Disability

Introduction

Individuals with disabilities are often excluded from large elements of social life. Overt and covert discrimination has historically hampered people with disabilities’ participation in a meaningful way in wider society. There has been long term and systematic denial of opportunities to people with disabilities, particularly in fields such as education, employment, housing, transport, cultural life and access to public places and services.¹

The mistreatment and oppression inflicted on individuals who have some form of disability or impairment has been well documented.² Whether mentally or physically impaired, individuals with disabilities are frequently the most marginalised in terms of receiving protection under human rights instruments. Often this has been the result of the human rights discourse being unable to accurately capture the concerns and experiences of people with disabilities and reflect them in both international legal standards and national law and policy.

International Law

A broad range of provisions exist within international law for the protection of the right to non-discrimination on grounds of disability. Across the international legal field both under the United Nations (UN) and the various regional systems discrimination on grounds of disability is now a focused area of protection.

A clear agenda has been set by the UN General Assembly through the adoption of the Convention on the Rights of Persons with Disabilities (the UN Convention) in December 2006. The Convention opened for signature on the 30 March 2007 and entered into force on 3 May 2008.³ It sets out unequivocally that non-discrimination is an essential principle to promote, protect and ensure the fulfilment and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.⁴

¹ [http://www.un.org/esa/socdev/enable/disovlf.htm]; See also, Report of the Special Rapporteur on Disability of the Commission for Social Development, 46th Session, [E/CN.5/2007/4], paras. 31 – 32, which states that 67 countries have not yet implemented an accessibility programme which is a prerequisite for full participation in society.
⁴ Article 3.
This reflects the historical attention given to disability discrimination within other UN treaties and conventions. Likewise, disability has been recognised in the text or realised in the jurisprudence of regional human rights instruments and institutions. For example, the Inter-American human rights system established the Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities in 1999. Here, various provisions are set out to ensure that persons with disabilities are fully integrated into society. The European Union (EU) and the Council of Europe have similar protections. Disability is recognised as a protected ground within the “Employment Framework” Directive of the EU and while disability is not listed as a protected ground within Article 14 of the European Convention of Human Rights, it may be protected as an “other status” ground. Also, Article 15 of the European Social Charter guarantees the right of persons with disabilities to independence, social integration and participation in the life of the community.

The Conceptual Debate on Defining Disability: the Medical Model v. the Social Model

A general challenge to protecting individuals under a national framework has been defining what constitutes a disability and therefore who is a person with a disability. Adopting the appropriate approach to defining disability has historically been and remains a subject of much conjecture. Whether an individual has a disability or impairment has been a matter of consideration for two differing schools of thought.

The medical model of disability considers the disability, impairment or illness to be a result of a physical condition which is intrinsic to the individual. This approach places a medical condition as the source of disadvantage for the individual and the basis for their marginalisation or exclusion from the wider society. The medical model suggests that these conditions can be mitigated and alleviated by medical procedures or practices (for instance, surgery) which will enable individuals to integrate and participate in the wider society.

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5 For example, from the outset of UN human rights work disability has been a recognised target for action in employment through Article 25 of the Universal Declaration on Human Rights, which states “the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”. Furthermore, in 1975 the General Assembly adopted a Declaration on the Rights of Disabled Persons which states that all persons with disabilities shall enjoy the rights set forth in the declaration without distinction or discrimination. This means that while discrimination is not explicitly mentioned within Article 26 and 2 of the ICCPR and the ICESCR respectively, it certainly can be read into the “other status” provision within both Articles.

6 See, for example, Article 3(1)(b), which refers to the adoption of legislative and social measures to ensure that new buildings, vehicles, and facilities constructed or manufactured within their respective territories facilitate transportation, communications, and access by persons with disabilities; Article 3(1)(c) requires eliminating, to the extent possible, of architectural, transportation, and communication obstacles to facilitate access and use by persons with disabilities; Article 3(1)(d) requires that persons responsible for applying this Convention and domestic law in this area are trained to do so.

A number of jurisdictions have adopted a medical definition of disability in their national legislation.\(^8\) Indeed, this appears to be the approach – at least initially – of the European Court of Justice in interpreting disability for the purposes of the Employment Framework Directive\(^9\). In Chacón Navas, Advocate General (AG) Geelhoed provided a description of disability which by and large subscribes to a medical definition of disability. However, elements of the definition set out by AG Geelhoed suggest that certain social model characteristics could be incorporated as future cases come before the European Court of Justice and the definition is further clarified and interpreted.\(^10\)

By contrast, the social model of disability views existing social norms (for example, the built environment) as advancing the position of certain individuals and perpetuating negative social and physical norms which lead to the disadvantage and marginalisation of persons with disabilities. The slogan “disabled by society not by our bodies”\(^11\) is often associated with the social model school of thought. The social model may be viewed as a response to two assumptions of the medical model. First, it views the primary problem faced by people with disabilities is their incapacity to work, and second, this incapacity is a natural result of the impairment of disabled people.\(^12\) In this regard social model protagonists claim that the medical model adopts an assimilationist perspective and cannot sufficiently understand the needs of disabled people.\(^13\)

The international conventions and standards contain aspects of both the medical model and the social model. Article I of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities states:

“The term "disability" means a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment.”

