

## **Disability, Society and International Law: The UN Disability Convention as a Catalyst for Change**

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### **Abstract**

*The UN Disability Convention's context, drafting and unprecedented acceptance marked a systematic change in legislative attitude. Inspired by decades of campaigning from disability rights groups, the Convention is reflective of a period of substantial social change. It was apparent that disability was no justification for the removal of an individual's human rights. The resulting Disability Convention is intended to protect the human rights of people with disabilities that had been violated for generations. Yet, closer examination of this unique document illustrates an instrument that is flawed in several key areas. This paper will discuss the changing social attitude to disability and the debate on the nature of disability identity in itself as the contextual backdrop of the Convention. It will also offer explanation of what makes the Convention different to its peers, both in terms of unique construction and monitoring as well as its (debatable) fundamental flaws.*

**Keywords:** *Disability; international law; social binding; stakeholders.*

### **Introduction**

Attitudes to disability are continually evolving and still cause a polarisation of opinion among disabled people. The most significant change in attitude has been momentous shift from the medical model of disability to the social model which gathered pace in the 1960s. This gradual shift in societal attitude to the concept and culture of disability

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provided the backdrop for the legislative transition from non-binding soft law, to rights-based Declarations, culminating in the UN Convention on the Rights of Persons with Disabilities. While international human rights instruments were broadly felt to apply to all, disabled persons were experiencing continual breaches of their human rights which were deemed justified under an outdated concept of disability. This paper aims to provide a summary of the shifting models of disability as well as discussion of disability as a culture in its own right, with examination of the sub-division of attitudes within this culture.

The introduction of the Disability Convention and its Optional Protocol illustrated a decisive turning point in the way disability was legislated for, with the inclusion of disability rights groups within the drafting process for the first time. The United Nations High Commissioner for Human Rights (2010 P.7) stated that “the entry into force of the Convention...and its Optional Protocol in May 2008 marked the beginning of a new era”, yet closer inspection of the Convention would indicate that while there had been legislative change on paper to match a clear change in social perceptions of disability, the reality of this ‘change’ was limited.

The Disability Convention is limited by several factors, the most fundamental issue being its lack of enforceability at international level coupled with states’ ability to decide individually whether the citizen should have a right of legal recourse. Despite its flaws, the Convention’s context still marks a significant shift in the processes of drafting an international instrument via the inclusion of stakeholder participation. It is hoped that while this paper highlights the Convention’s flaws, when placed within the context of ‘continuity and change’, it also illustrates the significance of the unique drafting style of the instrument itself.

### **The Changing “Culture” of Disability**

To understand the aforementioned transition from the medical model of disability to the social model and why such a fundamental change in attitude was sought, it is helpful to understand the culture of disability, as a concept-and its cycle of evolution. It is also

relevant to examine disability as a culture in its own right, as one which creates empowerment through diversity, and not conformity to the social norm. Society's dominant culture has shaped the way people with disabilities are viewed. Historically this has resulted in these individuals being contained within a culture of oppression (Riddell and Watson 2003), where the individual needs to fit into the dominant culture to be considered 'normal'<sup>2</sup>.

Historically, persons with disabilities have been viewed by society as requiring care, sympathy and protection. This "medical" model has been subject to much criticism in recent decades. Much of the criticism stems from the lack of dignity that the medical model provides individuals. Oliver (1990) stated the medical approach to disability is limiting and fails to consider a wider aspect of disability, meaning that medical and other professionals failed to engage people with disabilities in any meaningful way. The fundamental premise of the medical model tends to locate the "problem" of the disability within the individual (Quinn and Degener 2002). Presumptions as to the competency of the individual are based upon this or her medical condition, and not upon their actual capacity to interact. As such, those with disabilities are, under the medical model, to be pitied and taken care of. The by-product of this is that those individuals are given very little autonomy over their own affairs.

The social model of disability began to emerge in the 1960s (Kayess and French 2008) and its roots can be traced from those individuals who had been housed in specialist institutions (Thomas and Smith 2009). The social model highlights barriers to equal inclusion in society as being the cause of disability, rather than the medical condition of the individual. This new approach represented a more modern outlook and aimed to provide people with disabilities with what Quinn and Degener (2002) called an equalisation of opportunities.

