to third parties (SUNSTEIN, 2007, p. 2-4; EMENS, 2008).

This issue of benefits inspired the extensive study of Emens (2008). Emens dismisses the hypothesis that benefits are only felt by the individual who requests the accommodation, demonstrating that they can extend to the accommodating party and also, directly or indirectly, to second and third parties. The way to address the benefits should be less atomistic and more extensive, interactive, relational and collective, which modifies and complicates empirical analyses of costs and benefits (EMENS, 2008, p. 843; MINOW, 2008). In the *Vande Zande* decision, Posner emphasized the benefits to the employee and the costs to the employer, overlooking the benefits to other disabled employees, to employees more generally, to third parties outside the workplace and, ultimately, to the employer itself. This is a static conception of accommodation, as it “understands accommodation as a special thing done for one or a few individuals, for a subset of the population, to make it possible for those different individuals to participate in, for example, the workplace.” What is proposed is a dynamic model of accommodation that “understands accommodation as a process of interrogating the existing baseline, by focusing on the part of the population that was neglected in the creation of that baseline, [and] to make changes to that baseline that may affect everyone” (EMENS, 2008, p. 894). This being the case, there are a series of benefits and costs to be assessed, many of which are not economic in nature.

Finally, there are signs that the objective of the ADA was distorted in *Vande*

Zande. In the case, it is implicit from the interpretation that the purpose of the ADA was to save public funds, by removing people from the scope of welfare and social security (USA, *Vande Zande v. Wisconsin Dep't of Admin.*, 1995; USA, *Borkowski v. Valley Central School District*, 2002a; EMENS, 2008, p. 870). Sunstein emphatically denies that this is the purpose of the ADA. The underlying ideal of the ADA is the inclusion of people with disabilities, previously considered inferior and of a lower caste. It represents, therefore, the struggle for profound equality, for universal human rights, for justice (NUSSBAUM, 2007) and plurality. A non-assimilationist inclusion, beyond simple integration, is that which reconstructs and reorders the standards of architecting environments and creates rules for the workplace, schools and universities; that is, the intention is to make us realize that we establish the physical and regulatory structures that surround us through an archetype of *normality* that creates barriers for thousands of people. In short, it is an anti-caste proposal (SUNSTEIN, 2001, p. 155-182; 2008, p. 21) to create obstacles for oppression, not for people.

On the application of reasonable accommodation in the context of the ADA, there has been at least one more important case heard by the Supreme Court; it upheld the restrictive definition of parties with the duty to accommodate by excluding unions from its spectrum and by refusing the possibility of accommodation if it affects collective bargaining agreements or seniority systems. Furthermore, the Court clearly rejected the interpretation of the word “reasonable” as an indication of the effectiveness of the accommodation, taking a similar approach to the one formulated by Posner, i.e., that while the accommodation should be effective, the word “reasonable” is a modifier that weakens the noun. To make matters worse, the Court did not consider the magnitude of the employer when judging whether the costs constituted an undue hardship (USA, *U.S. Airways, Inc. v. Barnett*, 2002b).⁴

3.2 Canada - *afine mosaic*

In Canada, the development of the concept of reasonable accommodation began after the introduction of the U.S. doctrine of adverse impact. Once adverse impact was recognized, the duty would follow to accommodate reasonably, unless an undue hardship was demonstrated by the party owing the duty. The case law deals primarily with accommodation for religious minorities. It first appeared in the *O'Malley* case (CANADA, *Ont. Human Rights Comm. v. Simpsons-Sears*, 1985b), in which there were already signs that the thrust of the court rulings would be different than in the U.S.⁵

First of all, the Canadian Court made it clear that the term “reasonable,” when associated with “accommodation,” should be regarded as dependent on proof of undue hardship, i.e., accommodation is not reasonable when it imposes undue hardship. Therefore, while in the U.S. accommodation may be considered unreasonable in itself, even when hardship is minimal, in Canada accommodation fails to be reasonable *if and only if* there is proof that it will cause undue hardship on the party being asked to accommodate (MALHOTRA, 2007, p. 12).

Secondly, the Canadian Court established six factors to be considered when determining undue hardship in the workplace: (a) financial costs; (b) impact on collective bargaining agreements; (c) problems of employeemorale; (d) interchangeability of workforce and facilities; (e) size of the employer; (f) safety. In real situations, an analysis is made of the *weight* to be conferred to each of these factors (CANADA, *Central Alberta Dairy Pool v. Alberta*, 1990).

Thirdly, the Canadian Court did not restrict the range of parties with the duty to accommodate. The U.S. Supreme Court resisted the inclusion of parties other than those expressly mentioned in the legal norms, especially private parties. In Canada, participants in cases of discrimination, such as unions and condominium associations, were deemed to be parties with the duty to accommodate or similar duties even if circumstances were simply unfortunate and unintentional (CANADA, *Central Okanagan School District No. 23 v. Renaud*, 1992; CANADA, *SyndicatNorthcrestv. Amselem*, 2004).

By broadly interpreting the types of parties with the duty to accommodate, the Court took a truly interesting step in the *procedure* for arriving at reasonable accommodation. It considered this procedure to be an opportunity for dialogue, in which all the parties involved should participate. In this regard, the party requesting the accommodation has the duty to explain their limitations and needs and, if possible, to identify alternatives. The subject of the request, meanwhile, has the duty to offer reasonable proposals that, if genuinely reasonable, the claimant has the duty to facilitate and contribute to their implementation. According to the Court, “discrimination in the workplace is everybody’s business” (CANADA, *Central Okanagan School District No. 23 v. Renaud*, 1992). Therefore, *fourthly*, it can be noted that the pursuit of reasonable accommodation refers to a process of dialogue that is multilateral, participatory and inclusive.

By charging professional associations with the duty to accommodate, the Court makes it clear that this type of organization can also cause discrimination, whether directly or through adverse impact. Although the theory is not formulated in the words of the Court, note the presence of the three-dimensional model structured by Nancy Fraser, which claims that in demands for justice and inclusion there is a need to combine recognition, redistribution and representation (FRASER, 1996). Indeed, unions are professional associations that are directly involved with the issue of redistribution in capitalist societies. To suppose that unions cannot give rise to demands for recognition is to assume that they represent entirely homogenous groups whose demands for inclusion, self-respect and dignity are exactly the same, or at the very least that they exhibit a high level of parity of participation. The casuistry of both the U.S. and Canada indicate that unions are not always this impartial and representative. Architectures of social exclusion, whether intended or not, can be reproduced on a micro-scale in redistribution organizations. Membership in a professional association alone does not mean that workers from minority groups have their demands for recognition taken into consideration or that they effectively enjoy parity of participation.

Fifthly, the Supreme Court of Canada emphatically refused to adopt the U.S. constitutional standards of interpreting undue hardship based on the *de*

minimis test for two reasons: (a) the *de minimis* test is not compatible with the concept of undue hardship formulated by the Court; (b) the legal term is not *hardship* alone, but hardship qualified as undue. The *de minimis* test, however, leads to the recognition of only the hardship and there will always be some hardship; it is the cost of protecting the fundamental rights and shaping an inclusive society (CANADA, *Central Okanagan School District No. 23 v. Renaud*, 1992; CANADA, *Commission Scolaire Régionale de Chambly v. Bergevin*, 1994). What there cannot be is an excessive hardship:

The Hardison de minimis test virtually removes the duty to accommodate and seems particularly inappropriate in the Canadian context. More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term “undue” infers that some hardship is acceptable; it is only “undue” hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words “reasonable” and “short of undue hardship”. These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.

(CANADA, *Central Okanagan School District No. 23 v. Renaud*, 1992, emphasis added).

In more recent decisions, the Supreme Court has tried to refine its interpretation of reasonable accommodation, mainly by correlating the reasonableness of an accommodation with the widely acknowledged proportionality test. There have been two stages of comparison between reasonable accommodation and proportionality. First, the Court connected the steps of the test of reasonable accommodation. In the Court's interpretation, an examination of whether there are less harmful means of implementing a measure (*minimal impairment*) permits an analysis of whether a reasonable accommodation is available for the situation. If an accommodation is identified and undue hardship is not proven, this will be the *minimal impairment* for those adversely affected by measures that, when viewed generally and abstractly, are fair and proportional. Obviously, the public administration and the legislator are not required to foresee each and every possible adverse impact of a normative act that is not intentionally discriminatory and that in general does not infringe on the rights of the majority of people. Nevertheless, if the judiciary is confronted with an adverse impact, it is authorized, when examining proportionality, to find a means that minimizes infringement on the rights of those adversely affected by the measure, thereby recognizing a duty of reasonable accommodation to the point of undue hardship:

This correspondence of the concept of reasonable accommodation with the proportionality analysis is not without precedent (...).

In my view, this correspondence between the legal principles is logical. In relation to discrimination, the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes

undue hardship to the party who must perform it. Although it is not necessary to review all the cases on the subject, the analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar. In my view, Professor José Woehrling correctly explained the relationship between the duty to accommodate or adapt and the Oakes analysis in the following passage: 'Anyone seeking to disregard the duty to accommodate must show that it is necessary, in order to achieve a legitimate and important legislative objective, to apply the standard in its entirety, without the exceptions sought by the claimant. More specifically, in the context of section 1 of the Canadian Charter, it is necessary, in applying the test from R. v. Oakes, to show, in succession, that applying the standard in its entirety constitutes a rational means of achieving the legislative objective, that no other means are available that would be less intrusive in relation to the rights in question (minimal impairment test), and that there is proportionality between the measure's salutary and limiting effects. At a conceptual level, the minimal impairment test, which is central to the section 1 analysis, corresponds in large part with the undue hardship defence against the duty of reasonable accommodation in the context of human rights legislation.

(CANADA, *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006, emphasis added).

The correlation between reasonable accommodation and proportionality became nebulous in a more recent ruling, since they were deemed to be distinct constitutional tests. The reasonable accommodation standard should be used when analyzing the *application* of a law or when examining administrative acts and practices, covering both public and private entities. The proportionality test, meanwhile, should be applied to less individualized contexts on the constitutionality of laws and normative acts, involving the relationship of the legislator with the subjects of the law. Furthermore, one of the stages of the proportionality test – *minimal impairment* – was dissociated from reasonable accommodation:

Minimal impairment and reasonable accommodation are conceptually distinct. Reasonable accommodation (...) envisions a dynamic process whereby the parties - most commonly an employer and employee - adjust the terms of their relationship in conformity with the requirements of human rights legislation, up to the point at which accommodation would mean undue hardship for the accommodating party (...).

A very different kind of relationship exists between a legislature and the people subject to its laws. By their very nature, laws of general application are not tailored to the unique needs of individual claimants. (...). A law's constitutionality under section 1 of the Charter is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of Charter rights is directed at an important objective and is proportionate in its overall impact. While the law's impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court's ultimate perspective is societal. The question the court must answer is whether the

Charter infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.

Similarly, 'undue hardship', a pivotal concept in reasonable accommodation, is not easily applicable to a legislature enacting laws (...).

*In summary, where the validity of a law of general application is at stake, reasonable accommodation is not an appropriate substitute for a proper section 1 analysis based on the methodology of *Oakes*.*

(CANADA, *Alberta v. Hutterian Brethren of Wilson Colony*, 2009).

Note that the majority of the Court drew a significant distinction between proportionality and reasonable accommodation. The former would be used to control the constitutionality of general and abstract laws and normative acts confined to the field of public law and the latter to public and private administrative practices, in which there is a greater individualism. As a result, demands for reasonable accommodation are practically impossible when it comes to laws or normative acts that are more general and abstract. Therefore, the *majority* reading removes the legislator from the scope of the duty to accommodate (CANADA, *Alberta v. Hutterian Brethren of Wilson Colony*, 2009).

Notwithstanding this last decision and its potential consequences, the set of rulings by the Supreme Court of Canada on reasonable accommodation for religious minorities is very rich, both in conceptual definition and in their comprehensiveness and scope. The interpretation of ideas associated with protection and promotion of equality and dignity in order to build a society based on plural and intercultural foundations, a genuine inclusive mosaic, seems to have prospered much more in Canada than in other Western countries. The open nature of inclusive constitutional construction prompted the expansion of the concept of reasonable accommodation into the field of disability on far more interesting and fruitful terms than the U.S. model, which “dramatically contrasts” with that of Canada. (MALHOTRA, 2007, p. 14).

On the matter of disability, there are numerous Canadian decisions on reasonable accommodation, most in administrative arbitration systems. According to scholars, the interpretation has been as sophisticated as the reading on religious accommodation: “Disability rights jurisprudence has applied the Supreme Court of Canada’s decision in *Dairy Pool* in the context of providing reasonable accommodations to workers with disabilities in increasingly complex and sophisticated ways” (MALHOTRA, 2007, p. 15-16).

Finally, it should be clarified that the Court has unanimously reviewed the distinctions between *direct discrimination* and *adverse impact discrimination*. Prior to this, the Court separated the two, applying different standards and remedies for each one. The Court understood that a new approach was necessary for cases of discrimination and related accommodation, adopting a new standard for examining discrimination and reasonable accommodation in order to simplify the interpretations of the Canadian legislation and to clarify the scope of reasonable

accommodation. Nonetheless, it made note of the importance of having the previous standards in place, primarily the set of rulings that recognized and developed the notions of adverse impact and reasonable accommodation (CANADA, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999).

3.3 *European States and the European Union*

Reasonable accommodation was not part of the legal systems of European countries until 2000, when the Council of the European Union adopted the Employment Equality Directive (Directive 2000/78/CE, UNIÃO EUROPEIA, 2000; WADDINGTON, 2008, p. 317). After this adoption, the concept spread across the national systems and was strengthened with the authorization and signing, by the European Union, of the UN/CRPD in 2007 and 2009, respectively (NEVES, 2010, p. 5).

To explain how the concepts were understood in the national and community systems, this article shall draw on the comprehensive research of Waddington (2008), written with the purpose to consider “how the Member States of the European Union have responded to the challenge” to apply and interpret the dual concepts of reasonable accommodation and disproportionate or undue burden. Waddington found that countries have employed different terminologies for accommodation (*e.g.*, adaptation, adjustments, steps, appropriate measures) without any significant legal consequences. However, the term “reasonable” has been the subject of some very different interpretations. In a few States, this was the only limiting modifier used; in others, the term “reasonable” comes hand-in-hand with the expression of disproportionate or undue burden, or some other analogous expression. The question then is: what meanings are conferred on “reasonable”? How do they interact with the notion of disproportionate burden? (WADDINGTON, 2008, p. 323-326).

The author concludes that there are three approaches to understanding the word *reasonable* and its interaction with undue burden: (a) an accommodation will be *reasonable* if it does not impose excessive difficulties or costs on the party with the duty to accommodate. This reading is usually followed by the stricter test of disproportionate burden. Therefore, an accommodation may be deemed unreasonable without ever applying the burden test. Or, on very rare occasions, and it is difficult to conceive of such a situation, an accommodation could be deemed reasonable and also impose an undue burden. (b) An accommodation will be *reasonable* if it is effective, *i.e.*, if it allows the claimant to carry out the activities that gave rise to the request. In defense, the accommodating party may claim an undue or disproportionate burden; (c) an accommodation will be *reasonable* if it is effective for the right holder while not imposing excessive inconveniences or costs on the accommodating party (WADDINGTON, 2008, p. 339). Given the diversity of interpretations, Waddington (2008, p. 339-340) concludes that it is up to the European Court of Justice (ECJ), by standardizing the readings and applications, to determine the interpretation.

So far, there have been three key rulings in the field, two from the ECJ and one from the European Court of Human Rights (ECHR). In its decision on

the Chacón Navas case, the ECJ did not extend the protection from dismissal for disabled workers to employees who become sick, thereby distinguishing sickness from disability (TRIBUNAL DE JUSTIÇA EUROPEU, *Sonia Chacón Navas v Eurest Colectividades SA*, 2006). In the Coleman case, meanwhile, the ECJ recognized that the prohibition on discrimination and harassment does not only apply to people with disabilities, but also to those who are primary caretakers of people with disabilities. In the abstract, the ECJ upheld the thesis that a person without disabilities who is responsible for the care of a child with disabilities can suffer harassment in the workplace to the extent that they can request reasonable accommodation. It also established the standards for the burden of proof on the matter of discrimination and accommodation (TRIBUNAL DE JUSTIÇA EUROPEU, *S. Coleman v. Attridge Law and Steve Law*, 2008).

In an emblematic case, trialed in 2009, dealing with the incapacity of an individual to assume mandatory military service, the ECHR for the first time, as summarized by Kanter (2009): (a) alluded to reasonable accommodation; (b) recognized a violation of the right to not be discriminated against in virtue of disability; (c) expressly mentioned the UN/CRPD (TRIBUNAL EUROPEU DE DIREITOS HUMANOS, *Affaire Glor v. Suisse*, 2009). Despite having drawn on the concept of reasonable accommodation, the ECHR did not expressly mention the term in the ruling, nor did it specify the forms and readings it could assume in the case. Another important aspect of the ruling, though the limitations of this article do not permit a lengthy discussion here, is the dividing line between sickness and disability.

4 Reasonable accommodation: hermeneutic proposals from an inclusive constitutional perspective

The UN/CRPD is formally part of the Brazilian Constitution. The first conclusion to draw from this is that all past and future legal norms on disability need to be written and interpreted in accordance with the Constitution. Its interpretation should be based on inclusive constitutional hermeneutics. This means treating the Constitution as a touchstone for breaking with repressive, oppressive, segregative and assimilationist socio-political and economic environments. It is a normative framework designed to break down structures of direct and de facto power, as well as the machinery of symbolic power, in the sense that Bourdieu gives the term (BOURDIEU, 2010, p. 8); a constitutional document modeled on dignity, liberty, equality, solidarity, justice, participation and plurality. Therefore, the interpretive guidelines that are suggested are based on the inclusion and the equal and dignified participation of all human beings in a wide variety of settings.

It should be noted that the UN/CRPD was approved as a mechanism for the protection and promotion of the rights of people with disabilities, within both the biomedical and the social conception of disability. It is a document with inclusive and emancipatory purposes intended to minimize the barriers that contribute to or shape the asymmetry between humans. On this point, the article agrees with Sunstein. The document is underpinned by an anti-caste principle. A side effect

of protecting the rights of people with disabilities can even result in less spending and increased saving within some government departments, although it is doubtful that the network of protection and promotion for people with disabilities resulting from the UN/CRPD is intended primarily to reduce public spending.

Now that the initial considerations have been made, the next step is to propose how to interpret the dual concepts of reasonable accommodation and undue burden in Brazilian law. To begin with, although the UN/CRPD is part of the constitutional block, it was written in international terms for States Parties to adopt “legislative, administrative and other measures” to protect rights. In this regard, one might think that the UN/CRPD would acquire a programmatic character, attributing to States Parties commitments *ad futurum*, without having to be self-executing. Despite being written in a future-oriented tone and the presence of judicial resistance to the self-executing nature of IHRT clauses (STF, ADI 1480-DF/MC, BRASIL, 1996), it is believed to serve as current guidance to the Brazilian Supreme Court (STF) (STF, HC 87585/TO, BRASIL, 2008). Regarding the understanding of the STF on IHRTs, (STRAPAZZON, 2009, p. 379-399), the wording of Article 5, paragraph 2 *c/c* Article 5, item XXV, both from the Brazilian Constitution (BRASIL, 1988), confers self-executing status to a significant portion of the clauses of IHRTs, excluding only the more sensitive points; the application of these sensitive points requires complex public policies with particularities outside the scope of the judiciary, whether by virtue of institutional limitations and the separation of state functions or by virtue of the impossibility of effective implementation through the judicial system. Reasonable accommodation, as international casuistry shows, normally takes place to make exceptions to a general law or to the general rules of private entities, accommodating the needs of a person given the unique obstacles that a body or mind confronts. Therefore, it is a space in which the court may be called upon to act without significant problems, from a lack of provisions in the legislative or administrative fields, to allow exceptions to the general norms of these state functions.

The question then is: how should one read the binomial reasonable accommodation and undue burden in the Brazilian Constitution? Three points shall be addressed: (a) the holders of the right to accommodation; (b) the terms “reasonable accommodation” and “undue burden”; (c) the parties with the duty to accommodate.

The first point mentions the *holders* of the *right* to reasonable accommodation. It asserts, from the outset, that there is a fundamental right to reasonable accommodation. This can be inferred not only from the terms of the UN/CRPD, but also from the concept of discrimination. Therefore, if there is no undue burden, the absence of reasonable accommodation – if one exists – constitutes discrimination. There is a *right* to not be discriminated against, correlated with a duty to not discriminate. By consequence, there is a fundamental right to reasonable accommodation, provided one exists, up to the point of undue burden.

According to the UN/CRPD, the holders are people with disabilities, from the perspective of a social model combined with biomedical components. Therefore, all persons with disabilities are entitled to reasonable accommodation, provided

they have the skills, qualifications, licenses, etc. that are necessary for the job, task or activity for which they are claiming accommodation.⁶ For example, blind people cannot – yet – demand reasonable accommodation to work as bus drivers, since they do not have the required skills and licenses. But they could demand reasonable accommodation to work as a public prosecutor, provided they pass the exam and have the proper university qualifications. On this matter, there is one important caution. Disability sometimes rules out some activities entirely, since no reasonable accommodation is available to offer alternatives. However, there are countless examples in which it is ingrained but unfounded assumptions that lead people to believe that a person with a given disability cannot perform certain activities. It should not be forgotten that one of the purposes of reasonable accommodation is precisely to open up to review the practices, assumptions and methods that have molded our environment.

Attention needs to be paid to the possibilities of under-inclusion and over-inclusion (on the topic, (STRUCHINER, 2005, p. 147 and following). In the rulings mentioned in the previous sections, it has been noted that a debate has emerged on the *boundary* between sickness and disability, and on the possibility of primary care takers being entitled to reasonable accommodation. This issue should be explored on a case-by-case basis, to avoid both under-inclusion and a potential over-inclusion (e.g., by equating to disability the very temporary needs resulting from a sickness), which could distort the concept and make it unrealizable. In the meantime, cases of inclusion of individuals not considered persons with disabilities under the biomedical model, but deemed as such by the new concept of the UN/CRPD, will be unusual to begin with, since many infra-constitutional norms amount to under-inclusive rules from the perspective of the UN/CRPD.

Concerning the components of the term “reasonable accommodation,” it is understood that accommodation refers to all the modifications, adjustments, adaptations and even flexibilities to be carried out in the material and normative environment in which it is claimed, through the employment of a wide variety of mechanisms, from techniques, to technologies to a review of procedures and even exceptions in working hours and the workplace as well as in the performance of tasks, academic activities, etc.

The problem lies in the meaning of “reasonable.” Humberto Ávila has researched STF case law and found three senses of the term: (a) reasonableness as fairness: a guideline that requires that general and abstract norms be judged in light of peculiarities of the case, establishing conformity between the norm and the specifics of the case. It would suggest *private justice*. (b) reasonableness as congruence: a guideline that requires conformity between the legal norms and the external conditions of application, requiring a real cause to justify adoption of the measure; (c) reasonableness as equivalence: a guideline that requires a relation of equivalence between two measures, the adopted measure and the criterion that gives its dimension (e.g., the punishment and the act committed) (ÁVILA, 2009, p. 156 and following). Reasonableness is also applied as that which is ordinary or routine.

In a review of foreign cases, it appears that in the U.S. the word “reasonable” limits accommodation to what is regarded as common sense to demand of someone.

In Canada, meanwhile, the interpretation was quite different, and “reasonable” took on a broad connotation as all possible efforts to accommodate up to the point of undue burden. In the European context, there were three meanings, in particular one that considered the term as what is *effective* and for the individual or group in question. Which conception, then, is best suited to Brazilian constitutionalism? From the outset, “reasonable” should not be read as what is ordinary since this undermines the root of the purpose of accommodation, which is to offer alternatives, usually through an exception to what is common. It would be incongruous; it would be to interpret a fundamental right in the most restrictive way possible, in conflict with the recommended technique. Among the senses identified by Ávila (2009), it is believed that *reasonableness as fairness* is what most resembles reasonable accommodation, since it requires the molding of the general and abstract norm to the specifics of the case. In this first sense, the term “reasonable” shall only limit accommodation if the accommodation is not at all efficient.

Furthermore, when judging what is “reasonable,” the sense of *reasonableness as congruence* could also prove useful, since it would determine whether exceptions can be made to a measure in accordance with the causes that underpin it (e.g., when the disability and the accommodation in question reduce, below the minimum level, the degree of safety intended by the measure). “Reasonable” would then be another limitation of accommodation, i.e., there would be general norms that would not permit some exceptions, because they would result in significantly diminishing their purpose (e.g., health, safety, equality). This assessment would resemble one of the stages of the proportionality test, of necessity, which analyzes whether the chosen means have the least impact on fundamental rights, according to the proposed ends. Nevertheless, the result would not necessarily be the customary invalidation of the entire legal act (e.g., declaration of unconstitutionality or illegality...), but the proposal of intermediary solutions, such as can occur in the so-called *intermediary decisions* (on the topic, CERRI, 2001, p. 84 and following).

Although reasonableness as congruence is one of the senses of “reasonable,” it is proposed that this determination be made against undue burden, since “reasonable” and “undue burden” form a dual concept to be considered together. The defense for non-accommodation lies in the undue burden it will cause, insofar as the analysis becomes easier and clearer in the assessment of the burden. It is recommended that the term “reasonable” be interpreted as what is *effective* to adapt so as to make the material and normative environment meet the needs of the person with disabilities with the minimum possible segregation and stigma, with attention to the specifics that make it permissible to loosen or make exceptions to generally applicable norms and practices. *Effectiveness* is not restricted only to political aspects; in contrast, it is extendable to less tangible aspects, such as avoiding stigma, humiliation and embarrassment. For example, in *Vande Zande*, reasonableness was considered only from the practical angle, ignoring the sense of inferiority the employee felt by using the bathroom sink for her eating activities. To reflect on this point, imagine the opposite situation: if Vande Zande had to use the collective kitchen sink to brush her teeth or to wash her hands after using the toilet. How would her colleagues have felt?

To achieve reasonable accommodation, the dialogue procedure is imperative. It is incumbent on the person with disabilities or the representative entity to identify the best alternatives, since they have the knowledge and experience regarding the barriers to be overcome and the most effective ways of doing so; it is the application of the motto “nothing about us, without us.” It is important for all those involved – often second parties, such as student or work colleagues – to participate, at least for clarification purposes, except in situations that require confidentiality (e.g., mental disorders). Accommodating parties need to be open to dialogue and provide proof of undue burden.

