

HUMAN RIGHTS LEGAL INSTRUMENTS ON DISABILITY

PhD Candidate *Anna Maria NEAGOE**
SNSPA

Abstract

A number of international documents claim that disability was reclassified as a human rights issue, the last and most important is the Convention on the Rights of Persons with Disabilities which applies human rights to disability, stating in a legal instrument the right to have rights. In some cases, the content of existing rights, when it comes to people with disabilities, is fundamental enriched and changed often by recasting them. In other cases, new categories of rights are promoted significantly extend some existing rights, so that, ultimately, to create new rights specific to persons with disabilities.

National laws and policies must take into account the general principles and obligations provided by the international documents on human rights because the disability legislation based on human rights acts as a "civilizing factor" in any society *that respects diversity and aims to create a truly open society for all*.

Keywords: Disability, persons with disabilities, human rights, international conventions and instruments, Convention on the Rights of Persons with Disabilities

1. Disability, a human rights issue

With the paradigm shift from the medical approach to the social, disability, one of the discrimination criteria which accompanied evolution of humanity from the ancient times, has been reclassified as a matter of human rights reforms in this field, designed to provide opportunities equal for people with disabilities. The evolution of civil rights legislation for persons with disabilities has determined the evolution of national legal paradigms, from legislation based on providing benefits to the civil rights. This new dimension of disability law represented an important landmark on the way to the recognition of human rights for people with disabilities, a way that more and more governments seem willing to go through.

The last decades have been characterized by the involvement of more active persons with disabilities in the affirmation of power and confidence in their abilities to carry an independent life, their efforts being supported by the United Nations.

2. Human rights legal instruments in the field of disability

A number of international documents have highlighted that disability is a human rights issue:

► United Nations Charter (1945) which recognizes the inherent dignity, value and equal and inalienable rights for human as a fundament of freedom, justice and peace in the world;

* PhD Candidate, SNSPA, beneficiary of the project "Doctoral and postdoctoral scholarships for young researchers in the fields of Political Science, Administrative Science, Communication Science and Sociology", financed by the ESF - OPHRD 2007-2013 - Priority 1: "Education and training in support for growth and development of knowledge based society" Key area of intervention 1.5 "doctoral and post-doctoral research support".

► Universal Declaration of Human Rights (1948), the first international instrument provided civil and political rights and economic, social and cultural rights that should be enjoyed any person, underlining the importance of protecting them in a legal system. Not being a legal act, so, not having the legal power of a treaty, however, in time, the Declaration has been used as a reference document that includes minimum standards on human rights. Text is imposed as including the concept of the international community the field, being relied whenever there were flagrant violations of these rights. Therefore, perhaps with reason, it was considered part of customary international law¹.

The 30 articles of the Universal Declaration of Human Rights sets out basic human rights and fundamental freedoms that can claim without discrimination of any kind, which can be grouped as²:

- First category of rights is considering the rights and freedoms of personal conditions: life, liberty, security and dignity, equal protection before the law, the guarantee against slavery, torture, arrests and arbitrary punishment, judicial redress against abuse;

- The second category concerns individual rights to its relations with groups to which belongs and the elements of the outside world: man and woman have, in conditions of equality, the right to marry, to found a family, to have a home, an asylum from persecution

- The third category is the one of spiritual faculties, freedom of expression, meeting, association, the right to take part in public affairs and to participate in the fair periodic elections, the will of the people being proclaimed as a fundament of public power authority.

- The fourth category is that of economic, social and cultural rights: the right to work, to free choice of employment, social security, trade union freedom and the right to education, leisure, cultural life, the protection of intellectual or artistic creation.

► International Covenants on Human Rights (International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights) declares universal the right to self-determination and reaffirms equal right that it is both man and woman to enjoy all the rights. The Covenants arose from the statements of Universal Declaration of Human Rights – the ideal of free human beings enjoying civil and political freedoms and released of fear and misery cannot be achieved only if conditions are created whereby everyone may enjoy his civil and political rights as well as economic, social or cultural rights".

The covenants also provide safeguards against unlawful suppression or restriction of human rights or fundamental freedoms and against their misinterpretation of the provisions to justify the violation of a right or freedom.