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<sup>2</sup> An example of the dominant culture attempting to 'shape' an individual with a disability to fit the social norm is provided by a quote from Baroness TanniGrey-Thompson, Paralympic champion. When discussing her childhood experiences of spina bifida, Baroness Grey-Thompson stated "Doctors were obsessed with me walking. Their attitude was, I must stay on my feet for as long as possible... Everything the doctors did was about keeping me on my feet when it should have been about finding the best way for me to be mobile" Thomas, N and Smith, A. "Disability, Sport and Society" P8-9

The social model is rights-based. It acknowledges that people with disabilities have the same rights as the rest of society and wherever possible, those individuals should be included in decision making where the outcome affects them directly. The social model aims to give dignity back to the individual by allowing each person to utilize his or her previously overlooked human rights, where the medical model had excluded them from decision making. Despite this model providing a substantial shift in the way disability was viewed, the social model is not without criticism. The Disabled Peoples' movement itself has highlighted the social model as failing to provide an understanding of disability which acknowledges physical or mental impairment and how the lives of impaired people are affected by this (Thomas and Smith 2009). This illustrates an example of the contentious nature of what it means to be disabled. While the medical model highlights the impairment of the individual as the cause of disability, the social model highlights that it is society's lack of accessibility that creates the disability, not the individual's impairment. Yet, as the Disabled Peoples' Movement has vocalised, the social model fails to adequately address the idea that impairment itself also requires understanding and that the focus should not merely be upon the social environment. In this respect it may be considered that while the medical condition should not form the sole basis for the concept of disability, it cannot be ignored. Certainly, there is another emerging model of disability which aims to strike a balance between the two; the affirmative model.

Recently, disability studies have seen the emergence of a new model of disability; the affirmative model, as discussed by Swain, French and Cameron (2003). In this the prevailing notion of disability as 'personal tragedy' is addressed primarily around the disability arts movement. The premise of this model very much reflects the perspective that even though barriers to an inclusive society be removed via the social model, society's attitude will for the most part remain unchanged. Consequently individuals with impairment are still viewed as victims of misfortune by wider society, as the social model does not alter the collective psyche (Cameron 2009). This would indeed tie in with criticisms of the social model highlighted by Crow in Riddell and Watson's work (2003).

Crow compares the campaign for disability equality with the struggle for equality in the areas of race and gender. Crow states that removing barriers to inclusion does not

tackle the root cause of the problem, namely, society's attitude to the minority group (Riddell and Watson 2003). Oliver (1990) also grappled with this notion where he states that where disability is viewed as a tragedy, the people involved will be treated as victim of tragic set of circumstances, regardless of the action the legislature or government take to remove physical barriers to equal participation.

The affirmative model seeks to redress this issue by illustrating that the impairment is part of the individual and is what makes that individual unique. The social model has been viewed as the disabled person's response to the medical model (Cameron 2009) yet the affirmative model goes one step further. It portrays the 'disabled' identity as a positive one which society should seek to embrace rather than ignore or seek to eradicate. While this 'disability pride' has the potential to empower people with impairments to embrace their individuality, it can perhaps also result in clashes between those who have embraced their impairment and feel they should not change to meet society's ideal, and those who have embraced their impairment and push themselves to 'compete equally' with the dominant culture.

An illustration of this clash can perhaps be seen in the attempts of South African sprinter Oscar Pistorius to join the South African Olympic team. Pistorius is a double amputee who runs using prosthesis. Former Paralympics champion Baroness Tanni Grey-Thompson has publicly criticised Pistorius' attempts to join the Olympics rather than the Paralympics. It is suggested that treated in this way, the Paralympics could become a "B" event in the shadow of the Olympics themselves. Pistorius' own attitude to this is different. He has always maintained that his ultimate dream is to compete in the Olympics on an equal basis with 'able-bodied' athletes in the same event. This example illustrates two different perspectives, both from elite athletes. Baroness Grey-Thompson subscribes to the notion that disability and impairment should be celebrated as individuality and disability sport should not be relegated to a secondary position. Pistorius has also embraced his disability, but has always aimed to compete in the same event as able-bodied athletes. This is not because he views the Paralympics as a secondary competition, but because he does not wish athletes with impairments to be segregated into their own event, where they are capable of competing against other