Undue burden is the defense that allows the accommodating party to excuse itself and it shall be defined on a case-by-case basis, bearing in mind the valuable suggestion of the Supreme Court of Canada that while there will always be some burden, it may not be *undue*. For this reason, a method such as the *de minimis* test should be discarded, since it only considers the extent of the burden, ignoring the textuality. There are a range of factors to consider in determining whether a burden is undue and they can be split into two groups. The first is the purpose of the general measure for which an exception is being sought through accommodation. If the purpose of the measure is significantly hindered or undermined, the burden will be considered undue. It will not be sufficient to demonstrate that the measure was implemented in good faith, impartially or equally. The defense will only be complete if it can be shown that the accommodation obstructs the intended purpose.⁷

The second is a detailed comparison of costs and benefits. It has been mentioned that costs and benefits are not only economic and financial in nature (although these obviously enter into the calculation, together with the size of the accommodating party). On the benefits, it is worth recalling that accommodation is not intended to benefit just one individual; its *raison d'être* is far vaster, consisting of a dynamic model of accommodation (supra, EMENS, 2008, p. 894). It includes direct and indirect benefits, taking into consideration first and second parties, and also third parties. On the costs, attention should be paid to those that are mitigated by compensations or gains to the accommodating party, which could include incentives, exemptions and state immunities, or even gains from marketing social responsibility. The costs of stigmatization and humiliation are weighed up, as are the costs to second parties, when applicable (e.g., work colleagues).

Finally, it needs to be determined who should accommodate. For this, it is necessary to reiterate the differences in the concept of discrimination according to the UN/CRPD: (a) it includes, in addition to discrimination in its traditional forms, adverse impact discrimination; (b) the denial of reasonable accommodation constitutes discrimination, up to the point of undue burden. It is indisputable that the State, in all its ramifications, has a duty to accommodate. Private parties are included as well when there is a connection with fundamental rights. On this point, there are difficulties. It is believed that all private entities that perform functions via concession, license, etc. have this duty, as do private sector organizations providing services that are public in nature. For example, telephone

companies, public transport operators, private schools and universities have this in common. There is no doubt that organizations that rely on public money, even indirectly, are included (e.g., social services, foundations, NGOs). In the labor market, the Brazilian Constitution (BRASIL, 1988) states that employers have a duty to uphold fundamental rights, making it possible and justifiable to include the terms of the UN/CRPD, paying particular attention, however, to the capacity of each employer with regard to undue burden. Union organizations also have the duty, primarily when the discrimination results from their agreements and conventions. Moreover, guidelines apply linking the private sector to fundamental rights (on the topic, SARMENTO, 2005).

Ideally, the legislative process is the way to define the concept, but it is believed that until new legislation on accommodation is forthcoming, it is up to the courts to rule, on a case-by-case basis, on who deserves accommodation, who has the duty to accommodate, what constitutes reasonable accommodation and what counts as an undue burden, when dialogue between the parties involved is unsuccessful. When examining these cases, it is important to try to promote this dialogue in a judicial setting. If this is not possible, the decision needs to observe the terms of the UN/CRPD, i.e., interpretation in accordance with the Constitution of the existing legal norms for the protection of the rights of people with disabilities.

5 Conclusions

In order to outline some proposals on how to interpret the dual concepts of reasonable accommodation and undue burden in Brazilian constitutionalism, the main aspects of the topic in other legal systems have been revisited, with an emphasis on those that gave rise to these concepts. This review contributed to a constitutional dialogue, permitting identification of the strengths and weaknesses of the constitutional and international reading.

The following conclusions can be drawn:

- (a) reasonable accommodation is a concept that modifies the legal content of discrimination, which is now present if reasonable accommodation is not provided to the point of undue burden;
- (b) people with disabilities, from the perspective of a social model combined with biomedical elements, are holders of a fundamental right to reasonable accommodation to the point of undue burden in a wide variety of environments. Other parties can become holders of the fundamental right to reasonable accommodation, to the point of undue burden, and their inclusion should be analyzed on a case-by-case basis;
- (c) accommodation consists of modifications, adjustments, adaptations and even flexibilities in the material and normative environment in which it is claimed, through the employment of a wide variety of mechanisms;

- (d) “reasonable” is the *effective* accommodation for the individual or group, and the idea of effectiveness includes the prevention and elimination of segregation, humiliation and stigma;
- (e) reasonable accommodation must be the product of a process of dialogue between the parties involved;
- (f) the defense of reasonable accommodation is that it will cause an undue burden. In essence, the burden will be undue when: (g.1) adopting an accommodation *excessively* undermines the purpose of the general measure, posing risks to safety, health and well-being etc.; (g.2) in the balance of costs and benefits, the accommodation proves to be too expensive. Note that the cost-benefit analysis is not limited to financial aspects, nor does it only consider the two parties directly involved.

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NOTES

1. I would like to thank Professor Daniel Sarmento for bringing to my attention the importance of the concept of reasonable accommodation. I dedicate this article to my friends Leonardo, from Criciúma, and Diana and Daniel, from Rio, people who have surpassed countless barriers and who are fighting for inclusion
2. For the purposes of this article, burden and hardship are used interchangeably. The text of the UN/CRPD uses the term "burden," while international law often uses the term "hardship."
3. It is important to highlight that the building was still under construction, with a design predating the ADA. Posner understood that the ADA was not retroactive. The cost of lowering the sink was 150 dollars. Wisconsin had already provided some accommodations for Vande Zande, such as building a ramp, modifying the bathroom on her floor, adapting the furniture, paying half the cost of a cot she needed for her daily personal care at work, remodeling the staff locker room and adjusting her working hours to accommodate her medical appointments and treatments.
4. May it be noted that the employer was one of the largest airlines in the U.S. at the time.
5. In Canada, there are laws and government regulations on the subject, as well as government agencies responsible for handling claims for accommodation.
6. Since accommodation occurs in a wide variety of settings – schools, universities, training courses, and employment access and advancement – it may also be requested in processes for obtaining certificates, qualifications, career advancement. If not, there is a risk of creating or maintaining a vicious circle of exclusion of people with disabilities.
7. This point is illustrated in the Bhinder case, in which the Supreme Court of Canada understood that exceptions could not be made to a general workplace safety measure – the use of hard hats by people who work with high tension electricity – to accommodate a member of a religious group whose faith required that he wear a turban, on the grounds that safety would be unduly compromised.

RESUMO

A Convenção sobre os Direitos das Pessoas com Deficiência da ONU, parte da CRFB/88, introduziu novos conceitos e concepções no direito brasileiro. Este artigo objetiva compreender e discutir os conceitos de adaptação razoável e ônus indevido, oferecendo premissas para uma interpretação constitucionalmente adequada e útil das inovações normativas. Para tanto, foram pesquisados os conceitos e suas complexidades em outros ordenamentos jurídicos, especialmente os que os empregam há longa data. A seguir, formulou-se uma proposta interpretativa. Nela estão sediadas conclusões e resultados obtidos, em especial pela exclusão de algumas interpretações adotadas em outros países. Concluiu-se que a adaptação razoável é composta de medidas possíveis e eficazes para a inclusão de pessoas com deficiência, obtidas mediante processo de diálogo entre os envolvidos. O dever de adaptar é limitado pelo ônus indevido ou desproporcional, composto de vários elementos, cujo ônus probatório reside em quem deve acomodar.

PALAVRAS-CHAVE

Deficiência – Discriminação – Adaptação razoável – Ônus indevido

RESUMEN

La Convención sobre los Derechos de las Personas con Discapacidad de la ONU, incluida en la CRFB/88 (Constitución de la República Federativa del Brasil), introdujo nuevos conceptos y concepciones en el derecho brasileño. El objetivo de este artículo es comprender y discutir los conceptos de ajuste razonable y carga indebida, ofreciendo premisas para una interpretación constitucionalmente adecuada y útil de las innovaciones normativas. A este respecto, se investigaron los conceptos y sus complejidades en otros ordenamientos jurídicos, en especial los que se emplean desde larga data. A continuación, se formula una propuesta interpretativa. En la misma se ubican las conclusiones y los resultados obtenidos, en especial excluyendo algunas interpretaciones adoptadas en otros países. Se concluye que el ajuste razonable está compuesto por medidas posibles y eficaces para la inclusión de personas con discapacidad, obtenidas mediante el proceso de diálogo entre los involucrados. El deber de ajustar está limitado por la carga indebida o desproporcionada, compuesta por varios elementos y cuya carga probatoria reside en quien tiene el deber de realizar el ajuste.

PALABRAS CLAVE

Discapacidad – Discriminación – Adaptación razonable – Carga indebida



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ABSTRACT

The Convention on the Rights of Persons with Disabilities includes several sexuality-related rights. However, the sexuality-related rights in the Convention that was adopted are far less explicit and affirmative than those included in the initial draft text. This paper explores the reasons for these differences. First, the paper outlines the evolution of sexuality in disability theory and sexuality in international human rights debates. It then critically examines the discussions at the *Ad Hoc* Committee sessions where the Convention was elaborated. These discussions were marked by tensions between efforts to promote sexual rights and efforts to protect PWDs from unwanted sterilization and other forms of sexual abuse. Finally, the paper proposes ways of enhancing sexual rights claims for people with disabilities.

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KEYWORDS

Sexual rights – Reproductive rights – Convention on the Rights of Persons with Disabilities – Disability theory



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NEGOTIATING SEXUALITY IN THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES*

Marta Schaaf

1 Background

On May 3, 2008, the U.N. Convention on the Rights of Persons with Disabilities entered into force (UNITED NATIONS, 2011a). The first binding international instrument specific to people with disabilities (PWDs), the Convention elaborates how rights already enshrined in international rights law apply to PWDs, outlining domains where particular efforts are required.

The Convention enumerates several rights that relate directly to sexuality, including the right to health; the right to liberty and security of person; freedom from exploitation, violence, and abuse; and respect for home and the family. It also contains an article specific to women with disabilities and an article mandating awareness-raising to combat stigma (UNITED NATIONS, 2006a). However, the sexuality-related rights in the Convention that was adopted are far less explicit and affirmative than those included in the initial draft, as shown in Annex 1.

What happened? As an example of what Michel Foucault called “put[ting] into discourse” (*mise en discours*) (FOUCAULT, 1984, p. 299) the *Ad Hoc* Committee negotiations illuminate prevailing views about disabled sexuality, as well as sexuality more broadly. While disability theorists and advocates increasingly proclaim the import of acknowledging and supporting disabled sexuality, the discourse produced by the *Ad Hoc* Committee reflects the ongoing salience of Foucault’s assertions that “abnormality” and sexuality are both subject to “governmentality” (FOUCAULT, 1984, p. 338).

2 Foucault, Discourse and Governmentality

Foucault described discourses as “polymorphous techniques of power” that “produce” effects of truth (FOUCAULT, 1984, p. 60, 298). In other words, the workings of power shape paradigms and social rules that frame the limits of human

*Professor Carole Vance of the Department of Sociomedical Sciences at Columbia University’s Mailman School of Public Health kindly read the paper and provided valuable comments.

behavior and even reality. Such discourses need not be explicit; silences too hold power. “Silence itself – the things one declines to say or is forbidden to name... is less the absolute limit of discourse...than...an integral part of the strategies that underlie and permeate discourses” (FOUCAULT, 1984, p. 300). Thus, not acknowledging disabled sexuality is a way of regulating it.

As an attribute of the body that intersects with the control of the population, sexuality came to be a particular subject of governmentality in 19th century Western Europe. Sex “called for management procedures; it had to be taken charge of by analytical discourses” (FOUCAULT, 1984, p. 316, 307). The Church plays a particularly prominent role in Foucault’s analysis of discourse and sexuality; the “Christian pastoral also sought to produce specific effects on desire, by the mere fact of transforming it – fully and deliberately – into discourse: effects of mastery and detachment, to be sure, but also an effect of spiritual reconversion” (FOUCAULT, 1984, p. 306). Similarly, his concept of “bio-power” explains how the state, buttressed by scientific discourses, “brought life and its mechanisms into the realm of explicit calculations and made knowledge-power an agent of the transformation of human life” (FOUCAULT, 1984, p. 17).

Foucault’s insights regarding discourses, bio-power, and the role of the Church, shed light on evolutions in disability theory, as well as the negotiations regarding sexuality in the Convention on the Rights of Persons with Disabilities.

3 Prevailing discourses of disabled sexuality

The broad term “disability” is employed throughout this paper. Although this term obscures heterogeneity, it reflects usage in many of the discourses this paper will examine. Where relevant, distinctions are made. The terms “disability studies” and “disability theory” refer to a self-described area of theoretical inquiry that is peopled by academics and advocates, many of whom have disabilities themselves. Much of their work expressly relates to both physical and mental disabilities. However, most of those theorists with disabilities have physical, as opposed to mental disabilities, and they thus focus much of their work on embodiment. Moreover, it is important to note that while the Convention on the Rights of Persons with Disabilities is a global treaty, much of the disability theory that is visible in the academy or on the internet was written by persons from the Global North. Voices from the South are rarely in evidence, particularly in the context of sexuality.

Sexuality was a peripheral topic in disability studies until about twenty years ago, and it continues to be under-addressed outside of disability studies, as well in social policies and programs (SHILDRICK, 2007; RICHARDSON, 2000; TEPPER, 2000). Historically and presently, there are two notable exceptions. Outside of the field of disability studies, sexuality is most frequently invoked: 1) When disabled sexuality is perceived as a threat to others through the purported expression of hyper-sexuality or aggression, or at least as a troubling attribute of individuals perceived (or forced) to be asexual (SHILDRICK, 2007; TEPPER, 2000; LEYDEN, 2007). 2) When PWDs, particularly women and children, are described as requiring special protection from sexual abuse or exploitation.

The perceived threat of disabled sexuality relates in part to its possible challenge of the monogamous, heterosexual, reproduction-oriented norm (TEPPER, 2000). Certain individuals are unable to experience “normal” sexuality, because of embodied difference, such as lack of genital sensation, infertility, or requiring a third person to facilitate intimate contact (SHILDRICK, 2009). Physically disabled male sexuality especially challenges normative discourses, as male sexuality is traditionally understood as a dominant, phallogentric experience (SHAKESPEARE, 1999). A man with a physical disability having sex is inconsistent with the gendered discourse of male virility (HAHN, 1994).

References to disabled women’s and children’s need for special protections from sexual abuse are certainly merited (FIDUCCIA; WOLFE, 1999; SHUTTLEWORTH, 2007). However, as one of the few visible discourses of disabled female sexuality, these references reinforce norms of both femininity and disability that describe women with disabilities (WWDs) as vulnerable, sexually passive or asexual, and dependent (SHAKESPEARE, 1999; LYDEN, 2007). Moreover, the sexual protection discourse is gendered; male vulnerability to sexual abuse is much less frequently invoked.

Concern about abuse and fear of disabled sexuality intersect in the control of reproduction. WWDs’ fertility is often proscribed through forced or coerced sterilization or abortion (GIAMI, 1998; EUROPEAN DISABILITY FORUM, 2009; UNITED NATIONS, 2009). This long-standing and widespread practice is frequently ostensibly performed to protect women from the pregnancy that may follow sexual abuse, or from the honor killing that could possibly follow pregnancy. In many countries, the law allows parents to subject a minor to this procedure without his/her consent (UNITED NATIONS, 1999, para. 447; NSW DISABILITY DISCRIMINATION LEGAL CENTRE, 2009; FIDUCCIA; WOLFE, 1999).

4 Sexuality in disability theory

Disability theory (which is a fairly young field) has historically not addressed sexuality, except to selectively engage the issues noted above. Theorists and advocates countered the hegemonic discourse of hyper-sexuality, though they rarely engaged the canard of asexuality. They also sought to protect PWDs, particularly women, from forced or coerced sterilization or abortion (FIDUCCIA; WOLFE, 1999). Affirmative sexuality or sexual rights, however, were not in evidence. Silence may have persisted because sexuality was perceived as a desire, not a real need. Other advocacy priorities were more pressing (SHUTTLEWORTH, 2007; SHAKESPEARE, 2000). Moreover, sexuality had been an area of “distress, and exclusion, and self-doubt for so long, that it was sometimes easier not to consider it, than to engage with everything from which so many were excluded” (SHAKESPEARE, 2000, p. 160).

Over the past 20 years, this silence has been increasingly broken; theorists and activists make conscious efforts to undermine the power of discursive silence (TEPPER, 2000; SHUTTLEWORTH; MONA, 2000). Sexuality is more and more addressed in different theoretical strands of disability studies (RICHARDSON, 2000;

TEPPER, 2000; SHUTTLEWORTH, 2007; FIDUCCIA; WOLFE, 1999). This change reflects broader trends in the emerging field of sexual rights, as well as growing recognition of the centrality of sexuality in the struggle for equality:

I've always assumed that the most urgent Disability civil rights campaigns are the ones we're currently fighting for – employment, education, housing, transport, etc... For the first time now I'm beginning to believe that sexuality, the one area above all others to have been ignored, is at the absolute core of what we're working for... You can't get closer to the essence of self or more 'people-living-alongside-people' than sexuality, can you?.

(as cited in: SHAKESPEARE, 2000, p. 165).

Informed in part by Foucault's bio-power critique, disability theorists criticize what they refer to as the medical or individual model – a paradigm of disability that focuses on the individual body and the limitations imposed by physical or mental impairment. Social and programmatic manifestations of the medical model include physical rehabilitation and the primacy of professional (medical) power (SODER, 2009, p. 68). Locating harm in the discursive representations of disability as opposed to impairment itself, activists and theorists have sought to replace the medical model with the social model. The social model distinguishes between impairment and disability. Impairment is physical or mental dysfunction, whereas disability is the socially constructed assumption of incapacity that stems from an oppressive and discriminatory society (SHILDRICK, 2009; SODER, 2009; SHAKESPEARE, 1999; HAHN, 1994). In this conception, the social construction of disability underlies the stigma and harm that affects PWDs, not the impairments themselves.

However, in the past several years, some theorists have challenged the social model, arguing that it is hidebound and unduly dismissive of the importance of embodiment. These critiques are driven in part by the increasing attention to sexuality as well as to theoretical insights from feminism and queer theory. Some argue that the body should be 'brought back' into thinking about disability; impairment can restrict sexual engagement in a profound manner and this should be acknowledged and discussed (SODER, 2009; SHILDRICK, 2009). Dismissing the body at the expense of social analysis was, in the language of feminism, neglecting the relationship between the public and the private spheres (SHAKESPEARE, 1999).

This conceptual shift relates to the parallel development of notions of sexual citizenship, and its direct application to PWDs. Claims to sexual citizenship can crudely be grouped into two categories: 1) claims "for tolerance of diverse identities," and, 2) "active cultivation and integration of these identities" (RICHARDSON, 2000, p. 122). This first category describes campaigns for self-definition and the right to exist as a minority. The second is broader, demanding the enabling conditions for sexual diversity and 'sexual participation' for previously stigmatized individuals and groups. Disability theorists and activists make such claims, with some asserting that the experience of pleasure is an accessibility issue (TEPPER, 2000; SHUTTLEWORTH, 2007). Sexual participation for PWDs may require moving beyond current prevailing conceptions of sexuality. Reflecting queer theory's questioning of taxonomic understandings of sexuality, Tom Shakespeare,

one of the most prolific theorists of disabled sexuality, asks: “Are we trying to win access for disabled people to mainstream sexuality or to change way sexuality is conceived?” (SHAKESPEARE, 2000, p. 163). Recognizing the importance of the body and making it the subject of sexual citizenship claims does not reinforce the medical approach to disability; it instead pushes current understandings of sexuality and sexual citizenship beyond current categories.

These theoretical evolutions are reflected in advocacy by organizations focused on disability rights as well as those concerned with sexual rights. For example, both the Irish Family Planning Association (IFPA) and the U.S.-based Center for Reproductive Rights (CRR) have recently issued relevant briefing papers: the IFPA’s on sexuality and disability and CRR’s on reproductive rights for women with disabilities (Irish Family Planning Association, no date; Center for Reproductive Rights, 2002). These efforts encompass physical and mental disabilities. The American Association on Intellectual and Developmental Disabilities recently stated that “people with mental retardation and related developmental disabilities, like all people, have inherent sexual rights and basic human needs” (as cited in: LYDEN, 2007, p. 4).

Advocacy has resulted in some policy changes. For example, in the Netherlands, Denmark, and parts of Australia, the use of trained sex workers and sexual surrogates is subsidized by the state (SHILDRICK, 2009, p. 61).

5 Sexuality in international* human rights law

Conventions and declarations** are negotiated by member states of the United Nations, and individuals and NGOs may have the right to make proposals and express their opinion. The first UN human rights declaration, the Universal Declaration of Human Rights, and subsequent human rights treaties address several domains directly related to sexuality, including the role of the family, marriage, bodily integrity, and equality between the sexes (GIRARD, 2008). However, before 1993, the words “sexual” or “sexuality” had never appeared in an international intergovernmental document, except for an article in the Convention on the Rights of the Child providing for protection from sexual exploitation and abuse (PETCHESKY, 2000).

Sexuality was initially discussed in the context of reproductive health. Reproductive rights as such were not mentioned explicitly in a UN document until the 1968 International Human Rights Conference in Teheran (FREEDMAN; ISSACS, 1993), whose final act included a provision stating: “Parents have basic human rights to decide freely and responsibly on the number and spacing of their children” (UNITED NATIONS, 1968). The right of individual women (as opposed to parents) to decide on the number and spacing of their children was enshrined in the 1979

*The term “international law” is used in this paper to refer to U.N. declarations and conventions, not to those associated with regional mechanisms.

**Conventions are binding, whereas declarations are not. However, declarations do represent a consensus, and overtime, they can come to be considered binding (as customary international law). Moreover, as in the case of the CRPD, elements of Declarations can become the basis for a binding convention.

Convention on the Elimination of All Forms of Discrimination Against Women (FREEDMAN; ISSACS, 1993). Advocates tried to broaden definitions of reproductive rights to include sexuality-related rights at the International Conference on Population and Development in Cairo in 1994, and the International Conference on Women in Beijing in 1995 (GIRARD, 2008). As a result of transnational advocacy and changing perceptions regarding women's roles, among other factors, the final declarations of these two conferences represented a paradigm shift. Reproductive autonomy was recast as an objective, in contrast to earlier population control or pro-natalist orientations (GRUSKIN, 2008; GREER et al., 2009; GIRARD, 2008). The final declaration from the International Conference on Women stated:

the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relationships...require mutual respect, consent, and shared responsibility for sexual behavior and its consequences.

(UNITED NATIONS, 1995, para. 96)

Discussions about freedom from discrimination based on sexual orientation and gender identity have also begun in UN fora, although to date, there has been little mention of this in final documents.

Sexual and reproductive rights and non-discrimination on the basis of sexual orientation are increasingly included by advocates into the concept of sexual rights, which parallels the development of concepts of sexual citizenship. Sexual rights unites advocacy related to sexual violence against women; reproductive rights; lesbian, bisexual, gay, and transgender rights; and HIV/AIDS, among other areas (MILLER, 2009). However, the overriding concept of sexual rights remains insufficiently developed, with “predictable disjunctures” “constrain[ing] the evolution of coherent and progressive policy positions in this area” (MILLER, 2009, p. 1). Lack of coherence makes sexual rights—as well as the constituent elements that are grouped under this term – more vulnerable to powerful opposition.

Indeed, conservative forces pose many obstacles to the inclusion of sexual rights in UN documents. During negotiations, the Holy See has consistently proposed conservative definitions of family, and has sought to limit the de-coupling of women's reproduction from the family unit (GIRARD, 2008). The Holy See and conservative allies (generally several Latin American and Islamic countries and allied NGOs) assert that sexual rights would undermine family relations and national, ethnic, or religious identities (KLUGMAN, 2000; FREEDMAN, 1995). In heated moments, delegates have declared that the term “sexual rights” implies promiscuity, and the right to have sex with whomever one wants to, including children and animals (KLUGMAN, 2000). The Holy See and others also claim that affirming sexual rights would represent the creation of new rights, as opposed to the application of human rights norms to the domain of sexuality. This argument is fairly weak, as one of the explicit objectives of Cairo, for example, was to apply human rights principles to reproduction – not to create ‘new rights’ (KLUGMAN, 2000).

6 Negotiating sexuality in the Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities was negotiated between 2002 and 2006. The Holy See and others demanded the same limitations on sexual rights as they had at earlier negotiations. However, these debates were at times qualitatively different than discussions in Cairo and Beijing. Widespread concern about eugenic measures and the centrality of the body in conceptions of disability shaped the debate.

President Vicente Fox of Mexico proposed a comprehensive treaty on the rights of people with disabilities at the 56th Session of the General Assembly in 2001 (UNITED NATIONS, 2003a). The treaty would be a binding follow-up to the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, a resolution adopted by the General Assembly in 1993 (UNITED NATIONS, 1993). The treaty was negotiated in 7 sessions of an *Ad Hoc* Committee that was comprised of delegates from governments and NGOs holding consultative status with the UN's Economic and Social Council. The initial draft texts were prepared by a Working Group, which was made up of 27 governments, 12 NGOs, and 1 national human rights institution representative.

The following discussion is based on a close reading of *Ad Hoc* Committee session summaries, country and NGO position papers, and draft text emerging from regional intergovernmental consultations. However, given the volume of documentation, a text search was employed to identify relevant text. The words “sex,” “repro,” “intimate,” “personal,” and “fertility” were searched. In addition, summaries of discussions around pertinent articles were read in their entirety, including the articles relating to marriage and family life; privacy; awareness-raising; health; and freedom from exploitation, violence, and abuse. Proposals regarding how to mainstream gender concerns were also read. Further underlining the point that disabled sexuality remains an under-addressed topic, no peer-reviewed or other papers relating to sexuality in the Convention were identified.

The discussion below is not an exhaustive analysis of the sexuality-related negotiations; abbreviated discussions about non-discrimination based on sexual orientation and other matters are not discussed. However, the discussion does speak to the most debated sexual rights issues.

6.1 *Freedom from exploitation, violence, and abuse*

Sexuality was mentioned in documents emanating from initial regional consultations almost exclusively in the context of sexual abuse and forced sterilization; indeed, sexual vulnerability was presented as a principal area for increased protections. For example, the introductory paragraph of a summary emerging from an expert meeting in Bangkok stated that “people with disabilities throughout the world are subjected to widespread violations of their human rights. These violations include malnutrition, forced sterilization, sexual exploitation...” (UNITED NATIONS, 2003b). NGO input had a similar focus. The first contribution from the World Network of Users and Survivors of Psychiatry regarding the article related to family life mentioned only the right to be free from sexual assault (in the realm of sexuality) (UNITED NATIONS, 2004d). Thirty-

five participants from both governmental and non-governmental delegations presented a joint proposal in the first session regarding how to integrate “gender sensitive areas of concern.” Again, in relation to sexuality, they focused entirely on vulnerability to sexual assault. Indeed, other discussions regarding sexuality were rare in the first committee sessions. It did not emerge as a controversial issue until later in the negotiations.

References to sexual abuse in the Convention were uncontroversial, although they were not ultimately maintained in those terms. This was likely due in part to the semi-parallel discussions about the development of an article specific to women and children. Many of the same issues were covered in that draft text, though in somewhat different language. Moreover, forced sterilization, a widely shared priority, was addressed in the article relating to respect for home and the family. In any case, as will be shown, the concept of protection was a leitmotif of the sexuality-related negotiations; some delegates invoked the need for protection in their opposition to any mention of sexuality.

6.2 Right to health

The initial draft text developed by the Working Group included a “right to sexual and reproductive health services.” This language derived in part from the Standard Rules, which stipulated that “Persons with disabilities must have the same access as others to family-planning methods, as well as to information in accessible form on the sexual functioning of their bodies (UNITED NATIONS, 2003a).