► International Convention on the Elimination of All Forms of Racial Discrimination reaffirmed its conviction that discrimination between human beings on grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations

¹ A. Kiss, *Le role de la Declaration universelle des droits de l'homme dans le developpement du droit international*, ONU, Bulletin des droits de l'homme, 1988, p. 51.

² I. Moroianu Zlătescu, *Drepturile Omului – un sistem în evoluție*, p. 79-80.

between nations, being capable of disturbing peace and security among peoples and the harmonious coexistence of people in the same state, so that State condemn racial discrimination and undertake to follow through every appropriate means and without delay a policy of eliminating all forms of racial discrimination and promoting understanding among all races;

► International Convention on the Elimination of All Forms of Discrimination against Women was built on the premises that discrimination against women violates the principles of equality and human dignity, prevents the participation of women, on the same terms as men, in the political, social, economic and culture of their country, creates obstacles to the growth of the welfare of society and family and prevents women to serve their country and humanity in the fullness of their possibilities. Convention requires States to take appropriate measures to eliminate discrimination against women in political and public life, in terms of education, employment and health.

► Convention against Torture and Other Cruel, Inhuman or Degrading requires each State to take appropriate legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. The "torture" is defined as any act which causes a person intentionally, strong pain or suffering, physical or mental, especially in order to obtaining from that person or a third person information or a confession, punishing for an act that the person has committed or is suspected of having committed, intimidating or put pressure on a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by an agent of the public authority or any other person acting in an official capacity or at the instigation of its consent or acquiescence of such person.

► Convention on the Rights of the Child defines a child as every human being below the age of 18 years, guaranteeing the rights to all of the children under the jurisdiction of the States Parties, without distinction of race, colour, sex, language, religion, political or other opinion of the child or of the parents or of his/her legal representatives of their national origin, ethnic or social origin, his/her material situation of disability, birth or other status.

For the United Nations system, the 1970s represented a new stage in addressing disability, the concept of human rights of people with disabilities being increasingly used internationally more.

2.1. Declaration on the Rights of Mentally Retarded Persons (1971)

Adopted in 1971 by the General Assembly, Declaration on the Rights of Mentally Retarded Persons provided the framework for the promotion and protection of rights of persons with intellectual disabilities, thus affirming that they have the same rights as others, including the right to adequate medical care, education, economic security, qualified guardian for protection against exploitation and access to legal procedures. The document also considers that, as much as possible, persons with intellectual disabilities should live together with their families and should participate at different times of community life.

The document also states that, for mentally retarded persons who, because of the severity of the impairment, are unable to exercise all rights in a meaningful way should become necessary to restrict or prohibit some or all of these rights. The procedure used for this must contain proper legal safeguards against every form of abuse, be based on an assessment of social skills of mentally retarded person by qualified and subject to regular review and appeal to higher authorities.

2.2. Declaration on the Rights of Disabled Persons (1975)

Adopted in 1975 by the General Assembly, Declaration on the Rights of Disabled Persons considered the necessity “of assisting disabled persons to develop their abilities in the most varied fields of activities and of promoting their integration as far as possible in normal life“. Thus, establishing that “disabled person means any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities.”, the document recognizes the right to respect for human dignity whatever the origin, nature and seriousness of the impairments and its disorders.

According to the document, disabled persons have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible: the right to medical, psychological and functional treatment, including prosthetic and orthotic appliances, medical and social rehabilitation, education, vocational training and rehabilitation, aid, counselling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the processes of their social integration or reintegration. Also disabled persons have the right to economic and social security and to a decent level of living.

Moreover, the document affirms the right of disabled persons to live with their families, to participate in social events, to be protected against all exploitation, abuse or other degrading treatment, to receive qualified legal aid when such aid proves indispensable for the protection of themselves and their property to be fully informed, by all appropriate means, of their rights.

2.3. World Programme of Action concerning Disabled Persons (1982)

Adopted in 1982 by the UN General Assembly, the World Programme of Action concerning Disabled Persons emphasizes the need to approach disability from a human rights perspective.