able-bodied counterparts. Both attitudes could reflect the affirmative model. Both embrace disability, yet, Baroness Grey-Thompson's view reflects the position of disability as being a culture in itself which should not be eradicated to fit the social norm. Pistorius, however, adheres to the school of thought that a disability need not exclude the individual from equal participation inside the circle of the dominant culture. Their aims are ultimately not so different in that they are both campaigning to raise the profile of disabled athletes. Yet, their means to achieve these aims differ, and illustrate the clash of attitudes between differing disability identities and cultural spheres.

As such, in aiming to ensure persons with disabilities have the same rights as the majority of society, the phrase “individually equal” is often utilised. It is perhaps more appropriate, when applied alongside the affirmative model, that the Stanford (2007) philosopher’s term “equally individual” is more readily used in society today.

### **Pressure for Change**

It is important to consider why the establishment of a disability specific Convention was considered to be appropriate. While the perception of disability as a concept was experiencing a transitional change, the law itself was failing to reflect this. International human rights instruments were deemed to apply to all. Yet, the human rights of persons with disabilities were continually ignored, despite the Universal Declaration on Human Rights stating at Article 1 that “all humans are born free with equal dignity and rights”. Where able-bodied individuals could rely on the protections available under the European Convention on Human Rights, people with disabilities often found their rights being undermined due to their impairment.

A frequently litigated example of where the rights of persons with disabilities may be breached, which is justified under the medical model, involves the children of intellectually disabled parents being removed to state care. In *Kutzner v Germany*, the children had been removed solely on the basis of perception of a social work professional that the intellectually disabled parents were unable to adequately care for their children. The Guardianship Court stated (Para 20) that the children had been

removed “not through any fault of their [the parents] own, but due to the fact that they did not have the required intellectual capacity”. Following lengthy litigation, the children were eventually returned to their parents care six years later, with the court finding that Article 8 of the European Convention on Human Rights had been breached.

The facts of this case echoed what disability rights groups had been highlighting; that while most people could rely on human rights protections, those with disabilities could not. While the children in *Kutzner* were eventually returned back to the care of the parents, the damage that had been done to the parent/child relationship was irreparable<sup>3</sup>. The removal was based upon one person’s belief that the parents’ intellectual disability was tantamount to their inability to adequately care for their children rather than any genuine evidence that this was the case. The children were not at risk of harm.

A further example of the rights of disabled persons being violated (where similar action towards a non-disabled individual would amount to a human rights violation) are children with disabilities into ‘special’ schools on the basis of disability, and not on their capacity to learn. Emphasis has also been given to the legality of aborting an impaired foetus, regardless of the stage of development reached (Swain, French and Cameron 2003).

Disability has, as a consequence of the above examples, been called an invisible element of human rights law as none of the international Conventions mention people with disabilities as a protected category, with the exception of the Convention on the Rights of the Child (Kayess and French, 2008).

This backdrop provided the motivation for disability rights groups to demand change to the law’s approach to disability, and the guarantee that their rights would not be undermined by the medical model. What is of importance within the context of the Convention is that individuals with disabilities are seeking no new rights (Melish 2007), merely that they have equal rights with the rest of society. Disability rights groups

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<sup>3</sup> This area formed part of the argument of the parents. The parents were granted contact with their children six months after they were removed from their care. The contact was to be supervised by eight professionals. The court declared “insufficient reasoning” for the removal of the children from the parental care, yet the parents felt that their children had become alienated from them in this time.

argued that while the human rights instruments themselves offered significant potential, this had not yet been realised (Quinn and Degener 2003:2) The Convention's protections were intended to reflect this.