The Holy See objected to the term “sexual and reproductive health services” from the moment it was introduced (UNITED NATIONS, 2004b). NGO responses were slower. The Committee Chair solicited NGO input on the day the draft text was introduced. Several agencies commented, including Rehabilitation International, the World Network of Users and Survivors of Psychiatry, Handicap International, Save the Children, WHO, and a consortium of national human rights institutions. They did not mention sexual and reproductive health services. Only one NGO commented on this aspect – National Right to Life. They stated that explicitly mentioning sexual and reproductive health would necessarily limit the scope of the right to health, and would “promote the use of genetic testing to abort unborn babies with disabilities.” In its place, they proposed text proscribing the “denial of medical treatment, foods or fluids” (UNITED NATIONS, 2004b).

NGOs that were not part of the pro-life alliance were evidently ill-prepared to engage the debate. They did advocate for maintaining the text in later sessions, although not extensively, and they clearly lacked the organization of the right to life coalition. Indeed, the right to life message coalesced in later sessions, with numerous NGOs opining that the phrase might codify “abortion and euthanasia,” including of newborn babies, and several linking the discussion to denial of food and water for PWDs (UNITED NATIONS, 2005d). Governmental delegations also made this argument, though they discussed only abortion, not euthanasia. Qatar, Iran, Kenya, Jamaica, Yemen, Syria, Pakistan, Sudan, Bahrain, Kuwait, Oman, and the United Arab Emirates all urged cutting the text, alleging that it would create a new right, including potentially a right to abortion. The word “services,” in particular was alleged to be

code for including abortion (UNITED NATIONS, 2005b, 2005d, 2006c). The U.S. too supported the deletion of the text on the grounds that including it would somehow endanger PWDs, explaining that it supported deletion of the text because of the history of forced sterilization of PWDs in the United States (UNITED NATIONS, 2006d).

Several NGOs that were not physically present at the negotiations submitted comments stating that maintaining the text was important. They argued primarily that specifically mentioning sexual and reproductive health was important because PWDs often lacked access due to persistent perceptions that they were asexual (UNITED NATIONS, 2005a, 2006c). Several country delegations came out in favor of the text at the seventh session, including Brazil, Canada, Croatia, Ethiopia, Mali, Norway, Uganda, and the European Union (EU) (UNITED NATIONS, 2006d). The EU stated that sexual and reproductive health *services* do not include abortion, an assertion that the Council of Europe, WHO, and the Special Rapporteur on the Right to Health supported in written submissions (UNITED NATIONS, 2006d, 2006e). Delegates grew frustrated with the stagnant debate, and the Chair atypically intervened to state that sexual and reproductive health services do not include abortion, and that the phrase “health services” appears in both the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and CEDAW (UNITED NATIONS, 2006e).

Uruguay and Costa Rica and later several other countries eventually united around a proposal to maintain the phrase “sexual and reproductive” but to cut the term “services.” This is the language that was ultimately adopted (UNITED NATIONS, 2006d). Despite this compromise, several countries signed the treaty with relevant reservations. El Salvador stipulated that it signed the convention insofar as it did not violate the constitution of El Salvador (UNITED NATIONS, 2011b), which stipulates that life begins at conception (CENTER FOR REPRODUCTIVE RIGHTS, 2003). Several EU countries formally indicated their opposition to El Salvador’s reservation. Malta made the following interpretive statement: “Malta understands that the phrase ‘sexual and reproductive health’ in Art 25 (a) of the Convention does not constitute recognition of any new international law obligation, does not create any abortion rights, and cannot be interpreted to constitute support, endorsement, or promotion of abortion” (UNITED NATIONS, 2011b). Monaco and Poland made very similar interpretive statements (UNITED NATIONS, 2011b).

6.3 Marriage and family life and awareness raising

The sexuality-related debate in regards to these articles was even more contentious and moribund than the right to health negotiations. As can be seen in Annex 1, the initial text for both of these articles made several references to sexuality. Again, the proposed text was close to the Standard Rules, which specify:

- States should promote the full participation of persons with disabilities in family life. They should promote their right to personal integrity and ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships, marriage and parenthood.

- Persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood.
- States should promote measures to change negative attitudes towards marriage, sexuality and parenthood of persons with disabilities, especially of girls and women with disabilities, which still prevail in society (UNITED NATIONS, 2003a).

In the initial debate, several countries, namely Libya, Syria, Qatar, Iran, and Saudi Arabia urged sublimating sexuality-related rights to marriage and/or traditional norms or laws (UNITED NATIONS, 2004a). However, these delegates were not uniformly opposed to the mention of sexuality; several suggested rewordings that included the term (UNITED NATIONS, 2004a). Saudi Arabia, for example, explicitly stated that they accepted the term, but only with a marriage caveat (UNITED NATIONS, 2004a). For their part, the Holy See and Yemen were opposed to the term with or without any caveats (UNITED NATIONS, 2004a, 2004b).

The allegation that these draft articles, particularly the phrase “experience their sexuality,” would amount to the elaboration of new rights was frequently made. The Holy See repeatedly stated that the language in both articles did not appear in any other convention, neglecting to acknowledge that it did appear in the non-binding Standard Rules (UNITED NATIONS, 2004b, 2004e). Holy See-aligned NGOs again supported this position, with the Society of Catholic Social Scientists and the Pro-Life Family Coalition contending that mentioning sexual relationships out of the context of marriage would mean that the CRPD went into “uncharted and controversial directions” (UNITED NATIONS, 2004b).

As in the case of the sexual and reproductive health negotiations, opposition to the Holy See was somewhat slow in coming. Norway reacted initially (UNITED NATIONS, 2004b), but the EU, Australia, Brazil, Chile, and New Zealand did not express their desire to maintain at least some of the language until days later on in the session or the next session (UNITED NATIONS, 2005c, 2006d).

Several compromises were proposed. The Canadian delegation acknowledged that it was not “aware of a right to sexuality *per se*,” but unequivocally stated that they were opposed to the Holy See suggestions to exclude references to sexuality, as well as efforts by “Syria, Qatar, Libya, Saudi Arabia, and Yemen to roll back language on sexuality through references to marriage or religious and social conventions” (UNITED NATIONS, 2004e). The Canadian delegation suggested framing sexuality-related rights in the context of non-discrimination, specifying that PWDs had the right to enjoy these rights “on an equal footing” (UNITED NATIONS, 2004f). Several countries supported this proposal, including Costa Rica, Morocco, and New Zealand (UNITED NATIONS, 2004e, 2004f). Other delegates suggested different compromises, including replacing the term “sexual” with “intimate,” replacing the term “sexuality” with “sexual life,” or keeping some or all of the sexuality language but accepting the marriage caveat (UNITED NATIONS, 2004a). The Holy See, Yemen, Syria, and Qatar rejected these compromises.

NGO advocacy to maintain the sexuality language was also not immediate. With the exception of the pro-life groups, no NGO mentioned it during the

initial comment period on the draft article (UNITED NATIONS, 2004b). Only one explicitly addressed sexuality; Disabled Peoples' International spoke of the centrality of "intimate relationships" (UNITED NATIONS, 2004e). NGOs who were not present later submitted written contributions in support of language related to sexuality. A coalition of individuals and agencies from Eastern Europe noted laws should not discriminate "against persons with disabilities with respect to sexual relationships, marriage and parenthood. Persons with disabilities should be enabled to live with their families and must have the same access as others to family-planning methods, as well as to appropriately designed and accessible information on sex and sexuality" (UNITED NATIONS, 2004c). The World Network of Users and Survivors of Psychiatry maintained that the Convention needed "to address this issue [sexuality] even if it was not a right, as deprivation of this choice happens in instances of adults living in institutions" (UNITED NATIONS, 2004f).

Additional written contributions during the seventh session were even more unequivocal. The Japan Disability Forum and the International Disability Caucus both explained that they supported the articulated sexual rights because of the longstanding prejudice against sexual relationships of PWDs and the negative legacy of eugenics (UNITED NATIONS, 2004g). For them, the legacy of eugenics did not mean that references to sexuality were threatening, but rather that articulating sexual rights was vital to promoting autonomy and citizenship.

As in the case of the sexual and reproductive health debate, several countries with predominantly Muslim populations hardened their positions to converge with that of the Holy See. Nigeria, Qatar and Yemen eventually urged the deletion of all the text mentioning sexuality (UNITED NATIONS, 2006d). Other countries suggested deleting the text without explaining why, including Russia and China (UNITED NATIONS, 2006d). Japan recommended more general text to "avoid over-prescriptive, controversial language to many countries," a position India supported (UNITED NATIONS, 2004h).

As debate dragged on, the Chair intervened. Noting that the word "sexuality" is particularly difficult for some countries, he explained that delegates did not intend to force cultures to any particular position. He went on to say that it may be the first time that sexual relationships are addressed in a U.N. convention, and suggested language from the Standard Rules as a guide (UNITED NATIONS, 2005c). Opposition persisted. Citing the "numerous cultural concerns about the word sexuality," the Chair removed it at the seventh session (UNITED NATIONS, 2006d).

Forced sterilization was also included in the discussions regarding marriage and family life. As noted, as a violation of the right of bodily integrity of PWDs, forced sterilization was a widely shared priority. Despite the fact that the right to decide on the number of spacing of one's children implied the right to be free from forced sterilization, many countries, including Australia, China, Costa Rica, the EU, Kenya, Mexico, New Zealand, Serbia and Montenegro, Thailand, Uganda, Thailand, and the United States suggested the forced sterilization be explicitly mentioned in the Convention (UNITED NATIONS, 2004a). Many NGOs

also advocated for the Convention to directly address sterilization, including by prohibiting laws that allow parents to subject their minor children to sterilization (UNITED NATIONS, 2005d, 2006c). New Zealand suggested the more positive and uncontroversial wording that was ultimately retained, affirming that PWDs have the right to “retain their fertility” (UNITED NATIONS, 2004a).

7 Conclusions

7.1 Reproductive autonomy and disability

The false distinction between negative rights (freedom from) and positive rights (freedom to) is not unique to disability rights, but the context of particular concern about sexual abuse and eugenic measures is unique.

Throughout the Convention negotiations, considerable tension existed between efforts to promote sexual rights and efforts to protect PWDs from unwanted sterilization. This was complicated by repeated attempts to elevate the fetus to a being with rights, making a non-discrimination approach to disabled sexuality infeasible. The Holy See and their allies pushed the discussion to be about how to apply existing human rights norms to fetuses with abnormalities, rather than how to apply these norms to disabled sexuality. They further posited that access to reproductive and sexual health services would somehow lead to purposeful deprivation of food and water for adults with disabilities, or murder of newborn children with disabilities. This concern was alluded to only twice in the hundreds and hundreds of DPO statements. It was an intellectually flawed, but somewhat successful attempt to establish a slippery slope from abortion to euthanasia of the very kind of individuals attending the negotiations. As a result, protectionist measures were maintained and affirmations of sexual rights were eliminated. Discursive silences about disabled sexuality were enshrined in the most important official expression of global disability discourse.

As in Foucault’s description of 19th century Europe, the Church (the Holy See) was instrumental in delineating the boundaries of acceptable sexuality and in protecting those lacking ‘reason’ from the desires in their own bodies. Several states allied themselves with the Holy See, expressing the need to police “rampant sex” (UNITED NATIONS, 2005c) and restrict reproductive autonomy.

7.2 Negotiating the sexual rights of PWDs

The delay in response and the lack of vigorous advocacy for sexual rights indicates that DPOs continue to be reluctant to engage sexuality. Moreover, they were likely unprepared, not anticipating a coalition of Holy-See aligned organizations with a pre-planned agenda. Indeed, of the civil society groups present at the negotiations, all were DPOs, with the exception of the Catholic right to life groups and Save the Children. The right to life groups were ready to advocate from the moment discussion was allowed; the DPOs were not.

Enhancing DPO sexual rights advocacy capacity (assuming they would

want this) would facilitate future discussions regarding the Convention treaty body and other international negotiations. DPOs are already moving in this direction. In November 2010, the UN Committee on Economic, Social, and Cultural Rights held a day of general discussion on “the right to sexual and reproductive health.” Two of the 15 written submissions were from DPOs (UNITED NATIONS, 2010).

Similarly, ensuring that sexual and reproductive rights organizations contribute to disability-related debates would further erode taboos around disabled sexuality. Indeed, further integration of disability into sexual rights advocacy would be an important manifestation of the intent of the Convention – ensuring the application of human rights norms to PWDs.

As the workings of power are diffuse, so too should our advocacy come from multiple directions. Sexual rights as a rubric of rights’ claiming will likely continue to grow, providing greater and better opportunities to move beyond current understandings of sexual citizenship to include disabled and all other bodies.

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Annex 1

Domain	Draft presented by Committee Chair at the Fifth Session (1)	Convention as adopted (2)
Marriage and family life	That persons with disabilities are not denied the equal opportunity to [experience their sexuality,] (3) have sexual and other intimate relationships [through a legal marriage] and experience parenthood [in accordance with the national laws, customs and traditions in each country].	(a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized; (b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided
Awareness-raising	States parties shall take [all] appropriate and effective measures to promote awareness, and provide education and information to the public in accessible formats, aimed at changing negative perceptions and social prejudices towards [sexuality marriage and parenthood] [in all matters of marriage and family relations] for persons with disabilities.”	States Parties undertake to adopt immediate, effective and appropriate measures: (a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities; (b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life
Freedom from exploitation, violence, and abuse	States parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities both within and outside the home, from [all forms of exploitation, violence and abuse] [all forms of harm, including] [all forms of exploitation, violence and abuse, including abandonment, violence, injury or mental or physical abuse, abduction, harassment, neglect or negligent treatment, maltreatment or exploitation, including economic and sexual exploitation and abuse].	1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects. 2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.
Right to health	Provide persons with disabilities with the same range and standard of [affordable/free] health [and rehabilitation services] as provided other persons, [including sexual and reproductive health services] and population-based public health programmes (4)	Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes

(1) This draft was presented at the fifth session, and is a good representation of the initial and bracketed text.

(2) United Nations (2011a).

(3) Brackets delineate text that was supported by some delegates, and disputed by others.

(4) The right to health article was not presented until the sixth session.

RESUMO

A Convenção sobre os Direitos das Pessoas com Deficiência inclui vários direitos relacionados à sexualidade. Entretanto, os direitos relacionados à sexualidade que foram adotados pela versão final da Convenção são muito menos explícitos e taxativos do que os que haviam sido incluídos na versão inicial do texto. Este artigo explora as razões dessa diferença. Primeiramente, o artigo explica a evolução da sexualidade na teoria das deficiências e da sexualidade dentro dos debates internacionais de direitos humanos. Depois examina criticamente as discussões durante as sessões do Comitê *Ad Hoc* no qual a Convenção foi elaborada. Essas discussões foram marcadas pelas tensões entre os esforços para promover os direitos sexuais e os esforços para proteger pessoas com deficiências contra esterilização forçada e outras formas de abuso sexual. Finalmente, o artigo propõe formas de como podemos aumentar as reivindicações dos direitos sexuais das pessoas com deficiência.

PALAVRAS-CHAVE

Direitos sexuais – Direitos reprodutivos – Convenção sobre os Direitos das Pessoas com Deficiência – Teoria da deficiência

RESUMEN

La Convención sobre los Derechos de las Personas con Discapacidad incluye varios derechos relacionados con la sexualidad. Sin embargo, en la Convención tal como fue adoptada, esos derechos son mucho menos explícitos y afirmativos que aquellos incluidos en el borrador inicial. El presente artículo explora los motivos de tales diferencias. En primer lugar, el artículo hace un esbozo de la evolución de la sexualidad en la teoría de la discapacidad y en los debates internacionales sobre derechos humanos. Luego se hace un análisis crítico de las deliberaciones que tuvieron lugar durante los períodos de sesiones del Comité *Ad Hoc* en el que se elaboró la Convención. Dichas deliberaciones estuvieron marcadas por tensiones entre los esfuerzos por promover los derechos sexuales y los esfuerzos por proteger a las PcD de esterilizaciones no deseadas y otras formas de abuso sexual. Por último, se proponen formas de fortalecer las reivindicaciones de los derechos sexuales para las personas con discapacidad.

PALABRAS CLAVE

Derechos sexuales – Derechos reproductivos – Convención sobre los Derechos de las Personas con Discapacidad – Teoría de la discapacidad



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ABSTRACT

This article considers the potential impact of the adoption of the UN Convention of the Rights of Persons with Disabilities on both the African regional human rights system and selected domestic legal systems in southern and eastern Africa, against a historic background of “benign neglect” of disability rights. It first provides an overview of the current protection of disability rights in the African regional human rights system; secondly, it demonstrates the African regional contribution to the coming into being of the Disability Convention; thirdly, it considers the prevailing debates with respect to options for improving the position of persons with disabilities in Africa; thereafter it briefly examines the legal dispensations of South Africa, the Federal Democratic Republic of Ethiopia, Uganda and the United Republic of Tanzania in respect of disability. It concludes with recommendations in respect of aligning both regional and national systems with the Disability Convention.

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KEYWORDS

Disability rights law – African regional human rights system – Convention on the Rights of Persons with Disabilities and Optional Protocol – African states – Domestic incorporation



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THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN AFRICA: PROGRESS AFTER 5 YEARS

Tobias Pieter van Reenen
and Heléne Combrinck

1 Introduction

*One must resist the temptation of elegance or the easy assumption
that words alone will bring about the kind of change needed.*

(QUINN, 2009a, p. 216)

The UN Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol (OP) are intended to break “revolutionary” new ground in the field of disability rights law internationally and domestically.¹ While the particular dynamics of each regional system complicate direct comparison, it had become apparent in recent years that the development of disability rights in the African human rights system was progressing at a slower pace than in its European and Inter-American counterparts. However, the introduction of the CRPD offers new opportunities to African countries that have committed themselves to the Convention through signature and/or ratification to reconsider their domestic legal regimes relating to disability rights – in fact, it demands of them to do so. The purpose of this paper is accordingly to provide insight into the potential impact of the CRPD on the African continent and in the domestic legal systems of selected African states.²

In pursuance of this aim the article first provides an overview of the current status of the protection of the rights of persons with disabilities in the texts of the African political and human rights instruments. Secondly, it assesses the African encounter with the drafting of the CRPD. Thirdly, it considers the current debate with respect to options for improving the position of persons with disabilities in Africa. Fourthly, it examines the state of disability rights law in the selected African

Notes to this text start on page 161.

countries after ratification of the CRPD. Finally, it concludes with a number of considerations that may impact on the effective incorporation of the Convention into both the regional framework and domestic legal regimes.

2 Current status of disability rights protection in the African system

2.1 Background

The African human rights system has been described as the “least developed” among the regional systems (STEINER; ALSTON; GOODMAN, 2007, p. 1062). This perspective has been questioned (OLOWU, 2009, p. 50), and may admittedly underestimate the contribution that Africa has made to international human rights law (VILJOEN, 2001, p. 18). One must nonetheless concede that the African system has hitherto failed to prioritise disability rights.³

In order to put the potential consequences of the CRPD in Africa into context, it is necessary to consider the position prior to its adoption by the UN General Assembly and its subsequent ratification by various African states. For this purpose, a brief overview of the key features of the African human rights system is provided. Although this article is essentially focused on disability rights as human rights, these cannot be discussed without reference to the political and institutional system(s) within which they originate and apply. We accordingly intend here to gain an understanding of the “African”⁴ approach to human rights, and also to point out how this approach has gradually undergone a shift to become more inclusive of persons with disabilities.

The African human rights approach is traditionally perceived to be premised on a communitarian understanding of humanity, human society and the individual human being.⁵ To the extent that they are recognised, the interests and rights of the individual are subsumed under the interests and well-being of the community or society. The notions of community or society are sometimes used interchangeably. In the appropriate context, both, or either, can mean any form of unit consisting of more than a single human being. These collective units or groups range from the individual family group at the one end, through the clan, the tribe, the ‘people’, the nation, and the state right up to the Pan-African Community at the other end. The reason for being born human is to spend one’s life being useful to the community. Consequently, it does not come as a surprise that the granting of individual rights is coupled with the demand of concomitant duties towards the community. Moreover, it is accepted as indisputably logical that groups and/or ‘peoples’ should also be granted rights. Communitarian culture, in the sense of the African way of doing things, and communitarian values, in the sense of the African notions of right and wrong and good and bad/evil, strongly impact on the origins, contents and purpose of human rights in Africa.

In the discussion below, we shall demonstrate these traits with reference to selected key African political and human rights instruments. The reader is alerted to the dynamics of the developments from the essentially patriarchal

(paternalistic) African cultural and value systems to more tolerant, inclusive, and in places, more egalitarian systems. These dynamics are evidenced by the gradually introduced references to women's rights, gender equality, the youth and persons with disabilities. The terminology employed in references to the latter group ranges from "the disabled", "disabled people", "the handicapped", to "persons/people with disabilities" (often their inclusion is simply to be deduced under the default concept of groups or people "of any other status").

2.2 *Political instruments and structures of the African system*⁶

As point of departure the *Charter of the Organization of African Unity* (OAU) (ORGANISATION OF AFRICAN UNITY, 1963), as the founding legal and political instrument of the Pan-African Community, articulates the premises upon which it has been written and adopted. It expresses the conviction that it is the inalienable right of all people to control their own destiny; and it reaffirms the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples. The Charter proclaims the adherence of African States to the principles of the Charter of the United Nations and the Universal Declaration of Human Rights and links it with the desire that all African states should unite so that the welfare and well-being of their peoples can be assured.

Given the historical moment of its establishment, the OAU was primarily concerned with the struggle against colonialism and apartheid, the preservation of territorial integrity and non-interference in the internal affairs of States – rather than the prioritisation of human rights (OJO; SESAY, 1986, p. 92; NALDI, 2008, p. 45). With the subsequent transition from the OAU to the African Union (AU) this position changed: as explained below, human rights and democratic values are more clearly articulated as the foundational principles of the AU.

The OAU was superseded by the AU in 2000. Its Constitutive Act emphasises the common need to build a partnership between governments and all segments of civil society, in particular "women, youth and the private sector" in order to strengthen solidarity and cohesion among their peoples and to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law. The functioning of the AU is to be guided by the principles in Article 4. A number of these principles directly refer to human rights: the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances (namely war crimes, genocide and crimes against humanity); the promotion of *gender* equality; and respect for democratic principles, human rights, the rule of law and good governance. In terms of Article 13.1, the Executive Council of the AU must coordinate and take decisions on policies in areas of common interest to the Member States including social security, which incorporates "policies relating to the disabled and the handicapped".

In 2003 the *Protocol on Amendments to the Constitutive Act* inserted under the Objectives (AFRICAN UNION, 2003a, art. 3) a new subparagraph that requires the effective participation of *women* in decision-making, particularly in the political,

economic and socio-cultural areas. This failure to explicitly enumerate persons with disabilities in the same way represented a lost opportunity for inclusion.

The purpose of the *Economic, Social and Cultural Council* (ECOSOCC), established in 2004,⁷ is to promote popular participation in the activities of the African Union, as enunciated in the African Charter for Popular Participation in Development and Transformation. As an advisory organ of the African Union, ECOSOCC must be composed of different social and professional groups of the Member States of the African Union. Civil Society Organisations (CSOs) include, but are not limited to, the following: groups such as those representing women, children, the youth, the elderly and people with disability and special needs. This body provides an important opportunity for civil society organisations to participate in and gain insight into the work of the AU.

In the *African Charter on Democracy, Elections and Governance* (AFRICAN UNION, 2007a) States Parties commit themselves to promote the universal values and principles of democracy, good governance, human rights and the right to development (Preamble). In terms of Article 8, States Parties are required to –

1. eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds as well as “any other form of intolerance”; and
2. adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, people with disabilities, refugees and displaced persons and other marginalised and vulnerable social groups.

According to this Charter, States Parties undertake to promote participation of “social groups with special needs” (including the youth and people with disabilities) in the governance process, and to ensure systematic and comprehensive civic education in order to encourage full participation of these social groups in democracy and development processes (Article 41). They further agree to provide and enable access to basic social services, for example, free and compulsory basic education to all, especially girls, rural inhabitants, people with disabilities and other marginalised social groups (Articles 41; 43).

It is interesting to note that this Charter has to date been ratified by only eight States. This stands in contrast to the *African Youth Charter* (below) (AFRICAN UNION, 2007b), which was adopted in the same year,⁸ but attracted sufficient ratifications to come into operation on 8 August 2009.

2.3 Regional human rights instruments

2.3.1 General and thematic human rights protection

The *African Charter on Human and Peoples' Rights* (ORGANISATION OF AFRICAN UNITY, 1981) (also known as the “Banjul Charter”)⁹ is the pivotal instrument of the African human rights system. It recognises individual rights as well as peoples' rights, duties, and certain socio-economic rights, in addition to civil and political

rights. The supervisory mechanism initially created by the Charter is the African Commission on Human and Peoples' Rights (the African Commission), which was recently supplemented by the introduction of the African Court on Human and Peoples' Rights.¹⁰

The Charter explicitly emphasises that the virtues of the historical tradition and the values of African civilisation should inspire and characterise the reflection on the concept of human and peoples' rights; recognising on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand, that the reality and respect of peoples' rights should necessarily guarantee human rights. Similar to the *American Declaration of the Rights and Duties of Man* (ORGANISATION OF AMERICAN STATES, 1948),¹¹ the African Charter recognises the consideration that the enjoyment of rights and freedom also implies the performance of duties by the individual towards her family and society, the state and other legally recognised communities and the international community.

Important from the perspective of disability, the Charter highlights the essential need to pay particular attention to the right to development and to the fact that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights. In these respects, the Charter is in line with the CRPD.

In Chapter I of the Charter, which deals with rights, States Parties to the Charter undertake to adopt legislative or other measures to give effect to the rights, duties and freedoms enshrined in the Charter (Article 1). Every individual is entitled to enjoy the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth *or other status* (Article 2). In the communication of *Purohit and Moore v. The Gambia*,¹² the complainants argued that the practice of detaining persons regarded as mentally ill indefinitely and without due process constituted discrimination on the analogous ground of disability – and hence a violation of Article 2 of the Charter. While the African Commission agreed that this Article, along with various others, had been violated, it unfortunately did not express itself on the issue of disability as an analogous ground (AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHT, 2003, para. 54).

The Charter further states that every individual is equal before the law and entitled to equal protection of the law (Article 3). It recognises the “inviolability” of human beings (Article 4), and reaffirms the inherent right to dignity (Article 5). The civil and political rights to participate freely in the choice of government, the right of equal access to the public service of his country are to be accorded to every citizen, and the right of access to public property and services in strict equality of all persons before the law is to be accorded to every individual present in a country (Article 13).

Article 18 provides that the State has the duty to assist the family, which is the natural unit and basis of society and “the custodian of morals and traditional

values recognised by the community”. The State must ensure the elimination of every form of discrimination against women and also guarantee the protection of the rights of the woman and the child as stipulated in international declarations and conventions. Article 18(4) is of importance to persons with disabilities: it provides that the aged and the disabled have the right to “special measures of protection” in keeping with their physical or moral needs.

