

Human Rights of Persons with Disabilities

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1 Introduction

The International Convention on the Rights of Persons with Disabilities (CDRP) adopted by the United Nations General Assembly on 13 December 2006 is the most recent human rights treaty and also the first UN human rights treaty of the twenty-first century. Even though it is the first legally enforceable UN instrument specifically directed at the rights of persons with disabilities, it is, however, not the only human rights convention or legal instrument of importance to all persons with disabilities. At the European level, the protection provided by the EU equality directives was in 2000 extended beyond gender equality to include also disability, and Protocol 12 of the European Convention on Human Rights extends the sphere of protection against discrimination under the Convention.¹ Moreover, the rights of persons with disabilities are increasingly conceptualized as a non-discrimination issue under the revised European Social Charter.

Persons with disabilities are not a homogeneous group. For example women with disabilities often encounter a lot of problems; they are discriminated against on the ground of both disability and gender. I am of the opinion that there is an insufficient level of awareness of this twofold source of discrimination. Discrimination between men and women with disabilities is basically of the same type as discrimination between men and women in general. It is based on different roles traditionally assigned to men and women. Therefore, women with disabilities often have difficulties in attaining economic self-sufficiency and equal access to education and training. For women with disabilities it is even more difficult than for women without disabilities to earn their living independently.²

Children with disabilities, too, form a specific group in need of appropriate measures. Therefore, it is important to notice that the UN Convention on the Rights of the Child (1989) pays special attention to children with disabilities (Art. 23: States Parties must recognize the rights of children with disabilities to enjoy full and decent lives and participate in their communities).

In this short article I shall first explore the background of the Convention on the Rights of Persons with Disabilities. Why was it needed? Does the Convention bring some new ideas? What will its global effects be and, on the other hand, what does it require from the European legal systems, both in the EU and its member states? The CDRP is the first human rights convention, which the European Community (EC) has negotiated and signed and it will also ratify the Convention.³ Many older UN conventions contain equality provisions and some of them have quite effective monitoring mechanisms. What is new in the CRPD in this respect?

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- 1 *See Non-discrimination: a human right*, Seminar to mark the entry into force of Protocol No. 12, Strasbourg, 11 October 2005, Council of Europe Publishing, Strasbourg 2006.
 - 2 *See Discrimination against women with disabilities*, Report drawn by Maria Leonor Beleza in co-operation with the Drafting Group on Discrimination against Women with Disabilities, Council of Europe Publishing, Strasbourg 2003.
 - 3 *See Article 42 of the CRDP: the Convention shall be open for signature by all States and by regional integration organizations.*

Next I shall briefly analyse human rights of persons with disabilities especially from the perspective of the Finnish legislation. Finland has already signed both the Convention and the Optional Protocol to the Convention. The ratification of the Convention requires some legislative amendments in Finland. Therefore, the ratification is not an imminent matter, as the aim of the Finnish government is to ratify the Convention and the Optional Protocol without any reservations. Internationally the Convention entered into force already on 3 May 2008.⁴

Besides the above mentioned human rights treaties I shall consider the Constitution of Finland (2000). Section 6 of the Constitution contains both a general equality provision and an extensive prohibition of discrimination covering all spheres of life.⁵ In addition, there are many non-discrimination provisions in the Non-Discrimination Act (2004) and some other acts. How should the national monitoring mechanism of the Convention on the Rights of Persons with Disabilities be organised? Do we need a new monitoring body for it?

2 The Background of the UN Convention on the Rights of Persons with Disabilities

The adoption of the CRPD is a result of a very long and difficult process. It is realistic to say that the development “bears witness to several paradigmatic shifts, for example we can identify a transition from social policy to legal rights⁶, from procedural administrative law to substantive human rights law, from “soft law” to “hard law”, from formal equality to substantive and multidimensional equality, and from rehabilitation and assimilation to dignity and diversity”.⁷ This change means in practice that persons with disabilities are

4 In July 2009 there were 59 ratifications of the Convention and 37 ratifications of the Optional Protocol.

5 See Scheinin, Martin, *Constitutional Coexistence: Minority Rights and Non-Discrimination under the New Finnish Constitution of 2000*, in Scheinin, Martin & Toivanen, Reetta, ed., *Rethinking Non-Discrimination and Minority Rights*, Institute for Human Rights, Åbo 2004, p. 1-13.