### **Legislative Transition**

The Convention itself is a unique instrument on several levels. Its rapid negotiation and unprecedented acceptance by the international community (Kayess and French 2008) makes it stand out among its peers. The structure of the Convention also follows the 'Experimentalist' concept of policy making, as examined by De Burca (2010). A brief summary of Experimentalism, provided by Sabel and Zeitlin (2008), is thus: Higher level actors establish framework goals which are ends to be achieved. Lower level actors are given discretion on how they should act to achieve these goals. In return for this discretion, the lower level actors are obliged to report to the higher level actors with respect to their performance. They should also conduct peer review with other lower level actors. Further, and of significant importance for disability rights campaigners, experimentalism promotes the inclusion of stakeholders within the monitoring of the framework goals as their views are considered to be indispensable (De Burca 2010). Applying this experimentalist framework to the Disability Convention, it could be considered that the UN takes the position of the 'high level actor', creating framework goals via the terms of the Convention. The lower level actor may be considered to be the signatory states who accept the terms of the Convention and, perhaps<sup>4</sup>; the Convention's Optional Protocol. The states then conduct peer review on the framework goals with

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<sup>4</sup> The full implications of the Optional Protocol cannot be considered in this paper however for the purposes of further explanation at this stage, signature and ratification of the Convention allows a state to take actions against another state for a violation of the Convention's terms. There is no right for the individual citizen to take action against the state for a violation where only the Convention has been signed. Signature and ratification of the Optional Protocol provides the mechanism for individuals to take action against a state for breaches of the Conventions terms, or its implementing legislation (e.g. The Equality Act 2010 in the UK). The effect of this in real terms depends upon the jurisdiction the citizen is resident in, i.e. whether it is operates as a monist or dualist jurisdiction.

other states, but, vitally, must include stakeholder participation<sup>5</sup> in the reports prepared<sup>6</sup>. As a result of this structure, disabled people are given a platform on which to have their views heard, a concept that was virtually non-existent under the medical model<sup>7</sup>.

Prior to the Convention, legislation offering protection for persons with disabilities was primarily soft law such as the "Standard Rules for the Equalization of Opportunities for Persons with Disabilities". The Standard Rules were drafted against the backdrop of the 1982 World Programme of Action Concerning Disabled Persons and base their moral and political foundation on the International Bill of Rights (Quinn and Degener 2002). Despite this, the Standard Rules have been highlighted as being flawed, not only through their inability to bind states accepting them, but also through their lack of reasonable means to measure progress or, indeed, achieve progress (Justesen, T and Justesen, T 2007). The Rules are further criticised by the non-governmental organisations as being ineffective and have been called a compensatory alternative (Kayess and French 2008) to a binding instrument.

Despite this, the Standard Rules still served as model legislation and their use has continued, even beyond the adoption of the Disability Convention. For example, where continued exclusion of children with disabilities in the areas of leisure and play under the Convention on the Rights of the Child is highlighted, it is suggested that the Standard Rules act a backdrop for the proposed solution, with consideration of ratification of the Disability Convention and its Optional Protocol is a *potential* resolution. This is highlighted by Consideration of Reports Submitted by State Parties under Article 44 of

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<sup>5</sup> Article 35.5 details the process for state reporting with specific mention of the provision of Article 4.3 "State parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations."

<sup>6</sup> The United Kingdom released its draft report in May 2011 which gives the official de-brief on implementation of the Convention's broad themes. However, within the domestic monitoring system, the UK's Equality and Human Rights Commission as well as the Scottish Human Rights Commission will also submit shadow reports based upon independent evidence. The UK's draft report provided opportunity for the public to feedback on issues raised and can be accessed at <http://odi.dwp.gov.uk/docs/disabled-people-and-legislation/un-convention-draft-report.pdf>

<sup>7</sup> The 1971 Declaration on the Rights of Mentally Retarded Persons (discussed briefly later) could be considered a step away from the medical model, as their provisions are more rights based. However, examination of the Declaration reflects an attitude still rooted in the medical model by suggesting that those individuals that do not require to be institutionalised should be placed with foster families.

the Convention (2009). In this respect it could be considered that while the Convention itself offers more adequate legal protection once signed and the Optional Protocol ratified, the Standard Rules are still the first option available to resolve breaches of rights. The implications of the Convention in real terms will be discussed later, however, the above illustrates an underlying issue; that while the Convention offered much and is reflective of a significant change in legislative attitude, the scope of change is undermined by a lack of enforceability meaning the Standard Rules are still utilised as an intermediary code.