The *Agreement for the Establishment of the African Rehabilitation Institute* (ARI), adopted in 1985, made provision for the founding of the ARI. Drawing on the technical assistance of the International Labour Organisation, the aims of this Institute (which is located in Harare, Zimbabwe) are to assist the Members of the OAU to achieve a number of objectives with a strong emphasis on rehabilitation (ORGANISATION OF AFRICAN UNITY, 1985, art. II).¹³

The *African Charter on the Rights and Welfare of the Child*, 1990 (ACRWC) (ORGANISATION OF AFRICAN UNITY, 1990) is similar to the UN Convention on the Rights of the Child. However, the ACRWC also provides for an individual complaint procedure.¹⁴ Commentators’ views differ as to whether the ACRWC or the UN Convention provides a higher level of protection of the rights of children with disabilities (COMBRINCK, 2008, p. 310-311).

Article 13 of the ACRWC, which is entitled “Handicapped Children”, affords every child who is mentally or physically disabled the right to special measures of protection in keeping with his physical and moral needs and under conditions that ensure his dignity, promote his self-reliance and active participation in the community. States Parties are required to ensure, subject to available resources, to a disabled child and to those responsible for his care, assistance for which application is made and which is appropriate to the child’s condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development. States Parties must use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highways, buildings and other places “to which the disabled may legitimately want to have access to” (sic!) (ORGANISATION OF AFRICAN UNITY, 1990).

In July 1999, the OAU Heads of State and Government adopted a resolution declaring the period 1999-2009 as the *African Decade of Persons with Disabilities*. This proposal arose from the UN Decade of Persons with Disabilities (1983-1992) and the criticism levelled against this UN project for attempting to adopt global solutions without taking cognisance of the political and socio-economic realities of developing countries and emerging democracies (CHALKLEN; SWARTZ; WATERMEYER, 2006, p. 93).

The goal of the African Decade is the full participation, equality and empowerment of people with disabilities. In order to achieve this, a Continental Plan of Action was adopted by the AU in 2002. A Secretariat for the African Decade was established in Cape Town, South Africa, in 2004. Progress in commencing with activities under the Continental Plan of Action was initially extremely slow,

due to lack of financial resources. The Decade was recently extended for a second period, i.e. from 2009 to 2019.

The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 (African Women's Protocol)* (AFRICAN UNION, 2003c) owes its origins to a large extent to concerns about whether the formulation of Article 18(3) of the African Charter as set out above provides women with adequate protection of their rights (NSIBIRWA, 2001, p. 41; ONORIA, 2002, p.234). The Protocol is an extensive document addressing a number of rights of particular concern to women in the African context, including the rights to freedom from violence and harmful practices, to adequate housing, peace, sustainable development and participation in the political and decision-making process. Significantly, the Protocol pays considerable attention to the State obligations accompanying the recognition of these rights.

In terms of Article 23, which deals with the special protection of women with disabilities, States Parties undertake to: ensure the protection of women with disabilities and take specific measures to facilitate their access to employment, professional and vocational training as well as their participation in decision-making; ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity. Importantly, States Parties agree to provide appropriate legal and other remedies (Article 25) and to implement the Protocol at national level (Article 26).

In 2006 the AU adopted the *African Youth Charter* in recognition of the increasing calls and the enthusiasm of youth¹⁵ to “actively participate at local, national, regional and international levels to determine their own development and the advancement of society at large” (AFRICAN UNION, 2007b, preamble). The document explicitly acknowledges the needs and aspirations of young displaced persons, refugees and youth with special needs (AFRICAN UNION, 2007b, preamble).

One of the basic dispositions of the Charter is the entitlement of every young person to the enjoyments of the rights and freedoms recognised and guaranteed in the Charter irrespective of their race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth “or other status”. States Parties must take appropriate measures to ensure that youth are protected against all forms of discrimination on the basis of status, activities, expressed opinions or beliefs (AFRICAN UNION, 2007b, art. 2).

The Charter devotes Article 24 to “mentally and physically challenged youth”.¹⁶ States Parties recognise the right of mentally and physically challenged youth to special care and commit themselves to: ensuring that these youth have equal and effective access to education, training, health care services, employment, sport, physical education and cultural and recreational activities; and working towards eliminating any obstacles that may have negative implications for the full integration of mentally and physically challenged youth into society including the provision of appropriate infrastructure and services to facilitate easy mobility.

Although not in so many words, the prohibition of discrimination and the requirement to attend to the special needs of mentally and physically challenged

youth and youth with special needs are extended into a number of other provisions of the Charter, including those addressing training and skills development, education, poverty eradication and socio-economic integration of youth, sustainable livelihoods and employment, health, elimination of harmful social and cultural practices, and the responsibilities of youth.

The *AU Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention)* (AFRICAN UNION, 2009) imposes a number of obligations on States Parties in respect of internally displaced persons (AFRICAN UNION, 2009).¹⁷ In particular, they are required to provide special protection for and assistance to internally displaced persons with special needs, including (amongst others) separated and unaccompanied children, the elderly and persons with disabilities (Article 9).

2.3.2 “Pronouncements” regarding the promotion and protection of human rights

Both the OAU and AU (or their organs) have at key historic moments issued declarations¹⁸ relating to human rights. For example, in the *Grand Bay (Mauritius) Declaration and Plan of Action*, adopted by the OAU Ministerial Conference on Human Rights in Africa in 1999, States reaffirm their adherence to the principles, rules and values of international and African human rights instruments (ORGANISATION OF AFRICAN UNITY, 1999). They recommit themselves to the promotion of human rights set out in these documents and undertake to eliminate obstacles to this goal (ORGANISATION OF AFRICAN UNITY, 1999, Preamble, and Articles 2 and 5). The Declaration further notes that the rights of people with disability and people living with HIV/AIDS, in particular women and children, are not always observed and urges all African states to work towards ensuring the full respect of these rights (ORGANISATION OF AFRICAN UNITY, 1999, Article 7).

Through the *Kigali Declaration* the Conference of State Parties recommit themselves to the objectives and principles contained in an extensive list of binding and non-binding political, legal and human rights instruments (AFRICAN UNION, 2003b). Singled out is the principle that all human rights are universal, indivisible, inter-dependent and inter-related (AFRICAN UNION, 2003b, para. 1).

The Conference specifically calls upon Member States to fulfil their obligations under international law and, in particular, to take the necessary measures to ensure the protection of civilian populations, particularly children, women, elderly persons and persons with disability in situations of armed conflict (AFRICAN UNION, 2003b, Paragraph 17). In Paragraph 19 it further notes with great concern the plight of vulnerable groups, including persons with disability, and calls upon Member States to provide adequate support to the African Rehabilitation Institute in Harare, Zimbabwe. Lastly, it enjoins Member States to develop a Protocol on the protection of the rights of people with disabilities and the elderly (AFRICAN UNION, 2003b, Paragraph 20).

On the occasion of the 25th Anniversary of the African Charter, the AU adopted the *Banjul Declaration* (AFRICAN UNION, 2006). While this document

included a general reaffirmation of States' undertaking to respect and protect the rights set out in the African Charter, the Declaration does not make any explicit reference to disability.

2.3.3 Towards an African Disability Protocol?

As noted above, the Kigali Declaration called on Member States to develop a Protocol (to the African Charter) with the purpose of protecting the rights of persons with disabilities and the elderly (AFRICAN UNION, 2003b). Such a Protocol would presumably fulfil the same function(s) as the African Women's Protocol. Against this background, the African Commission appointed a "Focal Point on the Rights of Older Persons in Africa" in November 2007. However, since this Focal Point excluded persons with disabilities, the mandate of the Focal Point was subsequently broadened when it was transformed into a Working Group on The Rights of Older Persons and People with Disabilities in Africa in May 2009.¹⁹ The Working Group was tasked, *inter alia*, with drafting a concept paper for consideration by the African Commission that would serve as the basis for the adoption of a Draft Protocol on Ageing and People with Disabilities (BIEGON; KILLANDER, 2010, p. 220). A draft African Protocol on Disability dated November 2009 was produced;²⁰ at the time of writing, this Protocol has been withdrawn and the Working Group is reportedly planning further consultation on this issue.

The question whether such a Protocol is advisable, given the existence of the CRPD and the documented limitations of the implementation mechanisms of the African human rights system, is beyond the scope of this article. For the same reason, we also refrain from commenting on the contents of the draft Protocol dated 2009. It suffices to say that there are pressing questions regarding this proposed Protocol that should be still be debated extensively, and on an informed basis, with African disability sectors before the African Commission reaches its final decision.

2.3.4 Mechanisms for monitoring national compliance with regional human rights instruments

The mechanisms utilised in terms of all the regional human rights treaties (discussed in section 2.3.1, above) are those provided by the African Charter. These are the state reporting procedure, the communications procedure (or, differently put, the "individual cases procedure"), and the judicial procedure. In the case of the former two, the report and communications receiving institution is the African Commission. In the case of the latter procedure, the institution is the African Court on Human and Peoples' Rights. To date, this court has handed down only one judgment. Under the African Charter on the Rights and Welfare of the Child, the African Committee of Experts on the Rights and Welfare of the Child performs an additional, treaty-specific function similar to the African Commission. The committee has only recently started functioning.

Both the state reporting procedure and the communications procedure have chequered histories ranging from non-utilisation to ineffective and infrequent

utilisation.²¹ Against this background, making provision for a separate treaty body, similar to the African Children's Committee, will have to be thoroughly debated when contemplating an African Disability Rights Protocol.

2.4 Concluding observations

Looking at the political and human rights instruments examined above (both binding and non-binding), one notes that there is a degree of progress – from initial silence about disability to eventual inclusion. This is by no means a consistent trajectory: for example, as recently as 2004 the AU Assembly of Heads of State and Government adopted the *Solemn Declaration on Gender Equality in Africa*, which makes no reference to women with disabilities (AFRICAN UNION, 2004). We have also indicated a number of opportunities that could have been utilised to explicitly include disability in the normative framework of the African regional system.

A second observation, from an examination of these instruments, is that there are a number of binding and non-binding international instruments pertaining specifically to persons with disabilities adopted by the UN General Assembly, certain of its specialised agencies and other international organisations prior to 2006 that are not referred to in the African documents.²²

Since the majority of African states had already obtained their independence at the date of the earliest of these instruments, it can be relatively safely assumed that these states endorsed the adoption of these instruments by virtue of their membership of these organisations and the fact that the voting procedures of the latter are based on simple majority. To conclude that the latter had no impact on the policies and laws of African states would, therefore, be unfounded and unjustified.

On a formal level, it is somewhat disconcerting to note that the terminology in these instruments varies, from “handicapped”, to “challenged” to “the disabled”. It is axiomatic that terminologies may shift as political consciousness (both nationally and internationally) develops. It is nevertheless important for human rights instruments, which are potentially enormously powerful in shaping public awareness, to keep track with, and reflect human rights approaches that are steeped in a recognition of the capabilities rather than the limitations of persons with disabilities (UNITED NATIONS, 2006, art. 8).

Finally, it goes without saying that this overview only presents one side of the picture, i.e. *norm acceptance* at the regional level (HEYNS; VILJOEN, 2004, p. 133). The other side of this picture is *norm enforcement*, an aspect that has been plaguing the African system since its inception.²³

3 Provisional positioning of the CRPD in the African regional human rights context

African states were generally well represented and actively involved in the broader process leading up to the establishment of the *Ad Hoc* Drafting Committee by the UN General Assembly as well afterwards in the composition of the text of the Convention (KANTER, 2006-2007, p. 308; QUINN, 2009a, p. 256). This was a

departure from sometimes past practice where African states, owing to inadequate involvement at the global level, preferred to establish an almost identical parallel treaty at the regional level (VILJOEN, 1998, p. 205; KAIME, 2009, p. 55). It has been argued that the CRPD bears an “African” imprint through its emphasis on the links between disability, poverty and development. At the date of completion of this article 26 African states have ratified the Convention; 15 of these have also ratified the Optional Protocol (UNITED NATIONS, 2011).

Despite the potentially favourable impression created by the above remarks regarding the status of the CRPD, sight must not be lost of the fact that many of the “rule-making” activities occurring in the African regional human rights context (as discussed in paragraph 2.1 to 2.4 above) occurred parallel to the process of the negotiation and adoption, as well as after the coming into effect, of the CRPD. These activities involved the very same states that had ratified the CRPD. It is our view that one cannot, as matters presently stand, identify the CRPD as the preferred “normative framework” among African states. It seems to be, at best, one possible option among others.

At the risk of generalisation, other possibilities seem to include, first, attempts to optimise the existing African system by means of *ad hoc* soft-law reforms in the form of declarations; secondly, the adoption of an African disability rights protocol to the African Charter with or without its own separate treaty monitoring body; and, thirdly, assuming that the broad indications are adequately understood, the distillation of sets of standards specific to the rights of persons with disabilities cutting across the existing treaty regime – possibly under the guidance of the CRPD.

4 Disability rights law in selected African countries following ratification of the CRPD

The struggle for human rights will be won or lost at the national level.

(OLOWU, 2009, p. 73)

4.1 Introduction

4.1.1 Living up to the CRPD

We now turn to the next level of our investigation, i.e. “norm acceptance” in the national sphere. It is noteworthy that at the time of writing, around half of the 54 countries in Africa have ratified the CRPD. The current status of ratification, in respect of the Convention and its Optional Protocol, by the four countries examined for purposes of this article is set out in *Table 1* below. One thus notes an apparently enthusiastic response in terms of accepting the norms set out in the Convention. The question, however, is the extent to which this acceptance has also translated into norm implementation.

What can be expected from the CRPD at the national level? Stein and Lord

identify three areas where the CRPD may have an immediate national effect: the expressive value of acknowledging disability-based human rights; the impact of requiring States Parties to reflect upon and engage with domestic-level disability laws and policies; and advances in social integration by persons with disabilities that will be facilitated through the CRPD's inclusive development mandate (STEIN; LORD, 2009, p. 31). Given the short period of time since the adoption of this Convention, this article specifically focuses on the *second* of these areas. (This does not however mean that the other two areas should be discounted.)

For purposes of this discussion, then, the question is which elements should be taken into consideration when determining the extent to which the CRPD has infused domestic-level disability laws and policies. Analysts of disability legislation have reported that there are numerous variations internationally of legislative dispensations, with no specific “right” or “wrong” approach; what is important, is the practical impact of legislation (KANTER, 2003, p. 249-252; HERR, 2001, p. 355).

If the jurisdiction in question has not enacted “disability-specific” legislation, the question is whether disability is included in general anti-discrimination legislation addressing, for example, employment or social security. The effect to be avoided is that disability, included in generic legislation, becomes invisible yet again.

In addition to disability-focused legislation, an important point of inquiry should be the national constitution, particularly the Bill of Rights (LANDMINE SURVIVORS NETWORK, 2007, p. 15). Here the focus should be the anti-discrimination clause, as well as the question whether the constitution makes explicit provision for persons with disabilities as a marginalised group.

An important consideration is what the overall approach is taken to persons with disabilities in the constitutional and legislative framework, i.e. whether a paternalistic, “welfare” approach (typical of the so-called medical model) is adopted, or a social and human rights approach that recognises and encourages autonomy and dignity? The medical approach usually perceives persons with disabilities as “objects” of legal intervention, while the human rights approach implies seeing persons with disabilities as persons acting with agency—the holders of rights.

Another dimension to figure into the analysis is the interrelation between equality and socio-economic rights: it has been noted that interests of persons with disabilities are often most acutely affected in the social and economic arena; they are most vulnerable in the areas of employment, health, education and social services (BHABHA, 2009, p. 219). Does the constitution or legislation require the State to take positive measures to advance these rights for persons with disabilities?

A comprehensive analysis of each legal system is beyond scope of this article (the rules relating to the legal capacity of persons with intellectual disabilities, for example, can be complex, especially where encompassed in both common law and statute, as in South Africa). The authors acknowledge that a comprehensive comparative review would include a far more detailed analysis than is possible within the scope (and purpose) of this exploratory article. For example, in order to grasp the political choices underlying all law reform initiatives – and concomitant

advocacy processes – it would have been necessary to delve far more deeply into the power dynamics operating within the disability sectors/movements at national level.²⁴ This article is accordingly limited in that it only focuses on the “bare bones” of the legislative and policy provisions, rather than their implementation in practice. However, by bearing the above factors in mind when constructing an overview of the constitutional and legal framework, one can begin to gain an impression of the extent to which the particular system has seriously begun to align itself with the CRPD.²⁵

4.1.2 What does “domestic incorporation” of the CRPD mean in practice?

The ways in which norms and standards emerging at the level of international human rights law (in this instance, the CRPD and its interpretation) may bring to bear an influence on national law would traditionally depend on the relationship between international and a particular national legal system, and more specifically, whether the national legal system follows a *monist* or *dualist* approach to the reception of international law (ADJAMI, 2002, p. 108; OPPONG, 2007, p. 297).²⁶

In terms of the monist approach, international and national law form part of a single legal order, and international law is therefore directly applicable in the national legal order – there is no need for any act of domestic incorporation. The dualist view, on the other hand, entails that international and national law comprise distinct legal orders. In order for international law to be applicable in the national legal order, it must be received through domestic legislative measures, the effect of which is to transform the international legal rule into a national one. It is only after such an act of transformation (or domestic incorporation)²⁷ that individuals within the State may benefit from or rely on the international (now national) law. However, even when an international instrument has not been incorporated, it may still serve as an aid to interpretation of domestic constitutions or ordinary laws, as will be shown below (VILJOEN, 2007, p. 540).

African states for the most part inherited the legal framework (including the approach to international law) of their colonial predecessors. Most Francophone countries that were under French or Belgian rule adopted a monist approach to international law, whereas the Anglophone states of British colonial heritage took the dualist position generally found in common law systems (ADJAMI, 2002, p. 110). In addition to the framework provided by colonial legal systems, African legal systems also incorporate African customary law as well as the provisions of religious laws, for example, Islamic law.

Since 1990, a number of national constitutions have been enacted in African countries that place international law in a more prominent position than it would have enjoyed under a traditionally dualist system. The constitutions of Namibia, Malawi and South Africa are cases in point (ADJAMI, 2002, p. 110-112). For this reason, it is important to also examine the constitutional provisions (if any) prescribing the relationship between international law and the national legal system in order to determine the influence of the CRPD in each instance (LANDMINE SURVIVORS NETWORK, 2007, p. 21-22).

4.2 *Four African jurisdictions*

4.2.1 South Africa

The South African Constitution contains an equality clause with an anti-discrimination provision that explicitly lists disability among the prohibited grounds of discrimination (SOUTH AFRICA, 1996a, section 9(3)). The Bill of Rights further sets out the rights to dignity (section 10), to security of the person, which includes the right to freedom from all forms of violence (section 12), as well as the right to have access to adequate housing (section 26). Section 27 provides for all persons the right to have access to health care services, including reproductive health care, sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. In terms of section 29, everyone has the right to a basic education, including adult basic education. All of these provisions are underpinned by section 7(2), which enjoins the State to “respect, protect, promote and fulfil the rights in the Bill of Rights”. Although sign language is not one of the official languages, the Constitution does require that sign language should be promoted and that conditions should be created for its development and use (section 6).

The Constitution is far-reaching in its inclusion of provisions defining the relationship between international and national law. Although Section 231 requires an act of incorporation by parliament in order for an international agreement (such as the CRPD) to become law in the country, the Constitution also states that customary international law is law in South Africa unless it is inconsistent with the Constitution or national legislation (section 232). Importantly, Section 39(1)(b) of the Constitution requires a court to consider international law when interpreting the Bill of Rights. This may include both binding (i.e. treaties and conventions ratified by South Africa) and “non-binding” sources of international law (SOUTH AFRICA, *S v. Makwanyane*, 1995). In addition, section 233 of the Constitution states that every court, when interpreting legislation, must prefer any reasonable interpretation of such legislation that is consistent with international law.

South Africa does not at present have all-inclusive disability legislation. The implementation of disability rights is dealt within “generic” anti-discrimination legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act (SOUTH AFRICA, 2000),²⁸ and other legislative arrangements (SOUTH AFRICA, 1996b, 1998, 2002, 2004, 2005).

Given a relatively progressive constitutional and legal framework, it is somewhat surprising that South Africa has not yielded more in the form of disability jurisprudence – apart from two cases arising from the field of employment law (SOUTH AFRICA, *Independent Municipal and Allied Trade Union v. City of Cape Town*, 2005; *Standard Bank v. Commission for Conciliation, Mediation and Arbitration*, 2007) and a recent case relating to the right to education of children with severe and profound intellectual disabilities (SOUTH AFRICA, *Western Cape Forum for Intellectual Disability v. The Government of South Africa*, 2010). Importantly, the Constitutional Court has not yet had been faced with the interpretation of substantive equality in the context of disability.²⁹

4.2.2 Federal Democratic Republic of Ethiopia

The Constitution of the Federal Democratic Republic of Ethiopia was adopted in 1995, and it therefore pre-dates the CRPD by several years.³⁰ However, it can be seen as one of the “new generation” of African constitutions, which clearly engages with the role that international human rights law should play at domestic level. For example, Article 9.4, which deals with the supremacy of the Constitution, provides that international agreements ratified by Ethiopia “are an integral part of the law of the land”. This places Ethiopia squarely in the “monist” category. Furthermore, Article 13.2 (which forms the introduction to Chapter 3, setting out fundamental rights and freedoms) notes that this Chapter must be interpreted “in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia” (FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995).

Looking at the provisions of Chapter 3, a number of rights are of particular significance to persons with disabilities. Article 24.1 stipulates that everyone shall have the right to dignity, and the same article also notes that everyone shall have the right to freely develop his personality in a manner consistent with the rights of others (FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, art. 24.1 and 24.2). The equality clause, which is accompanied by a prohibition of discrimination, lists a number of prohibited grounds, such as race, nationality, sex, language and religion... “or other status” (FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, art. 25). Disability is not explicitly listed.

Article 41, which addresses economic, social and cultural rights, provides that all Ethiopians have the right to engage in any economic activity and gain their living by work that they freely choose (Article 41.1). They further have the right to choose their vocation, work and profession (Article 41.2). Every Ethiopian citizen has the right to equal access to social services run with state funds (Article 41.3).

This Article also lays down certain obligations for the Ethiopian State in addition to describing these rights. It notes firstly that the State must “progressively” allocate increasing funds for the purposes of promoting access to health, education and other social services (Article 41.4). The State must further, within the limits permitted by the economic capability of the country, care for and rehabilitate “the physically and mentally handicapped, the aged, and children who are left without parents or guardian” (Article 41.5). In addition, the State must devise policies designed to create employment of the poor and unemployed, issue programmes designed to open up work opportunities in the public sector and “undertake projects” (Article 41.6) (FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995).

In spite of the inclusion of a relatively comprehensive Bill of Rights in the Constitution, in practice the Ethiopian courts have been reluctant to develop a rights-based jurisprudence. The courts have in fact generally been unwilling to engage in the interpretation of the Constitution as such—there is a general conviction among judges that the courts are not allowed to discuss the provisions of the Constitution when they consider cases (FESSHA, 2006, p. 79; YESHANEW, 2008, p. 279). The reason for this is to be found in Articles 83 and 84 of the Constitution, which provide that all “constitutional

disputes” must be decided by the House of the Federation³¹ upon the recommendation of the Council of Constitutional Inquiry that it is necessary to interpret the Constitution. Few such disputes have been referred to the House of Federation. The consequence of this arrangement is that courts decide matters on the level of statutory (rather than constitutional) rights and obligations, and that key questions regarding the rights set out in the Constitution have not been clarified (FESSHA, 2006, p. 80).

In comparable vein, many members of the judiciary believe that the rights included in ratified international treaties but which are not clearly guaranteed in domestic laws are not justiciable (YESHANEW, 2008, p. 286). This results in litigants as well as courts avoiding reference to international human rights instruments ratified by Ethiopia, even in cases where they are directly relevant.

Similar to the case of South Africa, Ethiopia has not enacted all-encompassing disability legislation. However, in 2008 it adopted new labour legislation relating to persons with disabilities. The Proclamation on “The Right to Employment of Persons with Disability” clearly states its objective (FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 2008, preamble). It notes that deeply-rooted negative perceptions of disability had affected the rights of persons with disability to employment and by reserving vacancies for persons with disabilities, previous legislation on the right to employment of persons with disabilities had created an image that disabled persons were regarded as incapable of performing jobs based on merit—thus failing to guarantee their right to reasonable accommodation and to provide for proper protection. It therefore became necessary to enact new legislation that would comply with the country’s policy of equal employment opportunity, provide reasonable accommodation for persons with disabilities and also provide for a simplified remedy in the event of employment discrimination.

The Proclamation defines “person with disability” in line with the CRPD,³² and further provides explanations for “discrimination”,³³ “reasonable accommodation”³⁴ and “undue burden”.³⁵ It prohibits discrimination against persons with disabilities in employment practices and imposes concomitant responsibilities on employers, including taking measures to provide appropriate working and training conditions and materials for persons with disabilities, taking all reasonable accommodation and measures of affirmative action to women with disability, taking into account the multiple burden that arise from their sex and disability and assigning assistants to enable persons with disabilities to perform their work or follow their training. Significantly, a duty is imposed on employers to protect women with disabilities from sexual violence that occurs in work places.

4.2.3 Uganda

The Constitution of Uganda was adopted in 1995 and amended in 2005. It includes a Bill of Rights (embodied in Chapter Four), which contains dedicated provisions on the rights of marginalised groups, i.e. women, children and persons with disabilities (UGANDA, 1995, art. 32-35).

In addition to the Bill of Rights, it is also important to look at the introductory section to the Constitution, entitled “National Objectives and Directive Principles

of State Policy”; these principles are intended to guide all organs and agencies of the State, citizens and all other bodies and persons in applying or interpreting the Constitution or any other law and in implementing policy decisions. Under the heading of “*Social and economic objectives*”, the Directive Principles stipulate that society and the State are to recognise the right of persons with disabilities to respect and human dignity (Principle XVI).³⁶ According to Principle XXIV, the State must promote the development of sign language for the Deaf. While providing guidance, the Directive Principles are not justiciable.

Chapter Four of the Constitution sets out the important declaration that the fundamental rights and freedoms of the individual are inherent – and not granted by the State (Article 20). It enjoins all organs and agencies of government (and indeed, all persons) to respect, uphold and promote the rights and freedoms in this Chapter. The equality clause contains an anti-discrimination provision, which expressly lists disability as prohibited ground of discrimination (Article 21(2)). The State is required to take affirmative action in favour of groups marginalised on the basis of gender, age, disability, “or any other reason created by history, tradition or custom”, for the purposes of redressing imbalances that exist against them (UGANDA, 1995, art. 32). Parliament is required to make relevant laws to give effect to this provision.

As noted above, the Constitution provides that persons with disabilities have a right to respect and human dignity, and the State and society must take appropriate measures to ensure that they realize their full “mental and physical potential” (UGANDA, 1995, art. 35). Parliament is accordingly required to enact laws “appropriate for the protection of persons with disabilities”.