The central theme is "the equalization of opportunities" which means that permanently disabled person who need support services in the community, help and equipment to lead a life as close to normal both at home and in society, should have access to such services. Those who live with disabled persons and help them in their daily life should be also supported for the benefit of rest and relax and to be able to care for their own needs.

Furthermore, the document states that as disabled persons have equal rights with the other, they also have equal obligations. It is their duty to participate in the construction of society. Thus, young disabled persons must be provided with opportunities to have a career, not to be in institution and live in state aid.

The implementation of the Program requires integration into national policies of long-term strategy for economic development of prevention activities which relate to the development and use of technology for the prevention of disability, and legislation to eliminate discrimination in respect of access to services, social security, education and employment.

Also, the Program highlights the necessity to create in each state a distinct body with the role of coordinating national strategies and policies for the protection of persons with disabilities

2.4. Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993)

The Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the UN General Assembly on December 1993, was drafted as a result of experience gained during the United Nations Decade of Disabled Persons (1983-1992) who tried to define disability as the relationship between persons with disabilities and their environment, the imperative to remove social barriers that prevent full participation of persons with disabilities becoming increasingly recognized.

The concepts taken over by the Rules are usually those of the Universal Declaration of Human Rights, the International Covenants on Human Rights, the Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination against Women and World Program of Action on concern Disabled Persons.

Although "the rules are not mandatory, they can become international customary rules when applied to a large number of states with the intention to respect the rule of international law", their purpose being "to ensure that girls, boys, women and men with disabilities, as members of society to which they belong, may exercise the same rights and obligations as others. It is the responsibility of states to take appropriate action to remove the barriers that prevent persons with disabilities to exercise their rights and freedoms and making it difficult to participate fully in activities in the society to which they belong ". The 22 rules are grouped into three categories:

- The first category is the one of preconditions for equal participation: raising awareness, care, rehabilitation, support services,

- The second category of rules includes areas targeted for equal participation: accessibility, education, employment, income support and social security, family life and personal integrity, culture, recreation and sport, religion,

- A third category of rules includes measures for implementation: information and research, policy and planning, legislation, economic policies, coordination of work, organizations of persons with disabilities, national monitoring programs and assessment of disability, economic and technical cooperation, international Cooperation

Standard Rules states also the active role that persons with disabilities and their organizations as partners have to play in this process.

Furthermore, the rules provide for a monitoring mechanism to support the implementation of these and require the appointment of a special rapporteur to establish direct dialogue between Member States, local non-governmental organizations and other intergovernmental bodies, in order to implement them.

The rules have prepared the ground for an approach of disability in terms of rights and have allowed a significant change of position, from the social protection to rights for people with disabilities in a global context.

Although the rules are not binding for UN member states, they involve moral and political will for action.

Moral authority of Standard Rules allowed the legitimate paradigm shift which demonstrates that it is possible and beneficial, both for individuals and for their communities. If there is a wider message for the disability rights movement, it is that citizenship involves equally effective access for all dimensions of life.

2.5. UN Convention on the Rights of Persons with Disabilities (2006)

The adoption and entry into force of the UN Convention on the Rights of Persons with Disabilities (CRPD) marks a profound change in existing approaches on disability: the focus is not put on the "seen imperfection" of the person, on the contrary, sees disability as a "pathology of society", which is the result of the failure of societies to be inclusive and accommodate individual differences. Society must change, not the individual, and CRPD provides a "road map" for such a change

Entry into force of the CRPD, the main international legal instrument to fight discrimination against people with disabilities, marked the beginning of a new stage in efforts "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."

CRPD, the latest and most detailed recognition of human rights for persons with disabilities – underlines civil, cultural, political, social, and economical rights of persons with disabilities.

Although persons with disabilities have always been entitled to have the same rights as everyone else, this is the first time that their rights are comprehensively laid down into a binding international instrument, CRPD applying human rights to disability, thus making the general human rights to be specific to persons with disabilities, and clarifying existing international laws on disability.