6 I want to point out that in earlier approaches understandings of disability were usually oriented towards a medical or diagnostic model. The focus was then on the physical or intellectual limitations of individuals and on their therapeutic and other needs. See Quinn, Gerard, *The Human Rights of People with Disabilities under EU Law*, in Alston, Philip, ed., *The EU and Human Rights*, Oxford University Press, Oxford 1999, p. 281-326. Especially the situation of persons with intellectual disabilities has been bad and they have not had their fair share of human rights protection. See Herr, Stanley S., *From Wrongs to Rights: International Human Rights and Legal Protection*, in Herr, Stanley et al., ed., *The Human Rights of Persons with Intellectual Disabilities*, Oxford University Press, Oxford 2003, p. 115-150.

7 This was the theme of the International Conference “The Human Rights of Persons with Disabilities – from Social Policy to Equal Rights” organised by Reykjavik University and the Icelandic Human Rights Centre, 27-28 September 2007. See also Marks, Susan & Clapham, Andrew, *International Human Rights Lexicon*, Oxford University Press, Oxford 2005, p. 109-110.

not only users of social services, recipients of care or objects of charity. Instead it is increasingly self-evident that they are regarded as citizens, social agents and bearers of human rights.

Further, I shall point out that the adoption of the CRDP proves that all human rights are indivisible and interdependent. The traditional strict division between civil and political rights on one hand and to economic, social and cultural rights on the other, is in need of critical re-evaluation. The main idea of the new UN Convention is to recognize persons with disabilities as full citizens in all areas of life. According to the preamble the States Parties to the Convention “convinced that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their *participation* in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries”.

2.1 The United Nations Standpoint

In order to convince the audience of the indivisibility of all human rights we have to know a little more about the history of the human rights treaties in the United Nations. It would last until the 1980s before the idea that human rights are indivisible and interdependent was accepted. In the first decades of the United Nations it was not possible to get one unified human rights treaty adopted.

Ultimately, in December 1966 the UN General Assembly adopted both the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR). This kind of solution is very problematic, because the first mentioned Covenant has a quite effective monitoring mechanism, whereas the second does not have. According to the Optional Protocol to the International Covenant on Civil and Political Rights the states that ratified the Protocol recognize the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant. In recent years ESC rights have received increasing attention, but claims of violations of ESC rights are still treated less seriously and ESC rights are marginalised.⁸

On 18 December 2008 the UN General Assembly, however, adopted an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The Optional Protocol reaffirms “the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms”. The new UN Committee on Economic, Social and Cultural Rights has competence to receive and consider communications submitted by or on behalf of individuals or groups of individuals claiming to be victims of a

⁸ See Ssenyonjo, Manisuli, *Economic, Social and Cultural Rights in International Law*, Hart publishing, Oxford 2009.

violation of any of the ESC rights set forth in the Covenant. The Optional Protocol has not yet entered into force.⁹

From the standpoint of persons with disabilities the prevailing system is more problematic. Both the CCPR and the CESCRC guarantee the rights to *everyone* or recognize the rights of *everyone*, which in principle includes also persons with disabilities. In practice the rights are not always of great use to persons with disabilities, because the covenants do not address specific barriers that persons with disabilities face in realizing their rights.¹⁰ The Covenants do not know any alternative formats to effectively secure equal access to justice.

Next, I shall explain the current situation in some depth. One problematic aspect is that even though for example Article 12 of the CCPR provides that “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence”, in practice this is not so easily attained. A person with disabilities often has special needs in housing and therefore cannot freely choose his/her residence.

In the same way Article 6 of the CESCRC provides that the State Parties “recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”. For a person with disabilities this right is not easily attained and it would often require very active measures from the state. There are no sanctions for states not taking appropriate action.¹¹

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted by the UN General Assembly in December 1979 is the first human rights treaty based on the idea of indivisible and interdependent rights. In the same way, the UN Convention on the Rights of the Child (1989) contains both civil and political and also social rights. The monitoring mechanisms of these conventions are not very effective, and they are in practice very rarely used to secure human rights of persons with disabilities. However, both conventions have tremendous potential for women with disabilities who experience double discrimination on the ground of both gender and disability.¹²

9 On the Protocol see Ssenyonjo, Manisuli, *Economic, Social and Cultural Rights in International Law*, Hart Publishing, Oxford 2009, p. 30-37.