By the 1970s, resolutions adopted by the General Assembly and the Economic and Social Council tended to illustrate a gradual movement away from the traditional medical model to the rights based approach. Within the international community, the fundamental rights of persons with disabilities were acknowledged through the Declaration on the Rights of Disabled Persons 1975 and Declaration on the Rights of Mentally Retarded Persons 1971. While these instruments were instrumental in bringing the issue of legislative and attitudinal change to the attention of international law makers, they have been criticised as being paternalistic and for legitimising segregation of the able and disabled via specialist institutions (Kayess and French 2008). While these Declarations reflected a shifting of the tides, they marked only the beginning of the change in legislative attitude.

Talk of a Convention first arose in 1987, with Italy and Sweden providing draft Conventions at meetings in 1987 and 1989. These proposals were never acted upon as the general consensus (and one which tended to pervade the negotiations) was that a binding Convention was not appropriate as the Standard Rules for Equalization of Opportunities for Persons with Disabilities offered adequate protection. Further, the Netherlands and the EU (in contrast to Ireland who continually championed the cause for a binding instrument) felt that the Standard Rules should be developed rather than a fully binding Convention being drafted.

A further concern to the States was that a binding Convention would interfere with their own internal legislation. The United States, for example, already had in place the Americans with Disabilities Act 1990 which was considered an advanced piece of

legislation for the social climate of the time. As such, it was felt that any binding instrument could offer no more than domestic legislation already achieved. Despite these concerns, the United Nations had already begun its own research to examine the necessity for a Convention and, as a consequence, how changing social attitude to disability should be incorporated into the law.

The UN had been taking steps in the background to collect data culminating in two key studies in the 1980s, the first being “Principles, Guidelines, and Guarantees for the Protection of Persons Detained on the Grounds of Mental Ill-Health or Suffering from Mental Disorder” and “Human Rights and Disabled Persons.” The reports highlight what the disability rights groups had been saying for decades; that while other minority groups could rely on the human rights instruments for protection, those with disabilities could not. Despouy (1993 Para. 281(b) stated that “There is no specific body in charge of monitoring in respect of the human rights of disabled persons and acting, whether confidentially or publicly, when particular violations occur.”

It could be considered that despite the rumblings of discontent from some States as to the necessity of the Convention, the UN had already made up its mind that legislative change was required. It was certainly conducting its own research while draft Conventions presented by Italy and Sweden were being ignored by other states.

There were three unsuccessful attempts to persuade the international community that a human rights convention with respect to disability should be developed (Kayess and French 2008). In 1993 a Special Rapporteur was appointed to research for the Sub-Commission of the Prevention of Discrimination and Protection of Minorities (Kayess and French 2008). The Rapporteur's findings claimed that disability was a human rights concern and advised that the United Nations have an active role in the protection of these rights. While the UN had taken clear steps to research the requirement for a Convention and introduce Declarations in its absence, attempts to rectify the lack of enforceable rights were continually thwarted by those states who considered the Standard Rules adequate. While the disability rights groups and the United Nations were pushing for legislative change, they were still met with a degree of resistance. It should be borne in mind that this resistance was due to an uncertainty in part about what in

response to decades of lobbying from interested groups, format the new instrument should take, and was not based solely upon whether or not persons with disabilities were in need of further protection.

In 2001 the UN established an Ad-Hoc Committee to begin the draft of the Convention (De Burca 2010). In 2002 and 2003, The United Nations Ad-Hoc Committee held eight sessions, with consideration given to the drafting of a Convention during the first two meetings, and the second session establishing the working group comprising government and non-government officials. State parties had been obliged to nominate experts, particularly those

with disabilities, to serve on the UN Committee which had been charged with supervising the implementation of the Convention (Melish 2007). The intentional inclusion of individuals with disabilities to the drafting process cannot be overstated. No longer were the law makers legislating on behalf of others, but were encouraged to actively involve those with disabilities in the processes which would affect them directly.