The Ugandan Constitution furthermore prescribes that parliament (at the national level) must be composed of one woman representative per district, and such representatives of other marginalised groups as parliament may determine (Article 78(1)). In terms of this provision, six seats have been designated for persons with disabilities (five representing each of the regions and one representing women with disabilities nationally) (UGANDA, 1997; HUMAN RIGHTS WATCH, 2010, p. 65). Article 180 of the Constitution similarly stipulates that the composition of local government councils must provide for affirmative action for all marginalised groups, including persons with disabilities.³⁷

Regarding international law, the Ugandan system is a dualist one, requiring domestic incorporation of international treaties or agreements through enabling legislation (MUJUZI, 2009, p. 580). Although neither the Supreme Court nor the Constitutional Court of Uganda is expressly empowered by the Ugandan Constitution to draw interpretative guidance from international law, both these courts have shown themselves willing to do so on occasion.³⁸

Against this background, the Ugandan parliament enacted the Persons with Disabilities Act (UPDA) in August 2006 (UGANDA, 2006).³⁹ Although the Act thus predates the adoption of the CRPD, the ethos of the Convention appears to a large extent to have informed the drafting of the text. For example, the objectives of the Act include *inter alia* the promotion of dignity and equal opportunities to persons with disabilities, encouraging the people and all sectors of government and society to recognise, respect and accept difference and disability as part of

humanity and human diversity and promoting a positive attitude towards and image of persons with disabilities as capable and contributing members of society (Article 3). These objectives convey a meaning similar to those found in Articles 3 and 8 of the CRPD.

The UPDA addresses a broad range of areas, including education (Articles 5-6), health services (Articles 7-8), rehabilitation (Article 10) and vocation rehabilitation (Article 11). It specifically provides for the prevention of disability (Article 9). The Act further contains chapters on employment (Articles 12-18), accessibility (Articles 19-24) and discrimination in relation to goods, services and facilities (Articles 25-31).

Part VI of the Act is significant in that it requires the Government to take affirmative action in favour of persons with disabilities for the purpose of “redressing imbalances” that exist against them (UGANDA, 2006, art. 33). It prohibits cruel, unusual or degrading treatment of a person with disability by any person or institution (Article 34), and provides that persons with disabilities, including those in institutions, are not to be subjected to arbitrary or unlawful interference with their privacy (Article 35). This chapter further makes provision for the rights of persons with disabilities to a family and to participation in public and in cultural life (Articles 36-37).

The Act has been criticised for its “cautious approach” in that it uses the language of human rights in a minimalist manner; on the other hand, it does impose obligations on the State that could, if read conversely, imply rights for persons with disabilities (MBAZIRA, 2009, p. 45). Importantly, the general principles underpinning the Act appear to be in line with those animating the CRPD, viz. autonomy, accessibility and dignity.

However, there is one disquieting exception, to be found in the Act’s definition of disability,⁴⁰ which appears to rely on broad—and medically unfounded⁴¹—categories. It is difficult to see how these categories can be justified, and we argue that this is an area for reconsideration to align the UPDA with the CRPD.⁴²

A number of practical problems have emerged since the enactment of the UPDA. The most disconcerting one is a dispute between the Ministry of Justice and the National Union of Disabled People of Uganda (NUDIPU)⁴³ regarding the enforceability of the legislation (HUMAN RIGHTS WATCH, 2010, p. 65). The Ministry maintains that the language of the UPDA is “aspirational” and therefore not enforceable. The disability sector, including NUDIPU, disagrees with this view, and opposes efforts on the part of the government to repeal this Act before new legislation is ready for adoption.

A second problem, which goes to the implementation of this Act (and any future legislation), is the capacity of the National Disability Council to first, act on complaints received regarding the violation of rights of persons with disabilities, and secondly, to monitor the implementation of the CRPD (HUMAN RIGHTS WATCH, 2010, p. 66-67). This capacity currently appears to be limited.

A third area of contention that has troubled the Ugandan disability sector is the respective roles of the National Disability Council⁴⁴ and NUDIPU in selecting the parliamentary representatives referred to above. Commentators have observed

correctly that these governance difficulties will have to be resolved before the rights of persons with disabilities, whether under the Constitution, legislation or the CRPD, can be fully and effectively realised in Uganda (HUMAN RIGHTS WATCH, 2010, p. 67). At the same time, it has also been pointed out that certain serious rights violations, such as the continued detention of prisoners with psychosocial disabilities, remain unresolved.⁴⁵

4.2.4 United Republic of Tanzania

The United Republic of Tanzania (URT) is a political union of two semi-autonomous entities: the mainland area of Tanzania and the islands of Zanzibar. The Constitution of the URT dates from 1977 (UNITED REPUBLIC OF TANZANIA, 1977).⁴⁶ Part III of the Constitution sets out a number of basic rights and duties. Article 12 provides that all persons are born free and equal, and everyone is entitled to respect for his dignity. The concomitant anti-discrimination clause does not expressly include disability as a prohibited ground; although the list of grounds provided in the Article is not as clearly “open-ended” as the other examples provided above, the clause does arguably allow for “reading in” of additional grounds.⁴⁷

It is noteworthy that this Constitution sets out mostly those rights that are traditionally regarded as civil and political rights; among those usually termed socio-economic rights, only the right to work and the right to own property are included here. The Constitution also lists a number of duties resting on the individual.⁴⁸

Similar to the Ugandan document discussed above, the Constitution of the URT contains a number of (non-justiciable) “Fundamental Objectives and Directive Principles of State Policy” (Part II). These principles must be acknowledged and applied by the Government, all its organs and all persons or authorities exercising executive, legislative or judicial functions; however, the directive principles are not enforceable by the courts (Article 7). The Directive Principles include *inter alia* obligations resting on the Government, with its agencies, to direct its policies and programmes towards ensuring that human dignity and other human rights are respected (Article 9).

Although the Tanzanian Constitution is silent on the relationship between national law and international law, the country has generally accepted to adopt a dualist approach. Regarding the interpretative guidance to be taken from international law, the Tanzanian High Court resolved this question subsequent to the inclusion of the Bill of Rights in the Tanzanian Constitution. In a matter dealing with women’s right to inherit under Haya Customary Law, the Tanzanian High Court made it clear that it regarded international human rights law as an essential guide in its interpretation of the Constitution, in this instance, the equality clause (UNITED REPUBLIC OF TANZANIA, *Ephraim v. Pastory*, 1990).

Tanzania⁴⁹ enacted a comprehensive disability law in 2010, entitled the “Persons with Disabilities Act” (TPDA) (UNITED REPUBLIC OF TANZANIA, 2010). The Act, which is an ambitious document, is clearly inspired by the CRPD: several provisions follow the Convention *verbatim* (with interesting variations).⁵⁰ For example, the Act tasks the responsible Minister with a number of obligations for the realisation of the

rights of persons with disabilities on (Article 5); the text of this article is very close to that of Article 4 of the CRPD (which sets out the general obligations of State Parties).⁵¹ So, too, the provision on awareness-raising (Article 7).

The TPDA makes provision for healthcare for persons with disabilities (Article 26), education (Articles 27-29), rehabilitation and employment (Articles 30-34), and various aspects of accessibility (Articles 35-50). It addresses participation in political and public life (Articles 51-54) and communication (Articles 55-56). The Act further provides for the establishment of a National Advisory Council for Persons of Disabilities (Articles 8-14) and a National Fund for Persons with Disabilities (Articles 57-58).

A number of noteworthy provisions are encapsulated in a chapter entitled “Integration of persons with disabilities”. This chapter sets out the general principle that every person with disability must be assisted by their local government authority, relative, disability organizations, civil society or any other person to live as independently as possible and be integrated in the community (Article 15). A person with a disability may not be forced to live in an “institution” or in a particular living arrangement. The responsible Minister is required to take measures to enable and support persons with disabilities to live independently and fully integrated in the community.

Specific attention is paid to the role of local government authorities, which are required to provide support services to persons with disabilities. Firstly, the Act imposes a duty to “safeguard and promote the rights and welfare” of a person with disability within its jurisdiction (Article 20). The local government authority must provide counselling to parents, guardians, relatives and persons with disabilities for the purpose of reducing or removing the degree of stigma among them. The local government authority must also, within its area of jurisdiction, provide assistance to persons with disabilities to enable them to develop their “potential, empowerment and self reliance”.

Article 21 imposes a duty on any member of the community who has “evidence or information” that the rights of a child with disabilities are being infringed to report the matter to the local government authority as well as to any other relevant authority in the area. A similar reporting duty exists where a parent, guardian or relative of a person with disabilities “having custody” of a person with disabilities is able to, but refuses or neglects to provide the right to play, medical care, leisure and education.

The Commissioners for Social Welfare are required to establish and maintain a register of persons with disabilities and settlements (Article 23). This register may only be used for “identification and other statistical purposes”.

4.3 Observations

The four jurisdictions examined above illustrate different configurations of constitutional and legal frameworks within which the rights of persons with disabilities are to be protected and promoted. These frameworks, in turn, slot into the broader African regional system and ultimately, into the framework recently established by the CRPD.

In the case of South Africa, which has a “hybrid” system (dualist, but with clear provisions regarding interpretative guidance and customary international law deemed to form part of national law), the existing generic legislation does make provision for certain areas of life such as employment. However, it is clear that in order to fully incorporate the CRPD into domestic law, additional steps, likely in the form of comprehensive disability legislation, should be considered.

The position of Ethiopia is different from South Africa, in that it has a clear monist system. Whereas certain of its constitutional provisions relating to socio-economic rights of persons with disabilities are accordingly much weaker than those set out in the South African Constitution, the provisions of the CRPD are already effectively part of Ethiopian law. However, this is not where the matter ends, given the complicating effect of the arrangements regarding constitutional review and the reluctance of the courts to interpret provisions of the Constitution and apply international human rights agreements that have not been articulated in statute. Additional statutory intervention, along the lines of the Proclamation examined here, is accordingly required to ensure effective incorporation of the Convention.

While there are aspects of both the Ugandan and Tanzanian disability laws that are somewhat troubling (in the case of the latter, for example, the question of registration of persons with disabilities), both constitute a major step towards the recognition of rights of persons with disabilities and the realisation of those rights, especially in the socio-economic spheres. It is somewhat disconcerting to note that Uganda, for example, is lagging behind when it comes to the question of accessibility of the built environment, given the strong emphasis on this question in the UPDA (MBAZIRA, 2009). This again confirms the truism that rights are only as powerful as their implementation.

5 Conclusions

Our investigation of the African regional system and the four domestic systems indicates that the normative framework bound up in the CRPD has not yet been successfully incorporated at either level. While one does not wish to undermine the efforts that have been made, for example, in Tanzania to enact innovative legislative measures clarifying the duties of local government authorities, the reality is that in many jurisdictions, the act of ratification has been little more than a hollow promise. The history of disability rights at the continental level, as we have attempted to show by means of this brief overview, has at best been one of “benign neglect”.

However, the picture is not all bleak and discouraging. As illustrated, significant shifts have already taken place, and the CRPD has further opened up windows of opportunity both at regional and national level.

For instance, Article 43 of the CRPD allows for “regional integration organisations” to formally confirm or accede to the Convention. While this option is not open to the AU, due to the specific definition of “regional integration organisations” in Article 44, there is nothing that prevents the AU from adopting

a Declaration or Resolution in which it expresses its support of and commitment to the principles of the Convention. This will be a powerful public statement of endorsement.

There is much to be done to ensure that disability rights are integrated into the work of AU institutions, including the African Commission. A proliferation of instruments is not necessarily the panacea. However, in the event that the drafting of additional human rights documents is considered essential, we propose that two aspects are paramount: the importance of working with the African disability sectors, and ensuring that terminologies are inclusive and respectful.

These principles are also applicable at national level, where we have for example, identified the need for an instrument of incorporation in the case of South Africa, and additional steps to ensure that Ethiopian courts are less reluctant to apply the rights set out in the CRPD (even though these principles already form part of domestic law). It goes without saying, in respect of all the jurisdictions considered here, that well-drafted national legislation will facilitate the interpretative task of judicial officers who may never before have been confronted with the substance of “disability rights”.

Furthermore, if national legislation is clear in its provision for further regulatory mechanisms, it will make related issues such as the exercise of discretion by employers and administrators much easier. It will also allow for the easy development of indicators for monitoring and evaluation, which is required in terms of the CRPD (UNITED NATIONS, 2006, art. 33).

The challenge, ultimately, for disability rights advocates in Africa lies in ensuring that the impact of the CRPD at the national (and, we would argue, regional) levels pervades all three areas identified above by Stein and Lord, i.e. the expressive value of acknowledging disability-based human rights; requiring States Parties to engage with domestic-level disability laws and policies; and advances in social integration by persons with disabilities. The revolution implied by the adoption of the Disability Convention is still incomplete, at least as far as Africa is concerned.

Table 1

CURRENT STATUS OF SIGNATURE AND RATIFICATION OF CRPD AND ITS OPTIONAL PROTOCOL (AS AT 26 FEBRUARY 2011)				
Country	Convention		Optional Protocol	
	Signed	Ratified	Signed	Ratified
Ethiopia	30 Mar. 2007	7 July 2010	-	-
South Africa	30 Mar. 2007	30 Nov. 2007	30 Mar. 2007	30 Nov. 2007
Uganda	30 Mar. 2007	25 Sept. 2008	30 Mar. 2007	25 Sept. 2008
United Republic of Tanzania	30 Mar. 2007	10 Nov. 2009	29 Sept. 2008	10 Nov. 2009

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NOTES

1. The Convention on the Rights of Persons with Disabilities and the Optional Protocol were adopted by the UN General Assembly on 13 December 2006 and entered into force on 3 May 2008.
2. Four jurisdictions in Southern and Eastern Africa have been selected, viz South Africa, the United Republic of Tanzania, Uganda and the Federal Democratic Republic of Ethiopia. It is acknowledged that these jurisdictions are not representative of Africa as such (or indeed Anglophone Africa or the SADC countries plus Ethiopia). With a sample of 4 out of 54 countries, little more than a "qualitative" discussion is possible – it is not even really possible to distinguish trends.
3. A similar argument may be made in respect of women's rights; however, this situation has (arguably) been addressed through the adoption of the African Women's Protocol in 2003.
4. This article admittedly makes use of generalised terminology such as "the African approach" and "the African context", while at the same time disavowing any assumption to the effect that there is a homogenous "African experience" that applies to all persons with disabilities in the region.
5. There has been a great deal of discussion in the literature as to the nature of human rights in Africa, including the debate between the universalists and the cultural relativists (COBBAH, 1987, p. 320; ZELEZA, 2004, p. 13; IBHAWOH, 2004, p. 29; HEYNS; VILJOEN, 2004, p. 129; OLOWU, 2009, p. 51).
6. This article does not attempt a comprehensive analysis of the African regional architecture. There are, for example, a number of the African Union's initiatives such as the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism, which we have omitted due to length constraints. The same applies to AU programmes such as the Social Affairs Directorate, under which "disability" resorts.
7. The First Permanent General Assembly of the ECOSOC was elected on 8 September 2008, in Dar es Salaam, United Republic of Tanzania.
8. The African Charter on Democracy, Elections and Governance was adopted on 30 January 2007; the African Youth Charter on 2 July 2007. Both require 15 ratifications to come into operation. At the time of writing, 20 States have ratified the latter Charter.
9. We refer to the document as "the African Charter" in this article for ease of reference.
10. The findings of the African Commission are not legally binding. In 1998, the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights ("the African Court Protocol") was adopted; however, due to slow ratification by Member States, this Protocol only came into force on 25 January 2004. (In the meantime the Protocol on the Court

of Justice of the African Union had been adopted on 11 July 2003, and measures had been taken for the merger of the two courts. The combined court will be known as the African Court of Justice and Human Rights.) The first eleven judges were elected to the African Court on Human and Peoples' Rights in 2006, and at the time of writing, the court is operational. It may receive cases from States Parties, the African Commission, and individuals and NGOs with observer status before the African Commission, provided that the State Party in question has recognised the Court's jurisdiction in respect of direct access by individuals and NGOs. (Articles 5(3) and 34(6) of the African Court Protocol – above).

11. The American Declaration contains a number of articles detailing the duties of the citizen, including the duty to 'aid, support, educate and protect his minor children', to 'acquire at least an elementary education', to 'obey the law and other legitimate commands of the authorities' and to work (ORGANISATION OF AMERICAN STATES, 1948, art. XXX, XXXI, XXXIII, XXXVII).

12. This is the only communication relating to disability yet brought before the African Commission.

13. The mandate of the ARI, while still based on the original aims, has been adapted to include new societal demands and developments, taking into consideration building the capacity of governments and the concerns of disabled people's organisations. The mandate accordingly includes the promotion and encouragement of the implementation of the Continental Plan of Africa Decade of People with Disabilities as well as the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities among the Member States of the AU (ORGANISATION OF AFRICAN UNITY, 1985).

14. The monitoring body of the African Children's Charter is the Committee on the Rights and Welfare of the Child, which held its first meeting in 2002.

15. For the purposes of this Charter "minors" means young people aged 15 to 17 years and 'youth' or 'young people' refer to every person between the ages of 15 and 35 years.

16. There is no reference to youth with sensory impairments. It is uncertain whether they should merely be included under the descriptions of either "physically challenged youth" or "youth with special needs".

17. In this context, the important role of the *Peace and Security Council of the AU* (established in 2002) in post-conflict situations also needs to be stressed. The Council must, among other duties, assist in the resettlement and reintegration of refugees and internally displaced persons, particularly vulnerable persons, including children, the elderly, women and other traumatised groups in society. In the devising of preventative measures, the Council must encourage non-governmental organisations, community-based

and other civil society organisations, particularly women's organisations, to participate actively in the efforts aimed at promoting peace, security and stability in Africa.

18. In terms of international law, such Declarations constitute so-called "soft law" and therefore do not have binding effect.

19. The establishment of working groups has been one of the special mechanisms which the African Commission has utilised to deal with specific thematic human rights issues.

20. Copy on file with authors.

21. The serious implications of this state of affairs are succinctly exposed by Evans and Murray (2008, p. 63).

22. Instruments adopted by the UN General Assembly include the Declaration on the Rights of Disabled Persons (UNITED NATIONS, 1975); the World Programme of Action concerning Disabled Persons (UNITED NATIONS, 1982); Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (UNITED NATIONS, 1991); and the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (UNITED NATIONS, 1993). Instruments adopted by the General Conference of the International Labour Organisation (ILO): the Recommendation Concerning Vocational Rehabilitation of the Disabled (INTERNATIONAL LABOUR ORGANISATION, 1955); the Convention Concerning Vocational Rehabilitation and Employment (Disabled Persons) (INTERNATIONAL LABOUR ORGANISATION, 1983a); and the Recommendation Concerning Vocational Rehabilitation and Employment (Disabled Persons) (INTERNATIONAL LABOUR ORGANISATION, 1983b).

23. This issue is beyond the scope of this article.

24. Such an inquiry would have yielded *inter alia* a perspective on why certain groups or sectors appear to be marginalised even further within the already marginalised disability sectors, for example, persons with albinism in Tanzania. See European Parliament (2008).

25. A crucial aspect of the implementation of the Convention, which we have not considered here, is that of the enforcement mechanisms set out in Article 33, i.e. national focal points, coordination mechanisms, and independent mechanisms.

26. This traditional binary distinction is not beyond criticism; however, it is useful for emphasising the basic differences between legal systems in respect of the reception of international treaty obligations (LORD; STEIN, 2008, p. 451).

27. This process is often, somewhat misleadingly, referred to as "domestication".

28. The Act lists specific instances of discrimination on the grounds of race, gender and disability. Section 9 provides that no person may unfairly

discriminate against any person on the ground of *disability*, including —

(a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;

(b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;

(c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

29. It has been argued before the Constitutional Court that it should deal with discrimination based on HIV status as disability-related discrimination; however, the Court declined to do so, and decided the matter on HIV-based discrimination only (SOUTH AFRICA, *Hoffman v. South African Airways*, 2001).

30. The Constitution of the Federal Democratic Republic of Ethiopia was adopted on 8 December 1994 and came into effect in August 1995 (FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995).

31. The House of Federation (“the House”) can be seen as the “Upper House” or “Second Chamber” of the bicameral parliament of Ethiopia (FESSHA, 2006, p. 53). The Council of Constitutional Inquiry is a body composed of members of the judiciary, legal experts appointed by the House of Peoples’ Representatives and three persons designated by the House from among its members, to examine constitutional issues and submit its recommendations to the House for a final decision.

32. “Person with disability” means an individual whose equal employment opportunity is reduced as a result of his physical, mental or sensory impairments in relation with social, economic and cultural discrimination.

33. “Discrimination” means to accord different treatment in employment opportunity as a result of disability; provided, however, that any inherent requirement of the job or measures of affirmative actions may not be considered as discrimination.

34. “Reasonable accommodation” means an adjustment or accommodation with respect to equipment at the work place, requirement of the job, working hours, structure of the business and working environment with a view to accommodate persons with disabilities to employment.

35. “Undue burden” means an action that entails considerable difficulty or expense on the employer in accommodating persons with disabilities when considered in light of the nature and cost of the adjustments, the size and structure of the business, the cost of its operations and the number and composition of its employees.

36. A number of these Directive Principles are of

particular significance to persons with disabilities (e.g. Directive Principle VI, which requires the State to ensure gender balance and fair representation of marginalised groups on all constitutional and other bodies, and Directive Principle XI(i), which states that the State must give the highest priority to the enactment of legislation establishing measures that protect and enhance the right of the people to equal opportunities in development). However, Directive Principle XVI is the only one that specifically refers to persons with disabilities.

37. It has been observed that this provision has in practice resulted in a significant increase in representation of people with disabilities in local governments in Uganda (LANDMINE SURVIVORS NETWORK, 2007, p. 20).

38. For example, the Supreme Court of Uganda drew on international law in its judgment on the death penalty in (UGANDA, *Attorney-General v. Kigula and Others*, 2009).

39. The 2006 Act was preceded by the National Council for Disability Act, which was adopted in 2003 (and remains in force). This Act established the National Council for Disability, which has the mandate to promote the rights of persons with disabilities as set out in international conventions and legal instruments, the Constitution and other laws. The Council serves as the body through which the needs and concerns of persons with disabilities can be communicated to Government and its agencies for action. Although the Act refers to the UN Standard Rules on Equalisation of Opportunities for Persons with Disabilities and the Constitution as standards that should guide the Council, it does not define the rights of persons with disabilities (MBAZIRA, 2009, p. 42).

40. The UPDA gives an explanation for both “disability” and “person with disability” in the definition clause. “Disability” is defined as “a substantial functional limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation”; “person with disability” is defined as “a person having physical, intellectual, sensory or mental impairment which substantially limits one or more of the major life activities of that person”. The Act then further states that the “disability codings” in its Schedule 1 will determine whether an impairment has a substantial function limitation of daily activities, or whether an impairment has a long-term effect on a person (Article 4(1) and (2)). In addition, a medical officer and any relevant organisation of or for persons with disabilities must be consulted. Schedule 1 consists of a very broad list of these “disability codings”. For instance, under the heading of “Skin diseases”, one finds “diseases of the skin and cellular tissues”.

41. For example, under “mental disorders” in Schedule 1, one finds the following entries “psychoneuroses (e.g. anxiety or obsessional states hysteria (sic); other mental illness and mental sub-normality”. Aside from the fact that these “definitions” may be scientifically objectionable, the

terminology employed here is unfortunate. See also our earlier comments regarding terminology in Section 2.1. above.

42. The CRPD does not attempt to define "disability"; instead, it 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" (Article 1).

43. The National Union of Disabled Persons of Uganda (NUDIPU), founded in 1987, is an umbrella organisation of physical, mental, intellectual and sensory disability organisations. Members include national DPOs and district disabled persons' unions, including associations of the deaf, blind and people with physical disabilities, organisations of persons with psychosocial disabilities, and epilepsy organisations. While it is an NGO, its role in aiding in elections for members of parliament representing persons with disabilities is explicitly set out in s 118 of the Local Government Act, 1997 (HUMAN RIGHTS WATCH, 2010, p. 65, 250).

44. In terms of s 6 of the National Council for Disability Act, 2003, the Council is mandated to assist the electoral commission in conducting elections for members of parliament representing persons with disabilities.

45. At the time of writing, Human Rights Watch had identified 11 prisoners with psychosocial or mental disabilities who had been found not guilty of criminal offences by reason of "insanity" but returned by the courts to prison, where they are placed on "minister's orders" status indefinitely until the minister decides on a course of action. Under Ugandan criminal law, once a judge orders an individual to await the minister's order, the minister is supposed to determine whether the person should be released or placed in "appropriate custodial care". One detainee has been awaiting minister's orders for 16 years, and another for over ten. The remaining nine detainees have been waiting between one and six years (HUMAN RIGHTS WATCH, 2011).

46. This Constitution did not initially contain a Bill of Rights: this Chapter was introduced into the Constitution through the Fifth Amendment to the Constitution.

47. Article 13(5) reads: "For the purposes of this Article the expression "discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion or *station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications.*" (UNITED REPUBLIC OF TANZANIA, 1977, Emphasis added).

48. For example, Article 25 notes that "work alone creates the material wealth in society and is the source of the well-being of the people and the measure of human dignity. Accordingly, every person has the duty to participate voluntarily and honestly in lawful and productive work; and observe work discipline and strive to attain the individual and group production targets desired or set by law" (UNITED REPUBLIC OF TANZANIA, 1977).

49. A distinction should be drawn between the United Republic of Tanzania (which includes both the islands of Zanzibar and "mainland" Tanzania), which have autonomous legislative capacity in certain spheres. The Act under discussion here was passed by and relates only to mainland Tanzania; it thus excludes Zanzibar.

50. Compare, for example, Art 4, which sets out the basic principles of the Act, with the general principles of the CRPD: the principle of "respect for difference and acceptance of persons with disabilities as part of human diversity and humanity" as included in Art 3(d) of the CRPD does not appear in the Tanzanian Act. Similarly, the principle of respect for the evolving capacities of children with disabilities (Art 3(h)) is not included. The TPDA in turn adds a principle that does not appear in the CRPD, i.e. "provide basic standard of living and social protection" (sic)—Art 4(g). Another interesting area of comparison lies in the definition clause – see e.g. the definition of "person with disability" in the TPDA, which differs quite significantly from that found in the CRPD.

51. Again, deviations from the Convention's text require further scrutiny; however a comprehensive discussion goes beyond the scope of this article.

RESUMO

Este artigo analisa o impacto provável da adoção da Convenção da ONU sobre os Direitos das Pessoas com Deficiência tanto no sistema regional de direitos humanos vigente na África, quanto em certos ordenamentos jurídicos nacionais na África austral e oriental, em contraponto a um contexto histórico de “omissão benigna” no que diz respeito a direitos de pessoas com deficiência. Em primeiro lugar, este artigo apresenta um visão geral sobre a proteção, ora existente no sistema regional africano de direitos humanos, aos direitos de pessoas com deficiência. Em segundo lugar, este trabalho discute a contribuição regional africana para a elaboração da Convenção sobre os Direitos das Pessoas com Deficiência. Em seguida, em terceiro lugar, o presente artigo avalia os debates predominantes sobre quais seriam as alternativas para melhorar a condição de pessoas com deficiência na África. Este artigo, portanto, analisa sucintamente as exceções legais referentes à deficiência existente na África do Sul, República Federativa Democrática da Etiópia, Uganda e a República Unida da Tanzânia. Ao fim, os autores fazem recomendações sobre como harmonizar os ordenamentos jurídicos nacionais e o sistema regional à Convenção sobre os Direitos das Pessoas com Deficiência.