10 See however *Hamilton v. Jamaica*, Communication 616/1995, 28.7.1999.

11 See however the CESCRC, Article 2(2): “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin property, birth or other status.”

See also the UN Committee on Economic, Social and Cultural Rights, General Comment No. 5: *The rights of persons with disabilities* (1994), which requires States to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities.

12 See Bruce, Anna & Quinlivan, Shivaun & Degener, Theresia, *Gender and disability: the Convention on the Elimination of all Forms of Discrimination against Women*, p. 103-117, and Kilkelly, Ursula, *Disability and children: the Convention on the Rights of the Child (CRC)*, p. 119-140, both in Degener, Theresia & Koster-Dreese, Yolana, ed., *Human Rights and Disabled Persons*, United Nations, New York and Geneva 2002.

2.2 *The Council of Europe Standpoint*

The European Convention on Human Rights (1950), too, contains only traditional civil and political rights, but it has many benefits compared to many other human rights treaties. The European Convention on Human Rights has the most effective monitoring mechanism: the European Court of Human Rights. There are plenty of cases from the European Court of Human Rights dealing with human rights of persons with disabilities. The Court has in some cases interpreted the Convention in a progressive way and required states to be active in the fulfillment of the obligations derived from the Convention. It is not enough merely to refrain from doing something that violates the rights of persons with disabilities.

In cases concerning persons with disabilities, it has in recent case law of the European Court of Human Rights been recognized that in addition to a negative obligation not to interfere with the enjoyment of private life and home, states may be required to take positive steps to provide for their economic needs.¹³

One of the first and most well-known cases of the European Court of Human Rights concerning human rights of persons with disabilities is *Botta v. Italy* (24.2.1998). It was the beginning of a more disability sensitive development in the interpretation of the Convention. In that case the applicant complained of impairment of his private life and the development of his personality resulting from the Italian State's failure to take appropriate measures to remedy omissions imputable to the private bathing establishments, namely the lack of lavatories and ramps providing access to the sea for the use of persons with disabilities. He relied on Article 8 of the Convention (*Right to respect for private and family life*). He asserted that he was unable to enjoy a normal social life which would enable him to participate in the life of the community and to exercise essential rights, such as his non-pecuniary personal rights, not because of interference by the State but on account of its failure to discharge its positive obligations to adopt measures and to monitor compliance with domestic provisions relating to private beaches.

Private life, in the Court's view, "includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings".¹⁴ In this case the applicant complained not of action but of a lack of action by the State. The essential object of Article 8 is to protect the individual against arbitrary interference by the authorities, which does not merely compel the State to abstain from such interference. In addition to the negative undertaking, there may be positive obligations inherent in effective respect for private or family

13 On the case law see Palmer, Ellie, *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart Publishing, Oxford 2009, p. 74-81 and De Schutter, Olivier, *Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights*, in Lawson Anna & Gooding, Caroline, ed., *Disability Rights in Europe, From Theory to practice*, Hart Publishing, Oxford 2005, p. 35-63. More generally see also Mowbray, Alastair, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, Oxford 2004.

14 Para 32.

life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The concept of respect is not precisely defined. In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, while the State has, in any event, a margin of appreciation. The Court has held that a State has obligations of this type where it has found a direct and immediate link between the measures sought by an applicant and the latter's private and/or family life.

The Court concluded, "the right asserted by Mr. Botta, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life." Accordingly, Article 8 was not applicable.¹⁵

In another important case, *Zehnalova and Zehnal v. the Czech Republic* (14.5.2002) the applicants complained that in the town where they were residing, a number of buildings providing services to the public (e.g. post office, medical services) were not accessible to persons with certain impairments because of inadequate enforcement of regulations which required the removal of architectural barriers. In this case the inaccessible buildings were far more closely linked to the everyday lives of the applicants than it had been in the Botta case. The Court, however, ruled that they had failed to establish the necessary special link between the buildings and their private life.