The first meeting of the Ad-Hoc Committee concluded with three critical decisions made (De Burca 2010). It was decided that accredited non-governmental organisations should be permitted to attend and participate in public meetings of the Ad-Hoc Committee and make statements in accordance with UN practice. This was later expanded upon to allow the NGOs to attend formal and closed meetings, as well as allowing them extensive formal representation in the working groups. This allowed them to become full, active members in the negotiation process (Melish 2007). It was acknowledged during the drafting process that the UN Diplomats lacked expertise to draft a Convention with respect to disability and the inclusion of disability organisations was intended to reflect this.

The second decision of critical importance was that states had been encouraged to invite the participation of persons with disabilities at meetings as well as home consultation (Melish 2007) which provided comments and individual perspectives on the proposed measures. This operated alongside a requirement that member states were not only encouraged, but also obliged to include persons with disabilities as either official heads of their delegation, or as official advisers (Melish 2007). Significant input

was also sought by national human rights instruments (De Burca 2010). De Burca (2010) points out that while some aspects of experimentalism can be found in other international treaties (such as periodic reporting<sup>8</sup> and articulation of rights in broad terms), the inclusion of stakeholders and non-governmental organisations promoted by experimentalism are unique to the disability Convention.

The third critical decision reached at the first meeting was the creation of the UN Voluntary Fund on Disability. It was accepted that some states were better placed than others not only to negotiate the Convention, but also include NGOs and individuals in these processes. As a consequence, the Fund supported the participation of experts from the least developed countries. Melish (2007) states that this move had a “profound impact on the way the treaty was negotiated, both in terms of substance and process.”

The importance of the inclusion of disabled people in the drafting of the Convention cannot be overstated. Contextually, the Convention arose from a significant change of attitude towards disability, yet the drafting itself also marked the first time stakeholders to the Convention had been allowed such a significant input in drafting its terms.

The shift in the way disability was legislated for was reflected not only in the Convention’s drafting and context, but also within its process of monitoring its function. Monitoring negotiations were discussed at the seventh session of negotiations and have been considered one of the most challenging areas of negotiation (Kayess and French 2008).

The monitoring processes themselves generated a significant volume of debate with non-governmental organisations and others of the Asia Pacific Forum of National Human Rights Instruments arguing for a more innovative system (De Burca 2010). Echoing debate that surrounded the necessity for a binding instrument, several states were in favour of the UN's proposal for an integrated monitoring body at UN level, while other states felt previous UN monitoring mechanisms were a failure in practice (De

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<sup>8</sup> The Convention on the Rights of the Child requires reporting within two years of the Convention’s entry into force for the state party concerned and thereafter every five years whereas the Convention on the Elimination of Discrimination against Women requires reporting within one year of the Convention entry into force and thereafter every four years.

Burca 2010). Further areas of concern were raised when some delegations opposed the idea of establishing a new treaty body and a separate monitoring framework on the basis these were inconsistent with current treaty reform initiatives (Kayess and French 2008). Mexico acted as the informal lead to resolve the issues with the resultant effect that that individual complaint procedure against a violating state would be allowed by means of an Optional Protocol (Kayess and French 2008). Where the state has not ratified the Optional Protocol, the sanctions available against one state were to be actioned by another. While the ability of the individual to raise an action for a violation was not without criticism (discussed later), it still reflected a desire for change in legislative attitude. Acknowledgement was given to the failings of previous UN monitoring systems and a remedy had been sought. This serves to illustrate that the Convention was not merely a 'new' instrument in wording, but also in substance.

### **A Catalyst for Change?**

The Convention promised much and appeared on paper to be offer the protections the disability rights groups campaigned for. Its position as an international human rights instrument gave it status and yet, further examination of the Convention would indicate that it is perhaps not as effective in reality as it appears on paper. In this respect, the Convention reflected only a partial change in attitude. Contextually, the Convention is reflective upon a genuine desire for change, but it would appear that the drafters have balanced change in attitude with a necessity to appease those states who did not want a binding instrument. Analysis of the Convention illustrates that despite its promise, it was not an instrument which can be relied upon for absolute protection, contrary to how it appears on the surface.