Rightfully, the document has generated extraordinary expectations in terms of support for persons with disabilities around the world, whose rights were often repeatedly and systematically violated, being a very subtle mix of old and new, which confirms existing rights and reinforces the idea that, at least in part, specific treaties to a group are necessary, to consider its irreducible experience regarding the exercise of rights. To some extent CRPD, simply reaffirms the applicability of existing human rights to persons with disabilities in an anti-discrimination perspective.

In part, the CRPD is a way to say into a legal instrument a number of rights which are addressed in other human rights treaties, protected internationally, civilian, political, economic, social and cultural rights, States having the general obligation to promote, protect and ensure the full and on equal terms of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity. Thus, the CRPD affirms right to have rights, solemn recognition, unambiguous and the long awaited of the absolute equality of persons with disabilities to all other people.

The first general principle of the Convention, which requires "respect for the inherent dignity" of persons with disabilities, is revealing; it represents, in fact, the

fundamental premise which the rights flow in the traditional way. In addition to the recognition of rights for persons with disabilities, the CRPD is built on other twin pillars: equality and non-discrimination.

The idea of equality confirms the application of human rights for persons with disabilities, rather than creating new rights.

Although the CRPD is not specifically described as an anti-discrimination convention in the same template as the other, there is no doubt that a concern about discrimination is at its core because the preamble states "the need for persons with disabilities to be guaranteed their full enjoyment without discrimination" (Preamble, point c) and points out that "(...) discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of human" (Preamble, point h).

Also, the CRPD fundamentally enriches and modifies existing content rights when it comes to persons with disabilities, often by reformulating them. Thus, anti-discrimination affirmed by the CRPD, is more than a solemn reaffirmation of the obvious (or what should be obvious), by highlighting a number of key features of the rights provided in this document, nonspecific main tools international human rights..

First, the treaty clarifies how the rights apply to persons with disabilities: for example, the right to equal recognition before the law assumes that persons with disabilities should have access to appropriate measures to ensure access for persons with disabilities to the support they may require in exercising their legal capacity and legal capacity that must be protected by measures that provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law.

Other rights are also significantly reformulated: *the right to liberty and security of persons*, which implies that "the existence of a disability shall in no case justify a deprivation of liberty"³; *the right to liberty of movement and nationality* implies that people with disabilities will not, as a result of their disability, be deprived of their nationality, or of "the ability to obtain, possess and utilize documentation of their nationality," or the "right to enter their own country"; *freedom of expression and opinion, and access to information* is specified as including "freedom to seek, receive and impart information and ideas (...) through all forms of communication of their choice". *Respect for privacy* implies being protected "regardless of the place of residence" and specifically includes "the privacy of personal, health and rehabilitation information of persons with disabilities"; *respect for home and the family*, points out that people with disabilities have the right to "decide freely and responsibly on the number and spacing of their children" and "to retain their fertility on an equal basis with others"; content of the rights to *education, health, work and employment, adequate standards of living and social protection* are all spelled out in detail in a way that meets the needs of persons with disabilities.

CRPD makes an effort to highlight important and sometimes detailed measures to be taken in order to promote, protect and ensure the full and equal rights. There are many references to "appropriate action" or "adopt immediate, effective and appropriate measures". All these appear clearly as obligations of the state, rather than human rights themselves.

³ CRPD, art. 14, 1, b.

In some cases, the CRPD promotes new categories of rights that significantly extend some existing rights. Many of CRPD provisions go further than simply restating those contained in previous documents, capturing other rights that were not identified as such in the main international human rights instruments.

These rights are not entirely new and are indeed rights of all human beings, but the special circumstances of disability made it necessary to include them in the document. For example, Article 16 "Freedom from exploitation, violence and abuse" or "the right to full and effective participation and inclusion in society", including the right to participate "in political and public life" (which is not referred to, as such, in other existing human rights instruments, but is another way of describing political rights) and the right to participate "in cultural life, recreation, leisure and sport", are rights that were amplified in the context of disability, to such an extent that, for example, "participation in political and public life" includes the obligation for states to actively promote "an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs".

The entire CRPD is infused with the notion of "participation" that appears as something similar to a general right. This law goes beyond participation, is presented as the ability to stand and vote for public office, for example, or to particularly participate to the cultural life, recreation, leisure and sport, rather being a broader request that is not only incumbent on the state but also on society in order to enable people with disabilities to be full members of society.