In the third case, *Nikky Sentges v. the Netherlands* (8.7.2003), the applicant suffered from a disease characterised as muscle degeneration and he had to rely on assistance from other persons for every act he wished to perform, including eating and drinking. A robotic arm would have greatly reduced his dependence on the constant presence of carers and would have enabled him to continue living at home. Mr. Sentges turned to the European Court of Human Rights and argued that he was not free to establish and develop relationships with other human beings. The Court concluded that even if Article 8 was applicable, the Court must always consider the fair balance between the competing interests of the individual concerned and the community as a whole, and must also have regard to the wide margin of appreciation granted to States in determining how to ensure compliance with the Convention. The margin of appreciation is particularly wide where the issues involve the allocation of limited state resources. So, the Court ruled that the Netherlands were within this range of acceptable responses.

A problematic aspect of these cases is that even though the Court interpreted the concept of "private life" broadly, it was not yet ready to affirm an obligation for states to provide persons with disabilities with effective accommodations, which would contribute to their social integration.¹⁶

¹⁵ Para 35.

¹⁶ On the limits of the European Court of Human Rights practice *see also* Waddington, Lisa, *Reasonable Accommodation*, p. 754-756, in Schiek, Dagmar & Waddington, Lisa & Bell,

There are also some other measures, which the Council of Europe has used in order to improve the living conditions of persons with disabilities. It has mainly taken the form of different social programs and soft law (recommendations, resolutions and guidelines). The goal is to support the right to independent life in all sectors. This right belongs to everyone.¹⁷

The revised European Social Charter (1999) offers new possibilities for requiring states to enact legislation protecting persons with disabilities from discrimination in the context of economic and social rights. Article 15 of the revised Charter no longer merely applies to vocational rehabilitation but also to the right of persons with disabilities to independent social integration, personal autonomy and participation in the life of the community. The words “effective exercise of the right to independence” imply that persons with disabilities have the right to an independent life.¹⁸ The monitoring mechanism is not very effective, and there is no court for social rights.

2.3 *The European Union Standpoint*

Also the European Union has been active in the field of human rights of persons with disabilities. This is mainly the case within the framework of the EU Equality Directives. The turning point occurred in 2000, when the Amsterdam Treaty was adopted that is now Article 13(1) of the EC Treaty: “Without prejudice to the other provisions of the Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

Having regarded to the Treaty establishing the EC and particularly Article 13 thereof the Council of the European Union adopted *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*.¹⁹ The purpose of the Directive is “to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment

Mark, Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, Hart Publishing, Oxford 2007, p. 629-756.

17 See *Access to social rights for people with disabilities in Europe*, Drawn up by Marc Maudinet in co-operation with the Drafting Group, adopted by the Committee on the Rehabilitation and Integration of People with Disabilities (CD-P-RR) at its 26th session, Strasbourg, 7-10 October 2003.

18 See Samuel, Lenia, *Fundamental social rights*, Case law of the European Social Charter, Council of Europe Publishing, Strasbourg 2002, p. 341-352. See also Article 9 (The right to vocational guidance) and 10 (The right to vocational training), which also pay attention to persons with disabilities. The goal is their reintegration within society.

19 More profoundly on the Directive see Waddington, Lisa, *Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion*, in Lawson Anna & Gooding, Caroline, ed., *Disability Rights in Europe, From Theory to practice*, Hart Publishing, Oxford 2005, p. 107-134.

See also Apostopolou, Zoe, *Equal Treatment of People with Disabilities in the EC: What does “Equal” mean?*, Jean Monnet Working Paper 09/04, New York 2004.

and occupation, with a view to putting into effect in the Member States the principle of equal treatment” (Article 1).

For the purposes of the Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1. The Directive contains also a provision on Positive action (Article 7):

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.
2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

Article 5 of the Directive contains a provision on reasonable accommodation for disabled persons:

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

The above mentioned proves that the aim of the directive is to promote not only formal, but also substantial equality of all persons. The general positive action provision in Article 7 of the Directive indicates that positive action is optional for member states. An obligation for positive action does, however, derive from Article 5, which is much more compulsory in its formulation. In fact, the purpose of this Article is not to provide special measures to persons with disabilities, but instead to remove barriers to their participation where it is equitable to do so. Nevertheless, the employer has still the right to determine the job qualifications and require that the person with disabilities is qualified for the job.²⁰

There is already some case law on the interpretation of the Council Directive 2000/78 EC from the standpoint of persons with disabilities. One of the most

20 We can describe the difference between reasonable accommodation and positive discrimination as the focus of the first mentioned being on the individual, not the group. Positive action is optional and it is primarily targeted at states, but reasonable accommodation is compulsory and aimed directly at the individual employer. See also Whittle, Richard, *The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective*, p. 311-315, *European Law Review*, Vol. 27 (2002), p. 303-326.