Firstly, the Convention itself defined disability from a social<sup>9</sup>, not a medical, perspective (De Burca 2010). This in itself was not an issue, given that the instrument is intended to reflect the social model. However, defining disability has always been a

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<sup>9</sup> "Recognizing that disability is an evolving concept, and that disability results from the interactions between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others" Contained within the preamble of the UN Disability Convention.

controversial issue, not only what a disability is, but also where disability differs from impairment. While the Convention defines disability from the social perspective which is perhaps to be expected, the Americans with Disabilities Act 1990<sup>10</sup>, and the very recent Equality Act 2010<sup>11</sup> define disability from what could be considered the medical model<sup>12</sup> creating an interesting comparison. This is potentially due to the legal implications of maintaining the open-ended and flexible social model definition within internal legislation. By restricting the definition to those who have a “substantial or long-term” impairment, this may prevent the floodgates from opening and paving the way for litigation from those who may consider themselves to be impaired but disabled by society (as per the Convention’s definition), where the domestic law would not consider them so. The Office of the High Commissioner for Human Rights Guidance for Human Rights Monitors, however does not preclude the use of a definition within national legislation, particularly where definitions may be necessary, e.g. in the context of employment.

The EU was opposed to the inclusion of a definition within the Convention arguing that it would be difficult to reach agreement on it. A compromise was reached which De Burca (2010 P.191) calls "a soft threshold definition in the form of guidance, which is open-ended and inclusive". A flexible approach to defining disability is typical of the experimentalist (Sabel and Zeitlin 2008) nature of the Convention and it tends to prioritise adaptability (De Burca 2010). However, a traditional human rights perspective tends to prevail and the consensus would be that a lack of definition could be considered a way of avoiding any real commitment (De Burca 2010).

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<sup>10</sup> S12102 defines disability as “The term “disability” means, with respect to an individual (a) a physical or mental impairment that substantially limits one of more major life activities of an individual, (b) a record of such an impairment or, (c) being regarded as having such an impairment.

<sup>11</sup> S6(1) defines disability as “A person has a disability if (a) P has a physical or mental impairment and (b) the impairment has a substantial and long term adverse effect on P’s ability to carry out normal day-to-day activities.”

<sup>12</sup> Both definitions provided above highlight the individual’s medical impairment as the limiting factor, and not society attitude to the impairment as being the cause of the disability.

Despite the Convention's open ended definition<sup>13</sup>, it has been criticised and become entrenched causing the confusion between disability and impairment, as Kayess and French (2008) note. Their study further illustrates that a disability could be considered a limitation resulting from social oppression, while impairment is a characteristic of the individual. Kayess and French (2008) state that the Convention uses the term persons with disability, where persons with impairment is meant.

Kayess and French (2008) further elaborate that the logical progression from this was that the protection that the Convention offers was triggered by disability, rather than impairment. As a consequence, protections available under the Convention were limited to those who had already experienced discrimination (through a disability), rather than those who are at risk (through their impairment) of being discriminated against. The Convention is therefore not as inclusive as it was intended to be and could potentially restrict the rights contained within it to only a portion of the collective group it is intended to protect.

A further area of concern was the phrase that was often utilised during the negotiations and following the Convention's acceptance; legally binding (Hums, *et al*, 2007). As mentioned previously the Convention was drafted to create an international instrument which established the binding obligations the Standard Rules failed to provide. As also illustrated, the states involved in the drafting process were engaged in debate as to how binding the Convention should be. While the Convention sells itself as a binding instrument, it is far less legally binding in practice than it appears on paper. Elise Roy (2007 Para. 9) states that many scholars feel that labelling any human rights convention as 'legally binding' is a misnomer and examination of enforcement of the Disability Convention reflects this.