Very closely related to the notion of participation (and, in itself, a new incontestable right) is the right defined in Article 19 – *living independently and being included in the community*. Again, this is a right that is not protected in any of the existing international instruments on human rights.

The CRPD goes deeper into its approach, by extending all known and existing rights, with a top layer of rights whose objective can be seen as the protection people with disabilities from some of the deepest causes of violations of their rights. It is less clear whether these are rights that are specific to people with disabilities, or simply rights that exist in one form or another for all human beings, but whose existence must be emphasized in this context of the specific vulnerabilities of persons with disabilities.

Finally, CRPD is very close to creating new rights, specific rights for people with disabilities, going beyond simply extending existing rights, by formulating new rights specific to them, not framed as such. The most significant example is the "individual autonomy" which, although is not defined in CRPD, refers to the ability of disabled people to do things on their own without the help of others, and is related to the right to be "free to make one's own choices". The idea of autonomy is linked to *personal mobility* and *accessibility*, the right to *living independently and being included in the community*, to the measures for "habilitation and rehabilitation", which aim to allow the persons "to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life", but especially to the recognition of legal capacity of persons with disabilities which is actually the climax.

Indeed, the autonomy makes an individual be able to enjoy rights. There is a sense in which autonomy means something very different for people with disabilities, meaning that it has a very different sense in terms of rights. Autonomy is actually a form of human right which has its meaning in relation to specific vulnerabilities of persons with disabilities.

CRPD focuses on empowerment of society towards persons with disabilities. The society is obliged to make efforts to ensure life in dignity and equal opportunities to all its members and must consider the environment which the one who decides what effect a impairment may have on the daily life of the person.

The adoption and entry into force of the document marks a profound change in the existing approaches on disability. In the CRPD, the emphasis is not put on the seen "imperfection" of the person, but, on the contrary, disability appears as a "pathology of society" which is the result of the failure of societies to be inclusive and accommodate individual differences. The society must change, not the individual, and the CRPD provides a "road map" for such a change, in the preamble is recognized that "disability is an evolving concept and that it results from the interaction between persons with disabilities and barriers of attitude and environment that hinders their full and effective participation in society on an equal basis with others " (lit. e).

Also, States should consult persons with disabilities and their representative organizations when developing laws, policies, and programs to implement the document. Convention requires any public and private organizations to be "reasonably adapted" to the situation of persons with disabilities. The document is accompanied by an Optional Protocol which, in case of ratification, it provides a procedure for complaint and investigation, which can be submitted to the committee that monitors the treaty.

3. Conclusions

The CRPD advances legal reform of disability directly involving persons with disabilities and using the human rights, the basic message being that persons with disabilities should not be seen as "objects" to manage, but "subjects" that deserves equal respect and human rights.

Although important, inclusion on the public agenda of discrimination does not cover the full spectrum of issues affecting the full respect of human rights of persons with disabilities. Anti-discrimination law is an indispensable tool, but it must be recognized that although legislation may provide rights for persons with disabilities, are necessary measures to ensure the full exercise thereof. A disability legislation based on human rights acts as a "civilizing factor" in any society that respects diversity and aims to create a truly open society for all.

Bibliography:

1. Degener, Theresia, and Quinn, Gerard. 2000. *A Survey of International, Comparative and Regional Disability Law Reform*. M.L. Breslin and S. Yee (eds.), *Disability Rights Law and Policy: International and National Perspectives*.
2. Kiss, Alexandre. 1988. *Le role de la Declaration universelle des droits de l'homme dans le developpement du droit international*, ONU, Bulletin des droits de l'homme.
3. Megret, Frederic. 2008. *The disabilities convention: human rights of persons with disabilities or disability rights?*. 30(2) Human Rights Quarterly.
4. Zlătescu, Moroianu, Irina, 2008. *Drepturile Omului – un sistem în evoluție*. București, Editura IRDO.
5. Organizația Mondială a Sănătății și Banca Mondială. 2001. *Raportul Mondial privind Dizabilitatea*.