important cases is case C-303/06 (*S. Coleman v. Attridge Law and Steve Law*): the former employee of Attridge Law, Ms. Coleman pursued a claim on account of unfavourable treatment as mother and primary carer of her disabled child. The European Court of Justice concluded on 1 April 2008: “Directive 2000/78/EC of 27 November establishing a general framework for equal treatment in employment and occupation, and, in particular, Articles 1 and 2(1) and (2)(a) thereof, must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).” It implies an overall assessment of the person’s situation, and he/she is not regarded only as an employee.

The European Union is ready to take further steps in order to improve the legal rights of persons with disabilities. Even though Article 13 of the EC Treaty gives the European Union power to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, there is as yet no EU-wide legislation to deal with discrimination based on religion, or belief, disability, age or sexual orientation beyond the labour market. In July 2008 the European Commission adopted a proposal for a new anti-discrimination Directive.²¹ The ratification of the new UN CRPD will require it. The European Community is now under an obligation to extend its action to combat disability discrimination and to make wider use of the potential offered by the Article 13 of the EC Treaty.²²

The new proposal outlaws discrimination in social protection, including social security and health care, social advantages, housing, education and access to and supply of goods and services that are available to the public (Articles 1 and 3). It prohibits both direct and indirect discrimination and harassment and places the providers of goods and services under a duty of reasonable accommodation (Article 2). The directive makes, however, the duty to some degree conditional; “notwithstanding the obligation to ensure effective non-discriminatory access and where needed in a particular case, reasonable accommodation shall be provided *unless this would impose a disproportionate burden*” (Article 4).

21 *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM(2008)0426.

22 See also Waddington, Lisa, *The Implications of the UN Convention on the Rights of Persons with Disabilities for the European Community*, Paper presented in Reykjavik, 27 September 2007, *The Human Rights of Persons with Disabilities – from Social Policy to Equal Rights*, International Conference organised by Reykjavik University and the Icelandic Human Rights Centre.

3 The Drafting of the UN Convention on the Rights of Persons with Disabilities

As I have already shown, at the European level the legal status of persons with disabilities is much better provided for at the European level than it is at the global level.²³ Therefore, it was important that many European states and NGOs were so active in the drafting of the UN Convention. They could refer to many good European experiences in order to press representatives of the non-European states to adopt the Convention.

Globally the idea of an international convention protecting the rights of persons with disabilities goes back to the 1970s. The UN showed already then activity in the formulation of international disability-relevant standards. Among the early initiatives were the adoption of the Declaration on the Rights of Mentally Retarded Persons (1971) and the Declaration on the Rights of Disabled Persons (1975). The International Decade of Disabled Persons 1982-1991 encouraged national level programs to achieve equality for persons with disabilities. In 1993 the UN General Assembly adopted the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities.²⁴

Even though the above mentioned declarations raised awareness about human rights of persons with disabilities, they still reflected medical and charity models and they were not legally binding. Even though declarations can become international customary law, when they are applied by a great number of states, the drift was away from soft law instrument to legally binding ones. The experiences of the Convention on the Rights of Women (CEDAW) and the Convention on the Rights of the Child (CRC) were positive and encouraging. General human rights conventions are not enough; specific conventions are also necessary.

In December 2001 the UN General Assembly established an Ad Hoc Committee to consider the feasibility of a disability-specific human rights treaty. The Committee met altogether for nine sessions. Non-governmental organisations and national human rights institutions were allowed to be present and also to speak. Especially the European Disability Forum was very active. The process was all the time thoroughly transparent; all documents were available on the website of the project. In August 2006 the Ad Hoc Committee adopted the Convention on the Rights of Persons with Disabilities, and in December 2006 the UN General Assembly adopted the CRPD.²⁵

Even though some states opposed it strongly, the CRPD contains provisions for an international monitoring committee, the Committee on the Rights of

23 See many articles in Quinn, Gerard & Waddington, Lisa, *European Yearbook of Disability Law*, Hart Publishing, Oxford 2009. See also Arnardóttir Mjöll, Oddný & Quinn, Gerard, ed., *The UN Conversion on the Rights of Persons with Disabilities*, Martinus Nijhoff Publishers, The Hague 2009.