PALAVRAS-CHAVE

Legislação sobre direitos de pessoas com deficiência – Sistema regional africano de direitos humanos – Convenção sobre os Direitos de Pessoas com Deficiência e seu Protocolo Opcional – Estados africanos – Internalização de tratados.

RESUMEN

Este artículo examina el impacto potencial de la adopción de la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad (CDPD) tanto en el sistema regional africano de derechos humanos como en sistemas jurídicos nacionales selectos de África Austral y Oriental, frente a antecedentes históricos de “descuido benigno” de los derechos de estas personas. En primer lugar, el artículo ofrece un panorama de la actual protección de esos derechos en el sistema regional africano de derechos humanos; en segundo lugar, muestra cómo la región africana contribuyó a dar vida a la CDPD; en tercer lugar, considera los debates en curso respecto a opciones para mejorar la posición de las personas con discapacidad en África; luego pasa a examinar brevemente las disposiciones de Sudáfrica, la República Federal Democrática de Etiopía, Uganda y la República Unida de Tanzania en relación con la discapacidad. Concluye con recomendaciones para armonizar los sistemas tanto regionales como nacionales con la Convención.

PALABRAS CLAVE

Legislación sobre los derechos de las personas con discapacidad – Sistema regional africano de derechos humanos – Convención sobre los Derechos de las Personas con Discapacidad y su Protocolo Facultativo – Estados africanos – Incorporación nacional



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ABSTRACT

The present article seeks to examine the relationship between equality, human diversity, disability and political participation using the framework of Martha Nussbaum's capabilities approach.

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KEYWORDS

Equality – Human diversity – Persons with disabilities – Capabilities – Social contract



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HUMAN DIVERSITY AND ASYMMETRIES: A REINTERPRETATION OF THE SOCIAL CONTRACT UNDER THE CAPABILITIES APPROACH

Stella C. Reicher¹

Human beings are diverse in their psychological and biological nature, ethnicity, gender and sexual orientation; as regards life choices, musical preferences, taste in food and religious practices. They organize themselves socially in different ways and have complex interactions as they live in society. There are, however, shared traits regarding political and human nature.

We are inherently heterogeneous and, for this reason, any discourse on equality requires recognizing our differences. Thinking about equality in light of human diversity compels recognizing the existence of individuals and of groups and the relationship between them, taking into account the characteristics of each. Along similar lines, it requires making an effort so that all persons are respected no matter their peculiarities and all can fully exercise their fundamental rights.

In this way, building a just society requires the full political participation of all persons, so that differences can be taken into account in the formulation of collective arrangements and public policies, and in the development of programs and projects.

The present article seeks to examine the relationship between equality, human diversity, disability and political participation using the framework of Martha Nussbaum's capabilities approach. The goal of this article, however, is not to draw conclusions, but rather to encourage the reader to reflect on how these concepts can be applied to implement human rights generally and the rights of persons with disabilities specifically.

1 The capabilities approach

Developed from critiques of the contractualist theory of justice and of economic development models based on notions of utility, equality of distribution and

Notes to this text start on page 178.

the maximization of resources – theories that will not be discussed here – the capabilities approach can be understood as a normative framework that provides space for individual well-being to be evaluated and achieved, the development of public policies, and the implementation of social change with the goal of the full development of human beings.²⁻³

With its focus on certain core abilities, the capabilities approach emphasizes the idea of opportunities, particularly those of choice, the exercising of rights, and the possibility of persons making their own decisions based on their own notions of a good life. By understanding that the realization of rights depends not only on the formal recognition of those rights, this approach calls for the promotion of individual autonomy through the combination of (i) civil and political rights, (ii) economic, social and cultural rights, (iii) the freedom to make choices, and (iv) the guarantee of vindicating rights.

By combining the idea of human development with the guarantee of rights, and by understanding social differences not only through an economic lens, the capabilities approach considers the influence of particular human characteristics in creating/maintaining these inequalities.

For David A. Clark, the capabilities approach takes into account the diversity of human characteristics and considers differences between groups such as, for example, those regarding gender, ethnicity, class, age and disability. It is, thus, an approach that embraces human activity and participation, including the fact that different persons, cultures and societies can have different values and aspirations. (CLARK, 2005a, p. 5)

In this way, in addition to the access that individuals have to assets, rights and resources, the capabilities approach considers the potential such individuals have to enjoy them, their different lifestyles and their social contexts. Furthermore, this approach is sensitive to the barriers that impede the achievement of greater liberty, of opportunities, and of material comfort and that interfere in the fullness of their use and enjoyment, such as the unequal roles and responsibilities delegated to each participant in the familial context, the obstacles that traditional cultural norms and values create for women, and the reduced ease of access, in all its manifestations, for persons with disabilities.

To illustrate how the capabilities approach operates, let us consider a diagnosis of individual poverty that is based on a hypothetical poverty line based on minimum income. What would we say about the situations of two individuals who find themselves above this poverty line? The first response that comes to mind usually leads us to conclude that their living conditions are equal. Would we feel the same way, however, if we knew that one of them suffers from a grave illness that requires repeated sessions of dialysis or that the other, for example, is a person with a disability who requires daily physical therapy sessions to feel healthy?

To promote true equality, it is first necessary to understand of which kind of equality we are speaking. In raising this question, the capabilities approach suggests that the equality sought is the one which respects the range of human diversity and concerns itself with the potential of each individual to access

and take advantage of goods, resources and rights guaranteed them in light of the difficulties and barriers they may encounter throughout their lives. The capabilities approach incites interest because of its focus on the differences, characteristics, and reality of each individual.

2 Contractualism: unresolved differences and dilemmas

In light of these general considerations, we will briefly discuss the philosophy upon which the contractualist approach was developed and point out some of its limitations, which the capabilities approach tries to address.

Contractualism, as a political doctrine, is based on notions of social cooperation and mutual advantage. It is rooted in the idea that society, by foregoing the use of force and the taking of others' property, enters into a contract whereby it ceases to live in the state of nature and subjects itself to the realm of laws, driven by the will to guarantee its preservation and general well-being.⁴

In this initial stage, the state of nature, individuals would be considered "free, equal and independent" and would not experience any kind of oppression or domination, which would allow, in this context of equality, the development of political rules to protect everyone equally.

For contractualists, by stripping human beings of "artificial disadvantages," such as wealth, social class, and education, the social contract would be based on just principles developed by individuals living in equal conditions. Since the mechanism used for the selection of political principles would operate in a context of fairness and equality, the set of guidelines selected as a result of this process also would theoretically be considered fair, because, as Martha Nussbaum points out, "...from a procedure that does not confer benefits based on individual status, we extract a set of norms that duly protect the interest of all." (NUSSBAUM, 2006, p. 10).

In this arrangement, in which individuals live in equal conditions and social cooperation is a viable path to achieve mutual benefits, justice would be one of the governing political principles and would confer legitimacy to how those principles were selected since, ultimately, they would reflect the choices made by free, equal, and independent citizens about how to govern their lives.

Building on the contractualist logic, Rawlsian theory consists of two distinct features. The first involves the initial choice of moral judgments; the second focuses on equality, as all persons should be recognized as equal and as an end in themselves. In this scenario, the principles of justice would be those that, according to Rawls, "[...] free and rational persons concerned with expanding their rights would accept in an initial position of equality" (NUSSBAUM, 2006, p. 11).

Rawlsian contractualism brought advances to theories of justice. As it is a procedural theory of justice, it rejected the natural rights discourse while asserting that justice is not achieved by results, but by the fairness and impartiality of the procedure adopted – anything derived from this initial just and egalitarian condition will also be just. Moreover, it included moral elements in its definition of the social contract and recognized, under the veil of ignorance, the equality of all human

beings in their value and capabilities, highlighting the moral impartiality that should permeate the choice of political principles.⁵

Although he later described society as a just system of cooperation, according to Nussbaum, Rawls developed the concept of mutual benefit and did not consider integrating ideas of reciprocity, love, and care, which speak to the relationships of dependency and the weaknesses that are part of the human condition, limiting thereby the players likely to participate in the process of establishing political principles – and who are, ultimately, the very beneficiaries of these principles.

On this point, the capabilities approach operates under a different logic. It focuses on the evaluation of the desired results to determine the most appropriate procedure to reduce inequality and promote justice. By looking at the individual, and at the human person, the capabilities approach seeks to address these issues that classic contractualism and Rawlsian theory leave unresolved.

3 Contractualism and Human Diversity: persons with disabilities and other asymmetries

The idea of the political community proposed by Rawls is less a group bounded by historical, emotional, and linguistic ties, amongst others, and more an equitable system of cooperation, which requires the participation of all with the goal of obtaining mutual advantage. For Cicero Romão de Araújo, this community “is conceived, rationally as a ‘cooperative system’ – in the quasi-economic sense of an association whose members, in contributing to the preservation or success of a common enterprise, have the right to expect that gains be distributed equitably.” (ARAÚJO, 2002, p. 80-81).

By idealizing the political community as a place where all cooperate with the expectation of an equitable distribution of the gains, Rawls presupposes that persons, as citizens, have all the capabilities that allow them to be full and normal members of society.

This equality with respect to the ability of all persons to be members of society and to participate actively in society’s affairs would manifest itself in two distinct ways: (i) in the distribution of gains generated by joint participation; and (ii) in the development of political principles. This “equality,” however, merits further attention. First, it deserves further scrutiny because the guarantee of an “equitable share” of the gains, or the right to participate equally in the gains achieved by mutual cooperation, does not ensure that persons can enjoy the gains equally.

Although the distribution of the gains yielded by this cooperative system is equitable, the capacity to enjoy the gains, be they goods, resources, and/or rights, does not follow the same logic since the aforementioned capacity is variable according to the specific characteristics of each human being.

The view that possessing equal capabilities ensures to all full cooperation and, from that, full participation in all that is generated in this equitable system is flawed, or, at least, limited in that it disregards the peculiarities of each individual and the notion of human diversity.

As Amartya Sen points out, human beings differ with respect to external characteristics and circumstances, the natural environment in which they live, the number of opportunities available to them depending on the society in which they live, as well as with respect to personal characteristics, such as age, sex, and physical and mental abilities. (SEN, 2008, p. 50-51). Due to these differences, individuals contribute to the collectivity and enjoy the gains earned in different ways.

For example, let us consider the guarantee of the right to education and to work. Although most democratic constitutions ensure this right equally to all citizens, factors such as gender, ethnicity, and disability directly interfere with one's ability to enjoy these rights. Consequently, in order for a given right to be enjoyed by different persons, it is sometimes necessary to adopt measures that make possible their full enjoyment, as is the case with the use of quotas for persons with disabilities in the job market and the policy of inclusive education.

Human diversity is, therefore, an important factor in assessing social inequalities because they affect how persons interact or participate (or not) in this "system of cooperation" and the results generated. In this way, any theory of justice seeking to promote equality should measure several aspects of life without disassociating them from individual peculiarities. In Rawlsian contractualism, differences, whether innate or not, that affect how persons function in this cooperative system are not taken into consideration.

The capabilities approach, on the other hand, does not provide anything analogous to the contractualist notion that human beings "are equal in power and ability," asserting instead that "persons vary greatly in their need for resources and care and a given person might have a wide range of needs throughout her life" (NUSSBAUM, 2006, p. 98).

The ability to recognize human diversity and the peculiarities that affect the life of each person is, without a doubt, one of the most important contributions of the capabilities approach.

In the same vein, it is worth noting that the contractualist doctrine does not include persons with disabilities in the list of actors who can structure political principles that should govern the activities of social life. Is this a mere coincidence? It appears not.

Contractualist theories are based on the assumption that persons considered "free, equal and independent" would be able to participate in the creation of the basic structure of society"; they would be citizens who could defend their own interests as "fully cooperating members" and are generally endowed with a certain "idealized rationality." (NUSSBAUM, 2006, p. 98).

By understanding the trilogy of liberty, equality, and independence as a condition for the active participation of persons in the development of political principles, the contractualist approach disregards the fact that not all human beings are free, equal, and independent and that such attributes can, aside from varying from person to person, be enjoyed differently by a given person throughout her life.

The inequalities that permeate individuals' lives, their different skills, and the way in which they exercise their skills is not taken into consideration by

contractualist theories, which explains the little attention it pays to vulnerable groups generally, and persons with disabilities, specifically.

In Rawls's procedural model, to attain mutual cooperation and reciprocity amongst persons who enter into the social contract, it is necessary to evaluate *by whom the principles will be defined and to whom they will be directed*.

Recognizing that the selection of political principles is the responsibility of those persons living in equal conditions, or those endowed with the same capabilities – mainly economic and productive – makes it difficult for vulnerable groups, such as women, the elderly, children, and persons with disabilities to participate in the political process of building society – a situation that, as a theory of justice, is discriminatory and inconceivable.

Although Rawls recognizes that persons can be affected over the course of their lives in their capacity to participate equally in this system of mutual cooperation since there is no guarantee that one will never become ill or suffer an accident, for example, and since such contingencies should be foreseen to duly execute his theory of justice, “[...] permanent physical disabilities or mental illness so serious as to keep persons from being full and normal members of society in the usual sense” are not taken into consideration in defining the governing principles (RAWLS, 2000, p. 217).

Not being considered “full and normal members of society in the usual sense,” persons with severe disabilities cannot join the group responsible for developing political principles, because “they are not among those for whom and with whom the basic institutions of society are structured” (NUSSBAUM, 2006, p. 98).

But what are the consequences for this excluded group of not directly participating in the development of political principles in Rawls's theory? The absence of a voice and the obstacles imposed upon persons with disabilities reflects an internal contradiction in contractualist theory. As Martha Nussbaum points out, in human beings “[...] more or less equal in powers and capabilities, it seems arbitrary to confer upon some greater authority and opportunity than upon others.” (NUSSBAUM, 2006, p. 31). Therefore, excluding persons with disabilities from participating in shaping governing political principles results in the discriminatory and unequal treatment of the author vis-à-vis this and other vulnerable groups.

In practice, due to the exclusion of this group in the formulation of political principles, issues relevant to the achievement of social justice with respect to this group of persons, such as for example, the discussion about the allocation of the care they require, the costs of their inclusion in the job market and in the educational process, as well as the structure necessary to maintain social security programs, could be left by the group responsible for developing political principles for future consideration (NUSSBAUM, 2006, p. 33).

From the standpoint of justice, in ignoring the innate fragilities of human nature and the situations of extreme dependence to which we are all subject, Rawlsian theory excludes persons with disabilities (and members of other vulnerable groups, such as the elderly, women, and children) from the process of formulating political principles to govern their lives. This exclusion precludes the

needs of these populations from being considered by those defining the rules of society and, consequently, in how policies concerning the promotion of justice should be structured.

Under Rawls's proceduralist theory, justice is guaranteed through the process in which political principles are chosen. In this way, by being neglectful, incomplete, or exclusive – impeding certain groups from participating in this process – the public policies that flow from it may be considered unjust from their inception.

Another interesting aspect of Rawlsian contractualism, which is criticized by the capabilities approach and has its origins in classic contractualist theory, is the notion of “independence” included by Rawls, in addition to the equality of capabilities, as a prerequisite to full participation in political life and defined as the possibility for each individual to pursue her own projects and to cooperate socially.⁶

As Nussbaum points out, on this issue Rawls “[...] omits from the process of selecting basic policies the most extreme forms of dependency that human beings can experience [...], not having, therefore, in the scope of his idea of social cooperation a space for relations of extreme dependence” (NUSSBAUM, 2003, p. 24).

Assuming that all persons need the same goods and resources in equal amounts, Rawlsian contractualism recognizes for all people with equal skills the right to an equal share of the fruits resulting from their participation in this system of social cooperation. In this sense, it shows itself insensitive to the fact that some persons need access to certain goods and forms of individualized care, such as, for example, children, the elderly, persons with disabilities or others who, for any reason, have their physical and/or mental health temporarily weakened.

Note that in developing his list of primary goods, despite including basic freedoms (of thought, of conscience, etc.), freedom of movement and freedom to choose one's occupation, the powers and prerogatives associated with roles and positions of responsibility, income, wealth, and the social bases of self-respect, Rawls did not consider the notion of care.

This alleged lack of “independence” and the need of care served as a justification so that persons with disabilities and other segments of society deemed vulnerable could be excluded, yet again, from participating in the formulation of political principles that would be the foundation for a society that, in theory, is just.

Showing respect for human diversity, the capabilities approach incorporates care and dependency as essential elements in the establishment of a truly just society. As Nussbaum points out, every society gives and receives care and for this reason must find ways to deal with these facts that arise from human necessity and dependency, which are compatible with the self-respect of those who receive care and which should not be a motive to exploit those who provide care.⁷

The capabilities approach understands that equality in the capabilities of individuals and their “independence” is not eternal. In this way, it asserts that contingencies that might affect people throughout their lives, such as the notions of dependence and care, must be taken into consideration when formulating political principles.

In order to not fully discard from the capabilities approach this contractualist foundation, Nussbaum proposes the inclusion of the need for care on her list of

Rawls's primary goods and the recognition that individuals are beings endowed with distinct capabilities and necessities, thus requiring a range of life activities.

For the author, since the measurement of care does not meet the same requirements as the analysis of wealth and assets, the proposed supplement, although possible, only reaffirms the idea that the list of goods selected by Rawls should be conceived as a set of primordial capabilities provided to all individuals, rather than a set of goods to be distributed in equal terms to all human beings – a discussion we will not have the opportunity to further develop in this article.

4 Final thoughts

In recognizing and accepting human diversity as a singular and indispensable element to the effective promotion of equality and in seeking to reconcile conflicting interests with a more inclusive perspective, the capabilities approach is an interesting alternative tool that can be used to grapple with questions of justice and human rights.

The more we perceive that the asymmetries that are part of human life create relations of dependency and need and interfere with the ability of individuals to participate in the system of social cooperation in which they live, the more we distance ourselves from the classic idea of contractualist justice and the more we approach a decision-making framework that takes into consideration the diversity of situations of inequality that inform how individuals lead their lives.

In this statement lies, therefore, a major contribution of the capabilities approach to human rights discourse: the affirmation that the peculiarities of human life should be taken into consideration during the formulation, execution, evaluation and monitoring of laws, public policies, programs, and projects.

This rereading of the social contract under the capabilities approach leads to an understanding of equality in light of human diversity through the recognition and acceptance of differences. It helps us understand that reciprocity is not only between equal parties where benefits are equally shared but also between different parties, thereby recognizing and respecting individual differences.⁸ Finally, it highlights the importance of guaranteeing to all the means and resources necessary so that they may exercise their rights and participate in the process of formulating governing political principles.

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NOTES

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2. The word “capabilities” or “capacities” suggests substantive liberties that individuals can exercise in diverse ways to self-actualize, putting into practice that which they most value in their lives. For example, an extremely religious person can choose not to be well nourished to the extent that she values fasting; another individual could, for whatever reason, lead a life of celibacy rather than one of sexual expression; a third, despite having considerable financial resources, might choose to work intensely to enjoy leisure and recreation (NUSSBAUM, 2001, p. 87).
3. Capabilities and functionalities are concepts that, in the framework of this approach, walk side by side and are linked by a causal relationship – capabilities correspond to the potential to exercise a liberty right, in the substantive sense, or a power to act – necessary to facilitate the diverse ways in which an individual can self-actualize – functionalities are physical and psychological states of being and doing, whose range depends on the presence of minimal capabilities.
4. For Rousseau (2008), “[...] [a]s long as several men in assembly regard themselves as a single body, they have only a single will which is concerned with their common preservation and general well-being. In this case, all the springs of the State are vigorous and simple and its rules clear and luminous; there are no embroilments or conflicts of interests; the common good is everywhere clearly apparent, and only good sense is needed to perceive it. Peace, unity and equality are the enemies of political subtleties [...]”.
5. According to Nussbaum, Rawls’s approach moves away from classic contractualism first by being a purely procedural theory of justice, where adopting the correct procedure ensures a correct result, rejecting the argument that human beings possess natural rights; and by involving moral considerations in the process of defining the social contract, recognizing that all human beings are equal, endowed with value and capabilities.
6. According to Nussbaum, independence for Rawls presupposes that the parties, in the Original Position, have no interest in the interest of others, not because they are necessarily selfish but because they are concerned with advancing their own notions of what is good rather than those of others. (NUSSBAUM, 2006, p. 33).
7. An interesting point that Nussbaum makes, but which we will not have the opportunity to explore in this article, concerns the importance that should be given to persons who care for dependents to the extent that a just society should also concern itself with the recognition owed these individuals. For further information, see Nussbaum (2006, p. 100).
8. According to Martha Nussbaum, adopting measures to bring justice to persons with disabilities is costly and, for this reason, would not be justified as mutually advantageous from a strictly economic point of view.

RESUMO

O presente ensaio pretende examinar a inter-relação entre igualdade, diversidade humana, deficiência e participação política, a partir da crítica que a abordagem das capacidades, sob a ótica de Martha Nussbaum, faz a respeito do tema.

PALAVRAS-CHAVE

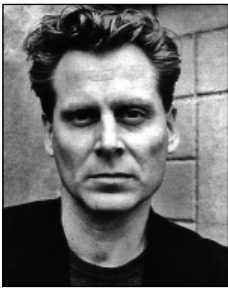
Igualdade – Diversidade humana – Pessoas com deficiência – Capacidades – Contrato social

RESUMEN

Este ensayo pretende examinar la interrelación entre la igualdad, la diversidad humana, la discapacidad y participación política, a partir de la crítica que el abordaje de las capacidades, visto desde el punto de vista de Martha Nussbaum, plantea sobre el tema.

PALABRAS CLAVE

Igualdad – Diversidad humana – Personas con discapacidad – Capacidades – Contrato social



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ABSTRACT

There would be no transformative change in human rights for persons with disabilities without the role of visual representation. This paper looks at five foundational documentaries from the late 1960s and early 1970s that seeded the visualization of disabilities. Describing the films, and reflecting on the changes of disability rights, the paper aims to situate the U.N. Convention on the Human Rights of Persons with Disabilities within the rich history of documentary practice.

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KEYWORDS

Documentary films – Human rights – Persons with disabilities



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THE OPEN DOOR: FIVE FOUNDATIONAL FILMS THAT SEEDED THE REPRESENTATION OF HUMAN RIGHTS FOR PERSONS WITH DISABILITIES

Peter Lucas

A door opens and a few people stumble into the light and an empty space. They seemed disoriented, unsure of where they are, and a few French nuns move them along. In the corner there's a man hunched over on a bench who seems frightened, almost like a wounded animal. Someone unlocks an iron door, and more people enter, dressed in period costumes of the French Revolution. Another man dressed in rags, obviously disabled in some way, drags himself across the room and hands a woman in a formal dress a bouquet of flowers. Someone kneeling on the floor is violently grabbed by two male orderlies in blue hospital robes; his scream muffled by their hands. A trumpet fanfare sounds and a master of ceremonies in a tuxedo and top hat addresses the camera from the other side of prison bars. He proclaims:

As director of the clinic of Charenton, I should like to welcome you to this salon. And to one of our residents a note of thanks is due, Monsieur de Sade, who wrote and produced this play for your delectation and for our patient's rehabilitation. We ask your kindly indulgence with a cast never on stage before coming to Charenton. But each inmate, I assure you, will try to pull his weight. We're modern, enlightened, and we don't agree with locking up patients. We prefer therapy through education and especially art so that our hospital can play its part faithfully following the Declaration of Human Rights (cynical laughing in the background). I agree with our author, Monsieur de Sade, that his play set in our modern 'bath house' will not be marred by all these instruments of mental and physical hygiene. Quite the contrary, they set the scene for Monsieur de Sade's play where he has tried to show how Jean Paul Marat died and how he waited in his bath before Charlotte Corday came knocking at his door

(MARAT/SADE, 2001).

Notes to this text start on page 198.

Thus begins Peter Brook's famous 1967 adaptation of the play *The Persecution and Assassination of Jean-Paul Marat as Performed by the Inmates of the Asylum of Charenton under the Direction of the Marquis de Sade*, otherwise known as *Marat/Sade* (2001). Set in the Charenton Asylum, just after the French Revolution, the play was directed by the Marquis de Sade with actors who were inmates of the asylum. Essentially a play-within-a-play, the story takes place in 1808, when historically, de Sade was imprisoned there and did direct performances with inmates. But his play concerns the famous writer Marat who was murdered in his bath by Charlotte Corday during the Revolution in 1793. The director of hospital Monsieur Coulmier, (who welcomed everyone), and who supervises the performance is a supporter of Napoleon's post-revolutionary government and he hopes the play will support his patriotic views.

During the performance, however, the patients had other things in mind and often break away from the text to express themselves. They felt no better after the revolution and their claims about rights and justice are repressed as the nurses and orderlies step in from time to time to keep order. Meanwhile de Sade sits idly by, debating philosophy with Marat and reflecting on the proceedings with detached amusement. Consumed with his own self-serving erotic and nihilistic beliefs, he even orders his own whipping by Charlotte Corday.

Peter Brook staged the play with the Royal Shakespeare Company under Antonin Artaud's axiom that "The theatre must give us everything that is in crime, war or madness, if it is to recover its necessity."¹ Brook translated Artaud's theories into practice by foregrounding the Charenton inmates with disabilities. In the history of avant-garde theatre (and indeed documentary film) *Marat/Sade* was a landmark performance, breaking away from established theatre conventions and bringing dramatic performance back to a mystical, primal state. By stressing scenes of violence, sadism, and insanity, the performance threatened the fragile boundary between the audience and the performers and made a mockery of psychotherapy that the play-within-the-play was supposed to achieve.

Peter Brook is famous for his notion of the stage as an "empty space" that allows actors to create a physical world from scratch.² For Brook, the empty space of the theatre makes it possible for a new phenomenon to come to life. With *Marat/Sade*, a door was opened onto a world of disability, among other political issues. That the play/film is introduced as a "human rights" response to psychosocial disabilities with drama therapy, the production allowed for a critical inversion to surface. Not only can the performance be read as a critique of classical first-generation civic and political rights in the time of the French Revolution (yet alone the late 1960s when the production was staged), but also second-generation economic and social rights that affects health and rehabilitative services for those with disabilities.

Brook states that one goes to the theatre to find life, and that there should be no difference between the two. But theatre, and for all intensive purposes a film as well, should make life more visible, more concentrated, more readable, and more intense. That irresistible presence of life—what Brook talks about in his writings—is the spark that lights up and intensifies the empty space where we witness life unfolding in front of us. In *Marat/Sade*, Brook crafted a landmark way of filming theatre,

which would influence all subsequent performative documentaries. One could argue that *Marat/Sade* was a stand-alone film as much as it was a documentation of a theatre piece. His use of close-ups and cutaways, handheld cameras tracking the actors, silhouettes and out-of-focus techniques, combined the creative strategies of art cinema with avant-garde theatre.