And despite the UN Convention avoiding an explicit definition of disability, Article 1 states that within its material scope:

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\(^8\) See for example, the United Kingdom's Disability Discrimination Act 2005, c.50, s.1 (1) which imports a medical definition into the legal framework.

\(^9\) See, for example, Chacón Navas v Eurest Colectividades SA, European Court of Justice, (Case C-13/05) (2006), particularly the judgement of Advocate General Geelhoed, paras. 76 – 81.


“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.”

These definitions for the most part adopt a medical definition where the standard for assessing whether an individual is a person with a disability is focused on the notion of impairment. Both definitions also however contain elements which permit a social model interpretation. The reference to the “social environment” in the Inter-American definition and “in interaction with various barriers” in the UN Convention suggests that persons with disabilities should not be exclusively regarded as those who fall within the scope of the medical model definition.  

While the conceptual debate regarding the most appropriate definition of disability is still ongoing, national legislation in a number of countries has sought to introduce the medical model framework into national anti-discrimination law. The extent to which there is scope for change towards a hybrid social model approach (as proposed within various international standards) within national legal frameworks remains unclear.

**An Asymmetrical or Symmetrical Approach and Reasonable Accommodation**

Some debate has been generated in respect to whether the legal protection in place against discrimination on grounds of disability in different jurisdictions should be based on a symmetrical or an asymmetrical approach. The debate has revolved around the proposition that unlike other grounds of discrimination protection against discrimination on grounds of disability should only apply to persons with a disability. This is known as the asymmetrical approach. Contrary to it, the symmetrical approach, regards legal protection for the advantaged group is equal to that of the disadvantaged group. For example, in respect of discrimination on grounds of gender men generally are afforded equal protection to women.

This issue has been particularly relevant in the European context where opinion has been divided since the conception of Council Directive 2000/78/EC. Some commentators argue that the wording

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14 This reflects the approach of the World Health Organisation, which advocates a biopsychosocial model of disability within the “International Classification of Functioning, Disability and Health”. See for example, World Health Organization, “Towards a Common Language for Functioning, Disability and Health”, WHO/EIP/GPE/CAS/01.3, Geneva, 2002, http://www.who.int/classifications/icf/site/beginners/bg.pdf. The biopsychosocial model contains elements of the medical model, the social model and also a psychological model (in which emotional and behavioural factors are considered relevant).

15 For example, in the USA section 3 of the Americans with Disabilities Act 1990 defines disability as ‘a physical or mental impairment that substantially limits one or more of the major life activities’, or in the UK section 1 of the Disability Discrimination Act 1995 defines a person as having a disability ‘if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities’.


17 For example, sex or race.
of the Directive permits a symmetrical interpretation.\textsuperscript{18} Such an approach would mirror only a select number of jurisdictions in the EU\textsuperscript{19}; it has been more visible approach for EU member states to adopt an asymmetrical approach.\textsuperscript{20} The debate regarding the adoption of a symmetrical or an asymmetrical approach has implications for the more general implementation of equality and non-discrimination laws. In many ways the implications of adopting a symmetrical approach remain practically and conceptually ambiguous. Uncertainty exists as to whether the adopting of a symmetrical approach, parallel to race and sex, would improve the protections for people with disabilities, or whether these gains would be diluted. The status of persons with disabilities in various jurisdictions pertains to treating individuals as special cases deserving of unique but perhaps overly paternalist treatment.\textsuperscript{21} Adopting an asymmetrical approach for persons with disabilities on one hand retains the unique nature of disability rights which is perhaps necessary if any such protections are to be effective. However, it also isolates disability from other protected grounds, thereby perpetuating an artificial distinction amongst the various grounds of discrimination. To this extent equality law formulated to protect against disability discrimination must reconcile and balance the conceptual challenge of accommodating issues specific to disability with the underlying theoretical context of equality law.

The requirement to provide reasonable accommodation\textsuperscript{22} is an associate of the asymmetrical approach. The Committee on Economic, Social and Cultural Rights have determined that the denial of “reasonable accommodation based on disability” constitutes “disability-based discrimination” for the purposes of the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{23} Essentially, reasonable accommodation places a positive duty on an employer or a service provider to incorporate social and environmental factors into their workplace and services design to facilitate and integrate persons with disabilities. This often involves the removal of barriers that create


\textsuperscript{19} For example, in the Netherlands the Dutch Equal Treatment Commission has confirmed that the ban on a distinction of having a handicap also applies to distinctions of not having a handicap. See Gerards, Janneke. “Discrimination Grounds”, in Schiek, Dagmar, Waddington, Lisa and Bell, Mark. Cases, Materials and Text on National, Supranational and International Non-Discrimination Law. Hart Publishing (2007) p. 131.

\textsuperscript{20} See, for example, the approaches under the UK’s Disability Discrimination Act 1995; Basic Law of Germany, Article 3(3) as amended in 1994; The Spanish Workers Charter (1980), or the Law on the Social Integration of the Disabled (1982).