24 See Quinn, Gerard & Degener, Theresia, *The application of moral authority: the shift to the human rights perspective on disability through United Nations "soft" law*, in Degener, Theresia & Koster-Dreese, Yolán, *Human Rights and Disabled Persons*, United Nations, New York and Geneva 2002, p. 19-30.

25 On the drafting process see "www.un.org/disabilities".

Persons with Disabilities. It reviews reports submitted periodically by states. The Optional Protocol, if ratified by a state, enables the Committee to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction, who claim to be victims of a violation by that State party of the provisions of the Convention.

4 An Overview of the Convention on the Rights of Persons with Disabilities²⁶

The Convention does not recognize any new human rights of persons with disabilities, but it clarifies the obligations and legal duties of states to respect and ensure the legal enjoyment of all human rights by all persons with disabilities. Its goal is to holistically combine civil and political rights with economic, social and cultural rights, thereby expressing the notion that human rights are “indivisible, interrelated and interconnected”.

Article 1 of the Convention includes a definition of persons with disabilities: “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”. This means that the Convention affirms the social model of disability.²⁷ Article 2 defines some disability-specific terms; for example 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”.

The general principles governing the Convention are enumerated in Article 3: dignity, autonomy, non-discrimination, human diversity, accessibility, equality between men and women etc. The inclusion of a general principles article is an innovation that serves to guide the interpretations of the entire text of the CRDP.

The Convention includes many traditional elements but also some new ones. Article 5 contains a traditional provision on equality and discrimination that also allows for positive action (special measures) in order to achieve substantive equality, but a new element in the Article is that “in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided”. This requires much more from the states than the traditional human rights conventions do. Equality covers all social life, not only labour market.

It is, however, a little problematic that the formulations “States Parties recognize” or “States Parties shall ensure” are almost systematically used instead

26 See *From Exclusion to Equality, Realizing the Rights of persons with disabilities*, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional protocol, United Nations, Geneva 2007.

27 Compare case C-13/05 (*Sonia Chacon Navas v. Ernest Colectividades SA*), 11 July 2006, in which the European Court of Justice relied on a medical, not social model of disability. This means that the Directive 2000/78/EC is not in accordance with the UN CRDP.

of “Everyone has the right to ..”. There are, however, some exceptions (Article 15: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”).

I find it positive that the Convention recognises the double discrimination of women and in this regard states “shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms” (Article 6).

Article 7 of the Convention (*Children with disabilities*) is very interesting. It resembles in many ways Article 12 of the CRC but in addition it pays attention to disabilities of the children. Article 7(3) requires States Parties to ensure “that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right”.

The CRDP pays special attention to international cooperation (Article 32): “States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities”.

Article 33 contains provisions on national implementation and monitoring. States Parties shall maintain, strengthen, designate and establish a framework to promote, protect and monitor implementation of the 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. Civil society, in particularly persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process.²⁸

5 The Ratification of the CRDP in Finland

Finland signed both the Convention and the Optional Protocol on March 2007, but they have not yet been ratified. The implementation procedure will take many years, after which the CRDP can be ratified without any reservations.

28 The national monitoring body must fulfill the requirements of the so called Paris Principles set for National Human Rights Institutions. See Quinn, Gerard, *The New UN Convention on the Rights of Persons with Disabilities*, European Anti-Discrimination Law Review, Issue No. 5, 2007, p. 41-43. For more about those principles see Pohjolainen, Anna-Elina, *The Evolution of National Human Rights Institutions, The Role of the United Nations*, The Danish Institute for Human Rights, Copenhagen 2006, p. 6-16. The principles were adopted as a result of an international workshop on national human rights institutions organised by the UN in Paris in 1991. The Principles are considered as the international minimum standards for national human rights institutions. The national institutions have to be official state-funded bodies which derive the mandate and powers from a constitutional or a legislative text and have a specific competence to protect human rights. Even though national institutions are governmental agencies, they should enjoy independence.

The main part of the Finnish legislation already complies with the requirements of the CRDP. Legislative amendments are, however, needed at least in the field of competence of the Ministry of Social Affairs and Health and the Ministry of the Interior.