But it's the degree of reflexivity in Brook's production that's so compelling. If theatre is to be a total experience, it must also involve the audience in the construction of the empty space. As *Marat/Sade* is a play-within-a-play, there are audience members among the actors themselves; the director of Charenton invites his wife and daughter into the bath house and he delivers his introduction to the French aristocrats who are seated just on the other side of the iron bars of the prison. This too was a historical fact, that the wealthy upper class would watch the therapeutic performances by the inmates at Charenton. The camera from time to time pulls back and we see the exchange between the actors and the audience. The audience is silhouetted in front of the bathhouse and the effect places us as film viewers right behind those seated on the other side of the bars, as if we too were complicit. And when the inmates are on the verge of total anarchy, which they are several times during the play, the director of the hospital stops the action, chastises de Sade, and threatens to halt the production so as not to offend the audience.

From the reviews of when Brook staged *Marat/Sade* in London and New York in the mid-1960s, we know that audiences were offended, many walked out, and others became physically ill watching the play.³ It wasn't just the drooling, nose-running, foaming at the mouth, muttering, moaning, twitching, shaking, weeping, screaming, and all the physical symptoms associated with madness. It was more the brutal repression that the orderlies enacted on the inmates to snuff out free expression. Inmates were beaten down, chained to the wall, and dragged across the stage in the name of censorship. This was shock theatre to its core. And what it mirrored (besides a larger social madness in the late 1960s) was the contemporary asylum and its supposed rehabilitative treatment of the mentally disabled.

In his book, *Theatre and Its Double*, Artaud extols that performance must physically affect the audience, that the total experience of the theatre is as much about your body as it is your senses.⁴ Life on the stage must pierce you; wound you in some way for it to be effective. He also argued that theatre is essential because it does away with any media interface – one comes up against other bodies and souls face to face. A documentary film can also be a powerful experience given the right cinematic strategies. The multiple reflexive strategies of *Marat/Sade* forces even viewers of the film to acknowledge their role in the exchange process, especially at the close of the performance when a riot breaks out and the prisoners exact brutal revenge (class warfare) on the hospital staff and the director's family caught onstage. The piece ends with the prisoners climbing the bars barely separating them from those patrons of the arts, which by extension, includes us as viewers. The revolution on the stage was about rights, which the inmates kept asking for the whole performance. But there was no resolution in the play, nothing except a final exhortation to Take a Stand! That was an apt slogan for the times but it also left all conclusions and interpretation up to the audience.



At the time in the 1960s, the international human rights movement was entering what some scholars call the third generation of human rights focusing on experiential or collective rights.⁵ Instead of the ontological focus on individual freedoms, the movement was beginning to recognize various collective struggles. In the name of self-determination, countries were fighting for independence from colonial powers. The civil rights movement was raging in the U.S. The peace movement was a growing international force. The women's movement gained momentum. The children's rights movement would eventually fall into place. Indigenous rights were spreading through traditional homelands. And eventually collectives would begin such as the gay, lesbian, bisexual, and transgendered (LGBT) movements.

The disability rights movement also began to take shape. The history of disability rights is checkered in the sense that local, national struggles tended to precede any wider international movement. In the United States where I'm writing from, the history of disability rights actually began just after WWI when soldiers returned home with tragic injuries that led to lifelong problems.⁶ In the 1920s, vocational rehabilitation acts were passed to provide services to veterans. But the recognition that wounded soldiers needed special care was still a very exclusive understanding of disabilities. Until the 1960s, anyone with a disability was deemed to be "handicapped," and the prevailing wisdom was to institutionalize patients and keep anyone with a disability out of public view.

Activism took off in the 1970s when people with disabilities lobbied Congress, staged sit-ins at various cities, and organized marches for rights. Borrowing from other collective struggles, the movement advocated for civil rights language and laws to protect all kinds of disabilities. This pluralistic approach, setting aside specific goals of niche groups affiliated with different kinds of disabilities, was what gave this activism its strength and collective ethos.

The major laws that were passed included the 1973 Rehabilitation Act, the 1975 Education for All Handicapped Children Act, and the 1990 Americans with Disabilities Act.⁷ What these Acts guaranteed was that anyone with a physical, mental, visual, auditory, or any other kind of disability, would have equal opportunities in employment, housing, and education. Children and youth would have appropriate and free public education in the least restrictive environment possible. Access to public areas, especially public transportation, was a crucial turning point. The right to adaptive technologies, enabling people to communicate, express themselves, study and learn, and work also became easier with new legislation. And so-called lifestyle issues, the ability of individuals to live independently became an important focus of disability activism.

One could argue that the goal of the collective movement was inclusion into mainstream society and an end to treating persons with disabilities with exclusionary practices and the 19th century asylum approach to treatment such as depicted in *Marat/Sade*. Inclusion also meant creating solidarity with activists who were not affected with disabilities. Filmmakers played an important role here because the movement needed all the help it could get including visual representation. In the 1960s, filmmakers working with disability issues did not necessarily see themselves as human rights workers. They tended to work under the banner of social reform. Today, this same group is screening their documentaries in human rights film festivals

around the world. In fact, it would be hard to even speak about contemporary human rights without visualizing the struggle in concrete terms.

There are many films about disability rights today—both documentary and feature—and people have gone to great lengths to catalogue such films under their appropriate disability headings.⁸ There's even special disability rights film festivals. But there are also some seminal films that seeded the wider movement and paved the way for the recognition and visual awareness that we have today concerning disability. My intention with this paper is to mark five of these landmark films and to suggest some of the more poetical strategies of representing disability rights. The poetical side to representing disability offers more open-ended interpretations and perhaps, because such films have no closure or overt policy recommendations, these film projects have a much longer life span of holding public interest. The five films discussed here are now considered classics in the documentation of disability.

As a professor of human rights and media, many of my students are studying to become documentary filmmakers and disability rights are one of the many rights-based themes that they work on. To be sure, from a conceptual framework approach towards human rights, specific impairments are never by themselves the only issue. The conceptual framework approach seeks to understand the depth and complexity of each human rights violation and make holistic connections between all rights.⁹ For example; women with disabilities are doubly vulnerable because they suffer oppression as women and as persons with disabilities. Children with disabilities also need a more holistic conceptual approach. Disabled victims of armed conflict, persons with disabilities who are forced into migration, or persons who suffer from poverty in addition to any physical, mental, or sensory impairment need a sophisticated human rights approach.



One of the Ur-films in depicting disability is Fredrick Wiseman's 1967 film *Titicut Follies* (1967). This is a much talked about film in the history of documentary practice but seldom seen until recently. Its history is complicated by ethical questions of consent and the public's right to know. The film was shot inside the Bridgewater State Hospital for the "criminally insane," which was administrated by the State of Massachusetts Department of Corrections, and not the Department of Mental Health. Like Charenton, this place was essentially a prison, and among the 2000 men who were there at the time, only 15% were actually convicted of a crime.¹⁰

How Wiseman and his cameraman, the famed ethnographic filmmaker Robert Gardner, gained access to the facilities and their subjects was a question that would be debated in the courts for years afterwards. Could the hospital superintendent, ostensibly the legal caretaker, grant consent for everyone under his charges? Not five minutes into the film, the men are lined up for strip search, naked and humiliated in front of each other and the guards. Shot in soft 16mm black and white tones, the scene is sobering November window into how those with psychosocial disabilities were warehoused at the time.

The next scene presents, in what might be understood as the "normalization of deviance," an intake interview with an inmate named Mitch and Dr. Ross, one of the two psychiatrists for the entire prison population. That they are later named in the film is astonishing given their conversation. While Mitch openly acknowledges

his pedophilia, the psychiatrist sits there chain-smoking wanting to know how he feels about his sexual deviance and why he masturbates three times a day. When Mitch genuinely asks if he'll receive help for his problems at the hospital, Dr. Ross wonders himself and replies: "You'll get it here, I guess." The simplicity of this response and the deduction of their conversation are staggering. There is no therapy here, no meaningful exchange of knowledge, and no treatment plan. There's only the institutional normalization of power and shame while constructing a deviant other.

Other scenes in the film are not so subtle. This is not the Royal Shakespeare Company acting out roles in the asylum; this is the real thing shot in a direct cinema technique of careful observation with no questioning or voiceover or any external sound track than what was happening at any given moment at Bridgewater. One man carrying a newspaper was talking a mile a minute mixing scraps of what he might have just read with a kind of gibberish in a constant stream of incomprehension. He later offers his blessings to the other inmates and, among the many critics of this film, the Catholic Church even condemned this scene.

The men out in the yard seem isolated and lonely. Some men talk only to themselves. One man, shaking and twitching, standing in the middle of the field openly masturbates. Another plays his soulful trombone by himself. Others hold their own soapbox, spouting their political beliefs and have arguments with other inmates on the madness of the Vietnam War. One man though seems different. A man named Vladimir, speaking fluent if measured English with an East European accent, stops Dr. Ross in the yard. He pleads his case that he was misdiagnosed and he should not be in the hospital. He's tone is urgent; he feels he's getting worse the longer he stays. The psychiatrist offers a kind of mocking cynicism, smiling and reminding Vladimir of his diagnosis of being a schizophrenic paranoia. Vladimir then argues, who has the right to define what these labels mean in society.

The most heartbreaking scenes are when the men are led to their cells, naked and isolated in their rooms. The cells themselves are shockingly bare, nothing but a cold floor, brick walls, and a window covered with metal guards. One naked man paces back and forth stamping the floor in his bare feet and pounding on the window and when he finally leans into a corner, you see the bloodstains where he must pound his own face against the wall. Meanwhile the guards openly taunt the men, constantly asking them why their rooms are so dirty. One man in the hall drops to his knees to hide his private parts. Another cups his hands over his groin in embarrassment. It's not clear whether these reactions are related to the presence of a camera. Having watched the film many times, I think these men must cover themselves even without a film crew present because the situation is so humiliating.

At the time, "elderly rights" was not a well-defined human rights concept. But many of the men at Bridgewater were in the twilight of their lives with no one to care for them making their situation even more painful to watch. The worst case is when a man refuses to eat and he's manually strapped to a table. He's also naked. Dr. Ross greases a rubber tube and sticks it into his nose all the way down into his stomach. He then stands on a chair above the patient and pours a kind of soup into a funnel feeding into the tube. He even jokingly asks if anyone has any good whisky for the patient while his cigarette ash is about to fall into the funnel.

When the camera closes in on the man's face, a teardrop runs down his cheek. The scene is cut with the same man's face being shaved and then back to the forced feeding and then back again to his face in a different situation as someone pulls open his eyes with tweezers and sticks cotton balls under his eyelids. Only when his body is wrapped in the hospital morgue and stuck into a cooler does the scene register. And when his body is lowered into the ground, the scene presages one of the burning human rights issues for prisons today, that being "length of incarceration" and the fact that many elderly people now die inside prisons.

Late in the film, Vladimir makes his case in front of a board of medical experts and hospital nurses. One of the doctors says: "Now as I told you before, if I see enough improvement..." "Vladimir lucidly cuts him off: "But how can I improve when day by day I'm getting worse, and now you tell me, until you see an improvement, but each time I get worse. So obviously it's the treatment I'm getting, or the situation, or the place, or the patients, or the inmates. I was supposed to only come down here for observation. What kind of observation did I get?" (TITICUT FOLLIES, 1967).

Vladimir continues, arguing eloquently saying that he's been caught in the system now for a year and a half, that he wants to go back to where he belongs, that at least back in the regular prison there was a school and a gym, and that the medicine is making his mind worse. The board is unmoved and when they ask him to leave they confer among themselves on camera. They note their surprise that he learned to speak English while in prison, and that he also passed his parole before being sent over to the hospital. The chief psychiatrist surmised that Vladimir was falling apart and that his anxiety is a common symptom of the anti-depressants and that what they should now do is administer heavier doses of tranquilizers.

At the end, the film circles back to the opening scene; an annual talent show put on by the prisoners and guards called *Titicut Follies*, hence the name of the film. As the patients and the staff sing *So Long for Now*, the performance reminds us that the public exhibition of inmates in institutional "mad-houses" like Charenton, reaches back hundreds of years. That the follies were presented as amusement in the name of rehabilitation is a travesty considering what Wiseman shows between the opening and closing scenes.

From the beginning the film caused controversy. Before it even opened at the New York Film Festival in 1968, the film was in a legal mess.¹¹ A social worker, without ever seeing the film, read there was full frontal nudity among the inmates and wrote a letter to the governor of Massachusetts complaining that such a film violates the dignity of its subjects. The state of Massachusetts then tried to get an injunction to stop the opening, saying the film violated the rights to privacy of the inmates and the guards. Wiseman countered saying he received legal written permission from the hospital superintendent and oral consent from the inmates and the staff. Furthermore, at no time during the 29 days of shooting were Wiseman or Gardner asked not to film something. While the legal issues were being sorted out in Massachusetts, a New York state court allowed the film to be shown.

Titicut Follies opened at the New York Film Festival (and later commercially in New York) to much acclaim as a bracing expose of a very troubled place. Its somber tones, soft focus at times, and open editing style forever marked *Titicut Follies* as an art film as much as it was an observational piece of investigative journalism.

But unlike expository films, there's no narrative per se in *Titicut Follies*, no policy recommendations, or any sense of closure in the film. Today, when students study the history of documentary films, *Titicut Follies* is a benchmark example of direct cinema technique, or the non-intervention of the filmmaker and an editing style to give the illusion of real time unfolding. I use it in my class *The Poetics of Witnessing* to demonstrate how one can study and represent human rights violations in a poetic manner that allows the film to be open to multiple interpretations.

But back in the courts up in Massachusetts in 1968, a Superior Court judge ordered that the film must be banned from general distribution. Since Wiseman himself lived in Boston and was a resident of Massachusetts, he was legally bound by this decision. But the judge went further and asked that all copies of the film and its negatives be destroyed because the film violated the patient's privacy and dignity (not to mention the negative representation it cast on the State). And while Wiseman, who himself was a lawyer and a former professor of law, argued his case, this was the first time in American history that a film was legally banned for reasons other than obscenity or national security.

From the perspective of the filmmaker, what is more important here, the privacy of the individual inmate or the public's right to know? Considering the context, this is a human rights dilemma involving the ethics of image making and the right of free speech. The First Amendment to the U.S. Constitution enshrines this very right itself. And Wiseman has consistently argued through his dozens of subsequent films after *Titicut Follies* that the public has the right to know what goes on in its tax-funded institutions. In fact, Wiseman has stated that if the First Amendment protects anything, it's a journalist's right to report about what goes on inside prisons. The irony at the state level is that it took a film for the state of Massachusetts to recognize the right to privacy for the first time. In the end, this ethical dilemma was not solved but the question lingered for years. Was the court's decision more of a violation of the civil liberties of the film than an infringement on the rights of the inmates?

More lawsuits and decisions and appeals followed. But outside of special and restrictive screenings for educational purposes, the film was effectively banned for 20 years. Finally, in 1987, families of several inmates who died at Bridgewater sued the hospital and claimed there was direct correlation between not allowing the film to be seen and the deaths of their loved ones. They called for the film to be used as evidence of the brutal mistreatment of inmates while incarcerated at Bridgewater. In other words, if the public had knowledge of the conditions at the hospital, it might have forced the state to change its institutional practices towards inmates with psychosocial disabilities.

Finally, in 1991, the superior courts in Massachusetts allowed the film to be released to the general public. However, the court ordered that the film must include an explanation that the prison for the criminally insane at Bridgewater has been reformed. But as one doctor, Thomas Szasz, has argued in an essay on *Titicut Follies*, the hospital is still surrounded by barbed wire, policed by hundreds of guards, and that no matter that there are now dozens of nurses, psychiatrists, psychologists and social workers, they are all still jailers (SZASZ, 2007). Today, the state hospital at Bridgewater is called a "health care facility." But despite the renaming, Szasz points

out that behind the façade, there's still the treatment of persons with psychosocial disabilities with pseudo-medical diagnoses and questionable therapies. Like *Marat/Sade*, prisoners with psychosocial disabilities are still on the other side of the bars.



As disability rights moved into a more international platform of awareness and even legal redress, activists looked at the normative standards of human rights to guide the movement. These standards are based in the U.N. Charter, the Universal Declaration of Human Rights, and the related covenants and instruments including the recent U.N. Convention on the Human Rights of Persons with Disabilities.¹² There's two ways to read disability rights into the normative standards. First, there's the general language that guarantees fundamental freedoms "without distinction" of any kind. From this perspective, everyone should have equal access to housing, education, social services, health care, and employment. Furthermore, everyone should have the right to participate in all aspects of social, political, economic, and cultural life in society. And everyone has the right to be treated with dignity and respect.

There's also language in more specific covenants and instruments especially those for women, children, and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.¹³ In theory, one could cite that the conditions at Bridgewater consisted of serious human rights violations that were cruel and degrading, if not torture. But *Titicut Follies* should not be read as a historical film. There are many similar places today where conditions are just as bad if not worse.

In 2003, the NGO Disability Rights International (DRI) teamed up with the video advocacy NGO Witness (both based out of New York) to document 460 patients at the Neuro-Psychiatric Hospital in Paraguay.¹⁴ Partnering with a third local NGO, video was clandestinely captured during tours of the hospital. The footage is shocking, even worse than what Wiseman and Gardner brought out of Bridgewater. The video was then presented as evidence before the Inter-American Commission on Human Rights in Costa Rica (of which Paraguay is a member).¹⁵ Specifically, the case documented two teenage boys who were locked in isolation for over four years. They were being kept in their cells naked, with no access to toilet facilities, and their floors and walls were covered with feces. The common yard for all of patients was littered with garbage and broken glass and at one point during the video, one of the patients urinates in public and another drinks water out of a puddle like a dog.

There are probably no human rights issues here without visual evidence just as there was no story at Abu Ghraib without the photographic images of Iraqi prisoners abused by American soldiers. DRI and Witness streamed the video on their websites, and worked with media networks to bring the case to a wider level of awareness. Presenting the visual documentation as evidence, the NGOs showed dehumanizing and life-threatening conditions at the hospital, that the most basic sanitary conditions were missing, and that patients were not receiving appropriate medical attention. Moreover, they proved that Paraguay had failed in its human rights obligations to treat and rehabilitate those with psychosocial disabilities. The footage and the case eventually shamed the State into reforming the hospital. Although reforms were made, DRI and Witness issued a follow-up video showing that the patients were still

in critical conditions at the hospital and they called for habilitation and eventual reintegration into the community for the patients.

The standards that DRI called upon are drawn from Principals for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care adopted at the United Nations in 1991. These are not binding international covenants as much as they are principals, ideals to strive for, and moral guidelines. Among the 25 articles, two are named in the film; that the patient has the right to treatment in the least restrictive environment and that treatment should be directed towards enhancing personal autonomy. The degrading treatment that their videos show is similar to *Titicut Follies* in that they document serious human rights violations. This is but one strategy of visual human rights, to shine a light on a troubled spot in the world, and to stimulate a change process.

Today, we have a new set of international standards, more legally binding too. The U.N. Convention on the Human Rights of Persons with Disabilities is an international treaty that is signed and ratified by member states.¹⁶ To date, as of January 2011, 147 states have signed and 97 states are parties to the treaty with the latest being the European Union which collectively ratified the document in December of 2010. What the treaty promotes and protects are the classic issues such dignity and integrity, freedom and autonomy, equality and non-discrimination, accessibility and opportunity, inclusion and full participation, respect for difference and acceptance of diversity. These are the very themes that contemporary filmmakers focus on when representing disability. But these ideas are nothing if we can't visualize them being violated and protected and actualized.



In 1971 a fascinating documentary was made about the right of persons with psychosocial disabilities to live in a communal setting. The film was called *Asylum* (2004). But this was something of a departure from the prevailing asylums such as Bridgewater. Made by the Canadian director Peter Robinson and cameraman/editor, Richard Adams, the film documented an experimental project called the Archway Community set in an East London row house. Here, for six weeks, the filmmakers observed the everyday life of its residents struggling with various sorts of mental issues including schizophrenia.

The experimental therapeutic community of Archway was founded in 1965 by the radical psychiatrist R.D. Laing and his colleagues.¹⁷ The idea was to have patients and therapists live together with as little rules as possible and no medication. Laing firmly rejected the medical (and prison) model of mental illness, and believed that only if patients could be responsible for their own actions and decisions, would they make therapeutic progress. Laing and his colleagues were part of a movement that questioned the existence of mental illness. For Laing, mental distress was the result of socialization, and especially the pressures of the nuclear family, which led to what he called the “divided self” or a split between the secure self in the world and another self slipping away and suffering from “ontological insecurity”.¹⁸ Once removed from the family, Laing thought that mental distress could be valued for its cathartic and transformative potential. Although Laing never denied the existence of mental illness, his approach was to treat mental distress as a kind of shamanic journey of the self.

This all sounds a bit cosmic and steeped in the counter-culture of the times. But in practice, Archway was real and a fascinating chance to treat mental disabilities with care and concern and empathy. There's an early scene in the film when one of the resident therapists, a relatively young and handsome man in a turtleneck sweater, is introducing the house to a young women with blue eye shadow and looking very mod. They're sitting in front of a burning fire as the therapist explains that the rent is due every Monday and everyone must pay their share for food. Other than that, he adds, there are no other rules in the house.

But he goes on to explain the situation: "There are some people here who were in the mental hospital and found that it didn't help them and they couldn't find anywhere else to live. And so they're here because of that reason and they find that they can live here and it's not a hospital and it's not set up like a hospital. And there's some people who felt like they might have to go into a hospital and didn't want to and that's why they've come here. And then there's people who haven't been in a hospital, they're not going to a hospital, but they're interested in this kind of life people live here." (ASYLUM, 2004).

It takes a few viewings of the *Asylum* to really know for sure who is a resident, who is a therapist, who is a live-in psychiatrist, and who is just a visitor. During the six weeks of filming in the spring of 1971 there were about 18 people in the house, and a few minutes into the film, Robinson's small crew is introduced at a gathering while they begin filming and recording sound. Some of the residents present themselves here as well, including a few who stand out in the film such as David, a middle-aged intellectual who speaks in a flood of coherent and incoherent language and is prone to staging fits. Then there's an ethereal beauty named Julia, looking like a folk singer in her black dress and long blond hair. She delicately introduces herself saying that she can draw, paint, and play the guitar.

The house itself is a complete antithesis of the hospital at Bridgewater. There's actual beds, throw pillows on the floors, several pets in the house, and a large communal kitchen. The residents are seen cooking together, sitting around smoking cigarettes, quietly reading, talking on the phone, having a picnic in the back yard, washing dishes, and having a cup of tea. None of this is exceptional except that these very people are struggling with serious mental issues and from films like *Titicut Follies*, one could imagine that these same folks could be in a totally different environment with cellblocks, tranquilizers, electroshock, and lobotomies. There's also the everyday struggle and caring for each other. Residents comfort each other after breakdowns, someone needs to help Julia down the stairs, another person needs help going to the bathroom, and the collective group has to problem solve serious issues. It's clear from the film that the residents themselves have to be as much caregivers as recipients of therapy. R. D. Laing himself used to remind students that the word "therapist" is derived from the Latin and means to be fully present, to listen, observe with care, and serve with compassion and patience.¹⁹

The title of the film *Asylum* suggests the kind of places that we associate with this word today. But again, the original usage of the word, and Laing's intention with it in his therapeutic communities, was to evoke a shelter, a place of refuge, and safe space. These ideas in themselves are fundamental human rights especially for persons with disabilities. A film crew could potentially upset this delicate balance. But here one gets the sense that the community trusted Robinson and his team. No one feels

exploited and no one seems to be performing for the camera. After studying this film at length, I feel like the shattering breakdowns and tense crisis situations in the film would have occurred with or without the camera. Peter Robinson himself passes in front of the camera from time to time and even has a couple of conversations with residents. This slight reflexive touch seems just right to expose their presence in the house and does not diminish the team's elegant style of observational filmmaking.

Asylum is considered today a classic documentary of its time and it seems to get better with age.²⁰ The document also recalls a wistful moment when alternative and humane options for healing were introduced against societal pressure to incarcerate and hide those with disabilities. The film also raises questions about the difference between those who are deemed "sane" and those who are considered "insane." The therapists, who advocate on behalf of residents to remain in the house, and try to convince their families to allow the residents to make their own decisions on placement, are very careful not to offer any diagnosis and use inclusive language that suggests that they too might be suffering. These bonds of empathy seem fascinating today when there's such a rush to diagnose learning and emotional disabilities and prescribe prescriptive drugs for any kind of alleged learning or behavioral disability.

The shift from incarceration and brutal mistreatment at Bridgewater and what was happening inside Archway evokes an important tenant of human rights for persons with disabilities. Everyone has the right to self-determination and self-knowledge. And everyone has the right to safety and peace. These were not theoretical ideas in this film. And while six weeks in Archway does not prescribe any kind of cure-all, it does suggest an alternative vision of rights realized and actualized.

At the end of the film, one of the medical volunteers visiting from the States who is struggling with David's outbursts and aggression confides with one of the resident therapists that it's possible to get lost in Archway. The therapist thoughtfully replies: "Yes, we tried to create a scene here together, that if someone needs to get lost then that can happen in as good of circumstances as necessary. And someone has to lose oneself to find oneself. The emphasis isn't so much on one person having the responsibility of being available to someone else—to talk to, to grapple with, or have therapy with. It's as much as the creation of an ambience, a group, a network that can facilitate someone finding themselves, being themselves, and finding out who they are and who can tolerate the vicissitudes of feelings and behavior that we all go through at different times of our lives especially in critical times when one of us is freaking out. And it seems to take a great deal of effort although what were aiming at is something quite hard to achieve, this simplicity, in terms of being with a person, caring for a person, being concerned." (ASYLUM, 2004).

There's something about this film that's quite simple but immensely moving. And it's hard to put my finger on it. Perhaps it's that someone struggling with mental health can stand out on the street and talk to neighborhood children, take a walk down the street, and go across town in the bus. That kind of freedom should never be taken for granted no matter what mental or physical condition we live with. The words human rights are never mentioned in the film. But *Asylum* is not one of those documentaries illuminating a troubled place in the world, it's rather one of those critical turning point films that show us that another way is possible.



In 1971, a young Japanese filmmaker challenged a group of people with cerebral palsy (CP) to hit the streets in order to take action.²¹ Kazuo Hara had never made a film before but he was already an activist of sorts for persons with disabilities. As a school aid for “handicapped children,” as they were called then, he would take his students into the streets in their wheelchairs, which would create quite a scene. People would just stop and stare. In the early 1970s, it was a rare for persons with disabilities to be seen in public yet alone a group en masse in wheelchairs. As their adult chaperone, Hara would refuse to help his students in the streets, which forced them to negotiate with the public themselves. It wasn’t just that the Tokyo infrastructure was not accessible to wheelchairs. It was a much larger question about what “disabled” meant in Japan and the line between confinement and physical freedom.