There are barriers which prevent the Convention being enforced effectively, even where states have signed with the 'unprecedented enthusiasm', as Melish (2007) stated was the reaction to the instrument. At the international level, enforcement is of a

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<sup>13</sup> "Recognizing that disability is an evolving concept, and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others" (Preamble to the UN Disability Convention).

horizontal mechanism with no courts or compulsory jurisdictions. The Articles of the Convention are, as stated by Roy (2007 Para. 10) merely “primary rules without secondary rules of legislative, adjudicative and enforcement procedures”. Indeed, Roy (2007) goes on to highlight the sanctions that can be placed upon States in breach of the Convention (where the Optional Protocol has not been signed). These sanctions are limited to public exposure of the State’s practices, and have non-governmental organisations submit shadow reports. It could perhaps be considered that States with poor human rights records who have little regard for international condemnation which will not be particularly concerned about the sanctions that are placed upon them are the “top” end of the enforcement and monitoring structure. To further this point, the general public have no right of legal recourse where the State has not ratified the Optional Protocol, with the United States being the chief example. While it cannot be denied that disabled citizens in the US have substantial protection under domestic law, it does illustrate a further restriction on how far the Disability Convention can be considered legally binding. This could perhaps be contrasted with the European Convention on Human Rights, where individuals have a right of recourse<sup>14</sup> irrespective of any further measures that may be envisaged for the State to adopt.

Consequently, the concerns of Leandro Despouy (1993 at Para 281(b)) still ring true in that disabled people “do not have an international control body to provide them with further and specific protection”. While this comment pre-dates the Convention itself, the broad theme of concern still remains appropriate; disabled people do not have the same depth of legal protection as other minority groups, with the individual right of recourse dependent upon whether the state accepts to be bound to this provision, via the Optional Protocol.

A further issue on the concept of the legally binding, and one which Roy (2007) also highlights, is the ability of signatory states to ‘opt out’ of provisions prior to accepting the terms. The United Kingdom entered four reservations prior to acceptance, under work and employment (Article 27), education (Article 24) and movement and nationality

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<sup>14</sup> Article 1 of the European Convention on Human Right states that, “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.”

(Article 18)<sup>15</sup>. The Universal Declaration on Human Rights states at Article 1 that all humans are born free with equal dignity and rights. It is therefore open to question why it is deemed acceptable for a state to select which rights it is to be bound to protect when the group affected are those with disabilities, whereas those without disabilities are protected under the Universal Declaration on Human Rights, and states cannot pre-select which articles they will be bound by.

### **Conclusion**

The Convention's context, drafting process and acceptance offered much hope for changes in the way in which disability was viewed and legislated for. While the Convention appeared on paper to offer the protection disability rights groups have been seeking for decades, further examination reveals it to be an instrument that is limited in its ability to bind states. Despite its status as an international binding instrument, much discretion is still given to individual states to determine which terms they agree to be bound by, which sanctions are employed for violating the terms and whether or not they choose to give their citizens a right of legal recourse via the Optional Protocol.

Despite this, it is perhaps worth recognizing the Convention in contribution to the process of 'continuity and change'. Disability rights groups succeeded in achieving their aim of bringing the issue of human rights breaches to international attention. Their actions marked a systematic change in how disability is viewed and legislated for. The Convention itself marked a turning point in how international human rights instruments were drafted through the use of stakeholder participation. Yet, despite the change in the

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<sup>15</sup> These reservations are justified by the UK in several ways. Article 18 (Freedom of Liberty and Movement) does not give any new or additional rights to remain in the UK, As such, it was felt that to properly comply with immigration rules, this reservation was necessary. Article 24 (education) contains a reservation to allow, where applicable, a child's education to be conducted outwith the local community. The UK argues that this reservation allows a child to access more appropriate education if it is not available in their local area. It also provides the child's parents with respect to which school their child attends. Finally Article 27 (Work and Employment) contains a reservation with respect to employment within the armed forces given that "Armed Forces personnel must be combat effective in order to meet a world-wide need to deploy, and to ensure that military health and fitness remain matters for the Ministry of Defence Ministers." Detail found in Office for Disability Issues draft UK Initial Report on the UN Convention on the Rights of Persons with Disabilities May 2011. Available: <http://odi.dwp.gov.uk/docs/disabled-people-and-legislation/un-convention-draft-report.pdf>

nature of the legislative attitude to disability, the echoing advice of the affirmative model should be borne in mind; that while the law can legislate against the discrimination of those with impairments and disabilities, it is limited in how it legislates for the collective attitude of society.

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