Article 14 of the CRDP requires that States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

The Finnish Act on special care of mentally disabled persons (1977) does not comply with those requirements. Provisions concerning use of coercion in special care for mentally disabled persons do not fulfill the requirements of the CRDP. Especially the Parliamentary Ombudsman has criticized the situation already for years, but the Finnish government has not taken action in order to amend the law.²⁹

Article 18 of the CRDP contains a provision on liberty of movement: States Parties shall recognize the rights of persons with disabilities to liberty of movement and to freedom to choose their residence. Section 3 of the Municipality of Residence Act (1994) does not comply with all requirements of the CRDP.

The CRDP sets for national monitoring mechanism higher standards than the previously ratified human rights conventions do. Article 33, paragraph 2 of the CRDP requires that 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 ratification of the CRDP requires the establishment of a monitoring mechanism or the transformation of an existing mechanism into such a mechanism. For example the Parliamentary Ombudsman does not fulfill the requirements of the CDRP in this respect, because the Ombudsman exercises oversight to ensure that public authorities and officials observe law and fulfill their duties (section 109 of the Constitution of Finland). This takes place afterwards³⁰; promotional work done on behalf of one specific group (persons with disabilities) does not belong to the duties of the Ombudsman. The other problem is how the civil society could be involved in the Ombudsman's monitoring process. Nowadays it is not possible.

Active promotion of human rights of persons with disabilities is better suited for some other body. We can take for a model the Ombudsman for Children, whose duty is to promote children's rights in Finland. Finland has also a

29 See also the Ombudsman's opinion, 19 September 2007, No. 2632/5/07.

30 See for example the Ombudsman's decision, 31 March 2008 (case 3624/4/07): A disability is not a ground for excluding a patient from resuscitation or intensive care.

Minority Ombudsman with a specific mandate relating to the protection of minorities and ethnic discrimination. The mandate of the Minority Ombudsman could be expanded to cover also discrimination on the ground of disability.

The establishment of the monitoring mechanism required by the CRDP is closely connected to the work of a committee which is commissioned to prepare a proposal for new non-discrimination legislation. The Ministry of Justice set up the committee in January 2007. The purpose is to strengthen the guarantees of non-discrimination by making the legislation cover more clearly all grounds of discrimination. The committee will also revise the duties and powers of the authorities currently responsible for discrimination matters.³¹

6 Summary

It is too early to assess the effectiveness of the Convention on the Rights of Persons with Disabilities. Will it give an added value to persons with disabilities? The new Convention does not nullify older UN and European Conventions, which also contain some provisions on the rights of persons with disabilities. On the contrary, the CRDP may strengthen the significance of those provisions.

The Convention contains a provision on awareness-raising (Article 8), which requires that States undertake to adopt immediate, effective and appropriate measures 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 and to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life. This is a very ambitious challenge for any country.

The role of the new UN Committee on the Rights of Persons with Disabilities is decisive.³² How seriously will the members of the Committee take the job? And how much and what kind of individual complaints will the Committee receive? Is there legal aid available to persons who intend to submit a communication to the Committee? At least in Finland very few lawyers have specialized in human rights of persons with disabilities.

Will the States Parties take the reporting seriously? This is the other big question. Article 35 of the CRDP requires that each party shall submit to the Committee a comprehensive report on measures taken to give effect to its obligations under the Convention and on the progress made in that regard within two years after the entry into force of the present Convention for the State Party concerned. Thereafter, States Parties shall submit subsequent reports at least

31 *See Tasa-arvo ja yhdenvertaisuuslainsäädännön uudistustarve ja –vaihtoehdot*, Yhdenvertaisuustoimikunnan välimietintö, Komiteanmietintö 2008:1, Helsinki 2008 (Equality Committee, The need and opinions for the reform of the equality and non-discrimination legislation, Interim report of the Equality Committee), Summary in English.

32 The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the Convention.

every four years and further whenever the Committee so requests. When preparing reports to the Committee, States Parties are invited to consider doing so in an open and transparent process.

From the Finnish standpoint it is important to follow the EU activities in the field of human rights of persons with disabilities, but also the activities of the Finnish government are important. They both have to be active in order to fulfill the requirements of the new Convention. Political action is needed. Cooperation with civil society, non-governmental human rights and other organisations is important at all levels. Up to the present human rights of persons with disabilities have not had a very high priority on the agenda of the Finnish human rights organisations. Therefore, they have to cooperate with organisations of persons with disabilities, if they are going to take the rights of persons with disabilities seriously.