When Hara met an adult group of cerebral palsy activists in Yokohama called the Green Grasses, he befriended them and slowly convinced them that they too had to go into the streets—without their wheelchairs. Only then would people be confronted with their bodies. As a group, they agreed that wheelchairs were part of their physical confinement that shielded their bodies from society. Together, the group with Hara agreed to make a collaborative film with no plan except that they would take “actions” in public spaces. And they wanted to make a different kind of film from the so-called “social welfare” documentaries that directed a sympathetic gaze on the persons with disabilities from a distant and privileged position. The group decided to make something much more radical, something straight from the streets, and they were not interested in pity or even empathy. They wanted change.

Goodbye CP (1972) (sometimes known as *Sayonara CP*) opens with the two leading activists of the film, Yokoto Hiroshi and his friend Yokotsuka Koichi hitting the streets in their own special way. Yokoto cannot walk so he devised a way of sliding along on his knees, a kind of lurching forward, his body twitching, pushing off with his arms, and constantly picking up his oversized glasses that are always falling off. The sight of an adult man literally crawling across the busy intersection at a red light astonished people in the street, brought everything to a standstill, and began to actualize the crew’s mandate for the film: “How can we make society accept our existence?”

Meanwhile Yokotsuka rambles along with a kind of zigzagging walk, arms flailing in every direction, his head jerking from side to side. But He has a 35-mm camera strapped around his neck and he’s stepping into the crowds to take pictures of the so-called “healthy” people. Hara convinced Yokotsuka that he had to shoot his pictures very close, within one meter of his subjects. Yokotsuka admitted that photographing complete strangers was initially terrifying but also liberating. The strategy of using another camera in the film created a “reverse gaze” whereby the dominant position of viewing others in the film would be complicated and reflexive.

Throughout the film, several street actions are staged, such as Yokoto sitting in a public walkway with a bullhorn declaring: “We might be killed tomorrow. We want to live freely as human beings.” Hara’s camera circling around Yokoto creates a spectacle itself and people stop to see what’s happening. Eventually people (mostly women) give pocket money to their children so they can donate. Hara breaks his

observational mode and asks them why they felt compelled to give money: “Some people are so unfortunate (...) Because they’re helpless (...) I just wanted to help people in need (...) My child felt sorry for them (...) I feel so bad for their bodies (...) My child is in good health so I feel blessed (...)” (GOODBYE CP, 1972).

Goodbye CP is radical film in many ways but it’s also shockingly beautiful. Despite the stereotypical responses by the adults, the shots of the children, running back and forth from their parents, silhouetted with starbursts of sunshine are stunning. But it’s the film’s rawness that compliments its subject matter. The film was shot with grainy black and white stock, on 16mm, with a camera that had to wound up every 40 seconds.²² Having never made a film before, Hara didn’t bother much with synchronized sound. Thus the overall sound design is a mix of street noise and people talking above and against the images. The team also decided not to subtitle the film forcing Japanese viewers to become accustomed to how people with cerebral palsy speak. Even more disconcerting was Hara’s angles and hand-held camera movement which were as restless as his fellow activists. And his brash editing style, done collectively with the Green Grasses team, displays such a fresh and gritty approach to filmmaking that *Goodbye CP* is considered today a seminal work of avant garde filmmaking as it is a landmark political documentary. Hara would later call his films “action documentaries” because they provoked change.

One of the most uncomfortable sections of the film is when Yokoto is fighting with his wife Yoshiko who also has cerebral palsy and Hara brings his camera into the their home documenting the anguish of their conflict. Hara would go on to make other films that crossed the ethical boundaries of the family and this stark portrayal of domestic rage was shocking for Japanese viewers. While they’re fighting, the team gathers in another room debating the merits of continuing with the project and dismissing Yoshiko’s belief that they’re just humiliating themselves further by the film.

The degree of reflexivity here makes the inclusive format of the film ever so real and taps into another fundamental human right. Everyone has the right to self-expression. And everyone has the right to represent themselves. Everyone also has the right to privacy. And the mixture of these rights clashing with each other makes *Goodbye CP* a truly transgressive film, edgy in its stark realism. But it’s also a collective project, and the crew present themselves not as victims but as participants. Today, participatory media platforms are all the rage in human rights, and *Goodbye CP* was on the vanguard of this movement.

More street actions happen in the film and one in particular brings on police intervention. The police call the protests a freak show but the team deems the intervention a critical success since they’ve created such a public nuisance. Yokoto later reads his poems in public, draws a chalk circle around himself where he sits, and writes: “You who have legs to stand, you who forbid me to walk, this is how you keep your legs, and all the people around me, all the legs, for what reasons do you forbid me to walk?” And in one famous scene, Yokoto takes off his clothes in the middle of the street, with no shame, forcing people to look at his body. In the end, Yokoto crawls away on his knees lamenting whether the film has done any good. My reading of this final scene is that he’s fighting as much against the prospect of death than his disability and this struggle links him with that common destiny that awaits us all.

Goodbye CP was not exactly a hit when it came out in 1972. It was scandalous. The public accused Hara of humiliating people with cerebral palsy and making a public spectacle of their struggles. They didn't know however, that public performance was the point because it was activism and resistance. Nor did they initially understand the participatory ethos of the film and how the space was collapsed between the filmmaker and his collaborators. But those with cerebral palsy loved the film and they understood everything people were saying without subtitles. They even got all the inside humor that the general public missed in the film. Yokoto Hiroshi became something of a folk hero for persons with disabilities in Japan. And in time, public sentiment began to change recognizing the singular beauty and courage of the film. Today, the film is required viewing in Japan for all students studying anything to do with disabilities. It's also a cult film for students of avant garde cinema. I use the film in my human rights and media classes to illustrate how activism, participatory media, and poetics can be fused together.



One of the questions in *Goodbye CP* was, what exactly does it mean to be human? Especially when someone is different. Never was this existential dilemma explored with more grace and wonder than in Werner Herzog's 1971 film, *The Land of Silence and Darkness* (2005). At the time, Herzog was a young filmmaker and this was almost a personal project, reputedly made with only a few thousand dollars and a small crew. The entire film has a feel of autumn in Germany with those melancholic pale colors that only films of the early 1970s seem to possess. Like many of Herzog's early films, it's ponderous, almost meditative at times, demanding prolonged concentration on the metaphysical questions that linger with each long take.

The film follows a 56-year old woman named Fini Straubinger who is deaf and blind. As she travels around Bavaria on behalf of the League of the Blind, she meets and helps others who share a similar fate. In fact, she calls them "comrades in fate" who need liberating. But unlike those who were born deaf-blind, Fini took a devastating fall down the stairs as a 9-year old child and in a matter of a few years; she lost all sight and hearing. During this time, she was bedridden for nearly 30 years. Finally, she rejoined society and wanted to help as many people as she could.

In one of the early sections of the film, Fini and her friend Juliet who is also deaf-blind take a small plane ride. It's the first time either of them have ever flown and the look on their faces in the air is nothing but pure bliss as they fly over the snow-covered mountains and reach for each others hands to sign back and forth by tapping and drawing the alphabet across their palms. They're accompanied by a "companion" who does not have a disability but can sign and translate what he sees. It's an unforgettable scene in the history of documentary film and every time I ask someone if they've ever seen *The Land of Silence and Darkness*, they always mention this sequence with awe.

There are other notable sections of the film that approach the experience of being different with nothing but joy. There's a visit to the botanical gardens when a large group of deaf-blind are guided through the cactus plants, each person with their companion translating, and they marvel at the sheer touch of the plants. Even more magical is the visit to the zoo as the deaf-blind hold animals in sheer delight. At Fini's birthday, she warmly greets everyone, speaking out loud for all the companions to

translate, touching her guests, clasping hands, signing, hugging old friends, genuinely asking about their companions who she also knows.

At the party, she asks for a poem and Juliet stands up and announces:

Please translate for the deaf-blind. I will tell you a poem reflecting on your situation.

The title is: The Most Wonderful Art.

to stay apart

when others have fun

by being happy all the time

gladly carry out

the most sacred task

renouncing in a noble way

ones personal desires

living in darkness

from the sun

but shining like a star

that is art

that only one whose soul

is bent on heaven

can understand

(THE LAND..., 2005).

The title of the film comes from Fini herself as she describes those who struggle to communicate with others. And it's this darker side of the film and her advocacy work among the deaf-blind that makes this story such a deeply felt human rights representation. Finally, we're at the point in these foundational films where persons with disabilities themselves are in the primary care-giving role. As Fini travels to meet others, their lonely stories are heartbreaking. More than that, they make us wonder how can someone live without communication? But *The Land of Silence and Darkness* is not a sad film. Fini's presence is steadfast as she approaches each situation with nothing but compassion and understanding.

Among those she meets is a certain man-child named Vladimir, age 22, but looking like a boy in his blue V-neck sweater sitting on the floor blowing bubbles and mumbling to himself. He never learned to walk, yet alone communicate, and his life has been lived in one long fog. As with everyone she meets, Fini caresses his face, touching his eyes and ears and places his hands on her face to let him know that she too cannot see or hear and that they're alike. As she begins to teach him some introductory signings on his palm, he seems to awaken, senses some chemistry between them, and digs his fingernails into her palms in a desperate act to communicate. He's shaking back and forth; his eyes are rolling, as he realizes this meeting is something different. When Fini places a portable radio in his lap, he's transformed. Hugging the radio and putting his face to the speaker as if he's listening to the music, he feels the vibrations and senses something magical. Fini surmises that his main problem is that he's bored and that he has the potential for much change.

We meet another deaf-blind child learning how to swim and there's a scene when he's wading in an indoor pool and his teacher lets go of his hand, and the boy reaches out for him. The outstretched hand here is symbolic, so fragile, of this innate need for

human contact. Herzog barely says a word in the film, just a few lines here and there to help introduce people but his camera style is mainly patient and observational. He lets these scenes just run their course which is the opposite of the cut-up style of *Goodbye CP*. This strategy of the long take without cutting recalls the transcendental cinema of so many East European directors and it's what lends this film its poetic aura. This same boy later takes a shower by himself, which is also something new for him, and once he figures out how to handle the rush of steaming water cascades over his body. The scene is another stopper in the film because it's an expression of pure tactile sensuality and it reminds us of how mysterious such an everyday act can be.

But it's the adults that Fini meets where one can interpret the title of the film literally. We meet a 48-year old deaf-blind woman sitting alone in an asylum in a black dress. She's in a cafeteria surrounded by other women who must also be blind or with psychosocial disabilities because they're just sitting there quietly staring straight ahead. It's a strange picture but Fini arrives and instantly humanizes the meeting. As explained, the woman used to know Braille but she has forgotten it and no one wanted her and she ended up at the "neurological clinic" all alone and completely withdrawn from everyone. She hasn't talked to anyone in years and as Fini touches her, she too seems to sense a kindred spirit. Fini takes her hand and begins to trace letters on the table and takes a Braille board and begins to teach her how to use it again. The staff at the asylum marvel that the woman keeps looking at Fini. Herzog closes this section with an inter-title: "When you let go of my hand it is as if we are a thousand miles apart."

The film closes with 51-year old deaf-blind man living with his mother in a home for the elderly. Fini remarks on meeting him that he seems to have dropped off the earth, he's so disconnected. He was deaf by birth but lost his sight at age 35 and has since forgotten how to speak and write. Although, his mother says that a few years before he stepped outside in the winter and reached down and exclaimed: Snow! At one point he felt so rejected by society that he lived with cows for a while in a stable.

They're sitting outside in a courtyard. Fini touches his face and makes contact and begins to communicate with him by signing on his palm. He senses her touch but still seems unmoved. The wind is blowing in the trees and while they're talking about his condition, he gets up and wanders across the yard. It's an autumn afternoon, and as he's walking he runs into some low hanging branches that he follows to the trunk of a tree. There he embraces the tree, hugs it, feels the bark, follows the larger branches, and finally bends over to pick up the fallen leaves. It's a remarkable bit of filming. And Herzog has said that the entire film was meant to lead up to this final moment when this primal connection to nature is made.

The *Land of Silence and Darkness* is a deeply ethical film, with much humility. To interpret it through the lens of human rights is to state the obvious. The *Darkness* is not the specific impairment. It's about the lack of understanding, the ignorance, and the mindset that wanted to let these people disappear without human contact and love. It's that same darkness at Charenton, Bridgewater, and the larger society outside of Archway. It's also all those people who didn't want to see people with cerebral palsy on the streets in Japan. The *Silence* is the silence of society that allowed these things to happen. These five films were foundational because they first broke the silence. They stand out because they were also works of art. They were also transformative

documents in human rights witnessing because they started the change process.

Many filmmakers today continue to represent persons with disabilities and they keep the struggle alive. But all of them are beholden to these astonishing films. To be sure, there would be no international transformation in disability rights and new normative standards of human rights for persons with disabilities without our visual recognition of these issues. This visualization begins with these five films that showed the sorrow, the violence, the rejection, the resistance, and the hope of changing how we perceive those with disabilities.

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NOTES

1. This quote is from a chapter about Peter Brook and the history of avant garde theatre (INNES, 1993).
2. For a detailed study of this idea of empty space, see: Brook (1995).
3. See the account of Brook's theatre openings in the 1960s in: Innes (1993).
4. For more on Artaud's thoughts on how theatre effects audiences, see: Artaud (1994).
5. My reading on the generations of human rights is taken from: Reardon (1995).
6. For a historical timeline on human rights of

persons with disabilities, see: <http://www.hrea.org/index.php?base_id=152>.

7. Please see the timeline on disability rights: <http://www.hrea.org/index.php?base_id=152>.

8. One particular website, breaks up all films about disability rights by theme: <<http://disabilityfilms.tripod.com>>.

9. I draw my conceptual framework approach for human rights from <<http://www.pdhre.org>>.

10. There are many articles about the circumstances at Bridgewater State Hospital during the filming of *Titicut Follies*, see: <<http://reason.com/archives/2007/11/16/let-the-viewer-decide>>.

11. For an overview of the history of this film and the legal issues, see Toby Miller's essay on Wiseman: <<http://www.mcc.murdoch.edu.au/ReadingRoom/7.2/Miller2.html>>.

12. For an overview of the Convention and the actual articles, see: <<http://www.un.org/esa/socdev/enable/rights/humanrights.htm>>.

13. To see the U.N. Convention against Torture, see: <<http://www2.ohchr.org/english/law/cat.htm>>.

14. To read about the case in Paraguay, see: <<http://www.disabilityrightsintl.org/work/country-projects/paraguay/>>.

15. To see the video submission on the case in Paraguay, see: <http://www.witness.org/index.php?option=com_content&task=view&id=227&Itemid=60>.

16. The homepage at the U.N. for this treaty can be found at: <<http://www.un.org/disabilities/index.asp>>.

17. For more R.D. Laing, see his Wikipedia Page: <http://en.wikipedia.org/wiki/R._D._Laing>.

18. To read more of Laing's ideas on the divided self, see his book (LAING, 1969).

19. Taken from the remarks by Kenneth Robinson at the opening of *Asylum* at the Museum of Modern Art in New York in 2010: <<http://surveillancefilms.com>>.

20. See the review of *Asylum* by J. Hoberman, one of the most esteemed film critics working today: <<http://surveillancefilms.com>>.

21. See the book *Camera Obtrusa* by Hara Kazuo and his chapter on the history of making the film *Goodbye CP* (KAZUO, 2009).

22. Please see the chapter on the making of *Goodbye CP* (KAZUO, 2009).

RESUMO

Não haveria mudança transformacional nos direitos humanos para pessoas com deficiência sem a existência de sua representação visual. Este artigo examina cinco documentários dos anos 1960 e início dos anos 70 que iniciaram a visualização das deficiências. Descrevendo os filmes e refletindo sobre as mudanças em relação aos direitos das pessoas com deficiência, o artigo objetiva situar a Convenção das Nações Unidas sobre os Direitos das Pessoas com Deficiência dentro da rica história da prática documentária.

PALAVRAS-CHAVE

Documentários – Direitos humanos – Pessoas com deficiências

RESUMEN

No habría ningún cambio transformador en los derechos humanos de las personas con discapacidad sin el papel de la representación visual. Este ensayo examina cinco documentales fundacionales de finales de la década de 1960 y principios de la década de 1970 que hicieron posible visibilizar las discapacidades. Al describir las películas y reflexionar sobre los cambios en los derechos relacionados con la discapacidad, este ensayo procura ubicar la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad dentro de la rica historia de la práctica documental.

PALABRAS CLAVE

Películas documentales – Derechos humanos – Personas con discapacidad

INTERVIEW WITH LUIS GALLEGOS CHIRIBOGA, PRESIDENT (2002-2005) OF THE *AD HOC* COMMITTEE THAT DREW UP THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

By Regina Atalla, President of RIADIS–*Red Latinoamericana de Organizaciones No Gubernamentales de Personas con Discapacidad y sus Familias* (The Latin American Network of Non-Governmental Organizations of Persons with Disabilities and their Families)

Luis Gallegos Chiriboga was president of the United Nations General Assembly *Ad-Hoc* Committee that drew up the Convention on the Rights of Persons with Disabilities from 2002 to 2005. He is president of the Global Initiative for Inclusive ICTs (G3ICT) and the *Comisión de Diseño Universal* (Global Universal Design Commission). He has won recognition on multiple occasions for his work on behalf of the human rights of persons with disabilities, both in Ecuador and internationally.

Additionally, he has been one of the ten elected members to the United Nations Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment since 2006. He also belongs to the Global Leadership Group on Human Rights and Transnational Corporations.

He is a career member of the Ecuadorian Foreign Service and has held bilateral diplomatic posts in Spain, Bulgaria, El Salvador, Australia and the United States of America. In the multilateral sphere he has been Ambassador, Permanent Representative of Ecuador to the United Nations in Geneva and in New York.

Before performing such an important role (as Your Excellency has in the United Nations in the process of negotiating the new Convention), what experiences have you had regarding persons with disabilities in Ecuador or other countries?

L: Before the Convention negotiating process, I participated as Vice President of the Commission of Human Rights in approving the resolution that began the process of achieving binding rights for persons with disabilities. For many years I have held a deep respect for these people who face extremely difficult situations, many of them unimaginable to those of us without disabilities or to those who have not lived in close proximity to someone who suffers from them. These people encounter many barriers, from everyday problems, such as difficulties in communication, mobility, entering a building or form of transport, to others that are much more difficult to overcome, such as discrimination and



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difficulties in accessing education and health services. These barriers become more complex in developing countries, where the necessary means to serve this vulnerable group in our society are often non-existent.

Nevertheless, despite the obstacles and adversities they have to face and their physical and social limitations, through a huge demonstration of willpower they seek to overcome them and succeed, setting a living example for us all.

How did this experience help you – if it has—when you took on the responsibility of presiding over the *Ad Hoc* Committee in 2002? What led you to open the doors to persons with disabilities to participate so directly in the process (which is recognized as a great success of yours, especially in light of the results achieved)?

L: The country representatives did not really understand the serious problems that affect persons with disabilities. Who better than they themselves to convey their experiences, their problems, the obstacles they face and their needs? Hence the importance and the need for them to take part in the process, so as to achieve a Convention that would serve to improve the lives of over 650 million persons with disabilities around the world. It's difficult to imagine that without the invaluable help of these actors, we could have succeeded in adopting a practical convention applicable to their realities. Opening negotiations to facilitate their participation was one of the greatest achievements of my professional career.

Persons with disabilities and their representative organizations played an active and important role in the treaty's negotiation. What do you think was the key factor in their playing this role? How do you explain how a sector so historically and structurally excluded could perform such a function in the process?

L: The motto of persons with disabilities during the Convention's negotiation, "Nothing about us without us," as well as the active participation of NGOs working in this field and the brilliant work carried out by these actors, great defenders of their rights, taught the international community that in order to have a convention on an issue as complex as disability, due to its specific nature, we had to incorporate representatives from the community of persons with disabilities.

It should be emphasized that in this regard the communication and information network built around the Convention negotiation was very important. There was a length follow-up to each meeting and every issued statement. The meetings' proposals and documents were distributed in the conference room in Braille and in accessible formats and technologies. Sign language was also used. Due to the communications network, what was taking place in United Nations conference rooms in New York was followed by the entire community of persons with disabilities around the world.

In your long and successful diplomatic career, Your Excellency has witnessed many negotiation processes at the UN. How would you generally evaluate the process that ended with the Convention's approval in December 2006?

L: I would be so bold as to say that this process was one of the most successful, not only for the short time it took to complete the negotiation (from 2002 to 2006), considering the standards of the United Nations where the approval

of Conventions can take decades, but above all for the broad participation of states and civil society. Finally, after overcoming the obstacles, the opposition to negotiating a convention and to including civil society in the discussions, we succeeded in obtaining the approval of a convention in favor of the promotion of rights for persons with disabilities. One can be born with a disability or acquire it during one's lifetime for various reasons (accidents, sickness, poverty, etc.), however, when we reach old age, we will all certainly have some kind of disability. For this reason, I think it is a universal Convention that encompasses billions of people and their families.

Drawing up this treaty followed a course previously unheard of at the UN, by creating a Special Committee, a mixed Working Group composed of both States and civil society to draw up a first draft of the Convention. How do you assess this democratizing experience at the UN? Could this be repeated with other conventions? What role did this first draft play in terms of the finally approved treaty?

L: The Working Group formed of representatives from both States and civil society was charged with drawing up a first draft that served as a basis for the Convention. I think that these practices should be repeated at the United Nations because they allow the adoption of instruments that are useful and applicable to the realities of the people on whose behalf they are legislating. The integration of everyone enabled a better result, and I hope that the same "inclusive" system can be used in dealing with other problems.

How do you evaluate the treaty that resulted from this process of negotiation? What is its scope? Do its contents meet your expectations?

L: Although the final results did not fully satisfy the participants in the process, we achieved the goal sought by everyone, the approval of an international instrument that places the rights of persons with disabilities on an equal footing with other people and eliminates discrimination. This instrument incorporates, among other things, provisions that signify that countries must commit to drawing up and putting into practice policies, laws and administrative measures guaranteeing the rights recognized in the convention and to abolishing laws, regulations, customs and practices that discriminate; to combating stereotypes and prejudices and promoting the awareness of the abilities of such people; to guaranteeing that persons with disabilities enjoy all their rights (to life, education, health, work) on an equal basis with all other people. I believe that what emerged was an instrument that permits a "universal language" for all those dealing with issues relating to disability to use as a road map for states and societies.

Does the large number of signatories and ratifications (99 so far) reflect the interest and commitment of States to changing the life conditions of persons with disabilities or is there still an idea that it's good to approve standards relating to persons with disabilities even if they are not complied with?

L: A new chapter in the story was written by those who have been fighting for the universal human rights of persons with disabilities. With resolution 61/106

of December 13, 2006, the United Nations General Assembly approved the International Convention on the Right of Persons with Disabilities, a milestone in the history of the UN and the first global human rights treaty of the 21st century.

So far, the Convention has registered 147 signatories and 99 ratifications, demonstrating the international community's firm commitment to this subject. The Convention, in its 50 articles and Optional Protocol, reaffirms that every person with a disability must be able to enjoy all human rights and fundamental freedoms, and codifies a broad set of rights ranging from civil and political rights to the economic, social and cultural spheres.

What do you think should be the key starting point to effectively apply this treaty in Latin American countries?

L: We are all very aware of the numerous global problems, new and emerging, that affect persons with disabilities. In this complex situation, our firm commitment to the advancement of the rights of persons with disabilities requires a strategic application of the human rights regulations set out in the Convention through actions, resources, institutions and mechanisms capable of responding to the needs of persons with disabilities.

We have to work together to promote the effective application of the Convention. Every one of the region's countries has to teach and convince each person, with or without disability, to join the movement toward a more universal and inclusive society, one that appreciates difference, recognizes diversity and is prepared to challenge the obstacles that still remain.

Poverty and disability are interrelated in a vicious circle. How can the treaty contribute to breaking this vicious circle?

L: The Convention on the Rights of Persons with Disabilities establishes that international cooperation must be used as a fundamental tool in achieving human rights for persons with disabilities. If poverty and its consequences are to be overcome, development policies must take into account the rights of persons with disabilities and this subject must be included in the actions undertaken, always with a focus based on human rights. This will have repercussions for many persons with disabilities living in situations of poverty.

Some countries have already drawn up and sent their first reports (two years) to the International Committee on the Rights of Persons with Disabilities, in compliance with the stipulations of the Convention's Article 35. Some persons with disabilities social movements have worked, or are working on, shadow reports due to lack of rigor in the official ones. What do you think of these initiatives by civil society?

L: The shadow reports drawn up by civil society regarding those presented by countries to the Committees monitoring compliance with the provisions of International Conventions give non-governmental organizations the chance to refute – when appropriate – the States' reports and make recommendations so that both the States and the Committees can take their views into account. The shadow reports also enable action to be taken to find solutions on issues about which they have voiced concern.

I feel that the active participation of civil society in various spheres is of great value.

How do you see the situation of persons with disabilities in our countries in 10 or 20 years from now if the provisions of the Convention are effectively complied with?

L: Ever since the Convention was approved by the United Nations on December 13, 2006 and signing began on March 30, 2007, the region of Latin America and the Caribbean has continued to lead the list of countries ratifying this international instrument, proof of the great interest in and commitment to this subject.

If the countries in the region assume the commitments to which they have agreed with the ratification of the Convention on the Rights of Persons with Disabilities, in 10 or 20 years we will have succeeded in achieving a substantial improvement in the situations of millions of people with disabilities. Those of us who participated in the process took up the challenge confident in the belief that our work would contribute to improving this population group's quality of life. The adoption of this instrument was a demonstration of solidarity and respect. Humanity took a great step forward in terms of universal human rights and all of us hope that in the shortest time possible we will be able to see positive palpable results from its application.

The Latin American Network of Non-Governmental Organizations of Persons with Disabilities and their Families—*La Red Latinoamericana de Organizaciones No Gubernamentales de Personas con Discapacidad y sus Familias* (RIADIS) – founded the International Disability Caucus and participated until the end of the process, bringing the ideas and voices of Latin Americans with disabilities to the treaty's drafting process. It therefore played an active role in promoting the signing and ratification of the Convention. Today RIADIS promotes the treaty's effective application through outreach work, training and advocacy. What do you feel should be the role of organizations such as RIADIS in contributing to making this treaty effective?

L: The Latin American Network of Non-Governmental Organizations of Persons with Disabilities and their Families played a fundamental role in the negotiation process and continues to do so today in the ratification and application of this instrument. I believe that the untiring work of RIADIS is invaluable.

My belief is that the essential elements contributing to the Convention's application are education and the publicizing of its contents at all levels so that people can better understand that only respect, solidarity and inclusion will enable us to improve the societies in which we live.

Lastly, I believe that we have to make clear that what we seek is a change in society—one where we can look in the mirror and clearly see our limitations and overcome barriers so that we have an inclusive society, where being "different" is valued and is not a reason for discrimination.

Ecuador, under the leadership of Vice-president Lenin Moreno has made great advances that are internationally recognized and have made Ecuador an example to the international community. It is a question of changing society so that respect for human rights is the norm rather than the exception.

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