\textsuperscript{21} Certain examples, such as the Korean experience, highlight the danger of paternalism where despite the legislation being grounded in anti-discrimination rhetoric, it is more accurately social welfare legislation or fostering programmes, rather than measures to ensure social equality and integration of persons with disabilities. See Degener, T. and Quinn, G. “A survey of International, Comparative and Regional Disability Law Reform”, Paper delivered at an International Disability Law and Policy Symposium, Disability Right Education Defense Fund, California, 2000, p. 20.

\textsuperscript{22} Also often referred to as reasonable adjustment, for example, in the UK legislation.

\textsuperscript{23} Committee on Economic, Social and Cultural Rights, General Comment 5, "Persons with Disabilities", 9 December 2004, para. 15.
accessibility challenges to persons with disabilities.\textsuperscript{24} Across jurisdictions reasonable accommodation has been a cornerstone principle of the legal regulation of discrimination against persons with disabilities. The Canadian Supreme Court has recognised this cornerstone status in adjudicating over Article 15 of the Charter of Rights and Freedoms:

“It is also a cornerstone of human rights jurisprudence that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation.”\textsuperscript{25}

Likewise a host of national legal systems have recognised either explicitly in their legislation or in its interpretation by the national courts that reasonable accommodation is inherent to the effective protection of the rights of persons with disabilities.\textsuperscript{26}

It must also be noted that, while found in many national legal systems, this requirement is rarely left unchecked. In many jurisdictions the principle is not absolute but is limited by the requirements of reasonableness and proportionality.\textsuperscript{27} This limitation is itself inherent to the concept of reasonable accommodation. The positive duty to provide accommodation only applies to the extent that is does not create an unreasonable imposition on the part of the employer or service provider.\textsuperscript{28}

The issue of reasonable accommodation is intrinsic to the asymmetric versus symmetric debate. Indeed, it relates back to the very idea of equality and non-discrimination. With continually emerging issues in the struggle for recognition of equal rights for people with disabilities, the legal interpretation of the rights of disabled people to equality and non-discrimination represents a critically important instrument to advancing the position and protection inherent to the right in general.

\textbf{Future Disability and Genetic Predispositions}

\textsuperscript{24} Barriers can be physical, social or technological; for example, narrow door frames or the lack of technology for disabled individuals to use IT systems.


\textsuperscript{26} For example, section 16 (3)(b) of the Irish Employment Equality Act 1998; section 6(3) of the Israeli Equal Rights for people with Disabilities Law, 5758, 1998; or section 4(h) of the Magna Carta for Disabled persons of the Philippines 1992.

\textsuperscript{27} For example, Article 5 of Council Directive 2000/78/EC states, “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.” Under South African law the Code of Good Practice on Disability in the Workplace, para. 6.12, sets out that the requirement of reasonable accommodation contained in Section 15(2) of the Employment Equity Act No.55 of 1998 is limited to the extent it does not impose “unjustifiable hardship”.

\textsuperscript{28} As stated above, reasonableness is judged on whether the burden of the positive duty is a proportionate burden to place on the employer or service provider. In determining proportionality various factors, including economic, environmental and temporal are generally relevant.
One current and prevalent issue relates to future disabilities and whether people who may possess certain dormant traits which may manifest in future illness or disability should be protected under law. Medical testing and advancements in genetic technology now make it possible to identify whether an individual has a propensity to developing a genetic disease, such as Huntington’s disease or sickle cell anaemia.

At present the protection offered to persons with the propensity to develop future disabilities is inadequate. Certain countries, such as Sweden, do account for instances of future disability within their legislation by bringing conditions which “may be expected to arise” within the definition of disability. However, this approach is generally the exception rather the rule.

Undoubtedly, the emergence of new technologies for identifying genetic predispositions is a double edged sword. On one hand they will play a significant role in treating individuals and mitigating conditions before they can manifest into severe impairments, on the other they have the potential to identify characteristics which may lead to an individual’s marginalisation, disadvantage and discrimination. This means that the incorporation of protection for individuals who have a propensity for future disability may be timely and necessary.

Conclusion

The UN Convention on the Rights of Persons with Disabilities offers new hope for protection from one of the most abhorrent and systematic forms of discrimination. Historically discrimination on grounds of disability has plagued both the public and private sphere and most areas of social life. In part this type of discrimination has been perpetuated by the inability of existing social norms and especially legal normative discourses to capture the lived experiences of persons with disabilities. Currently this social problem is as extensive as ever. In countries with underdeveloped or non-existent equal rights laws the un-remedied oppression of persons with disabilities remains painfully and unforgivably widespread. Even in countries with unequivocal equality and non-discrimination laws persons with disabilities very often remain on the margins of social, economic and political life. The UN Convention emphasises a hybrid medical/social model definition of disability and adopts a rights based approach to protecting persons with disabilities. This approach perhaps requires a reconsideration of many national legal approaches, and provides a starting point in which the issues that have manifested themselves at a national level can be articulated, analysed and addressed.

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29 Section 2, Swedish Disability Discrimination Act 1999.