

FIFTY YEARS OF DISABILITY LAW: THE RELEVANCE OF THE UNIVERSAL DECLARATION

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I. INTRODUCTION: WHY TALK ABOUT DISABILITIES LAW IN CELEBRATION OF UNIVERSAL DECLARATION OF HUMAN RIGHTS?

This discussion is about the relevance of the Universal Declaration to disability rights law. There has been a good deal of discussion historically about the status of the Declaration. Is it law or not? But the real question for me is its impact on the lives of real people with real problems. About

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the time I was asked to participate in this panel, I had gotten involved in some disabilities rights cases. In areas like disability rights, the key is not broad statement in international documents; the key is what states do in practice and what is in local law.

The following points are significant: the Declaration is virtually silent on disability discrimination; from 1971 to the present, the United Nations has spent a lot of effort in the area; all that effort may not have brought much change; and, do not despair, good may yet come.

We tend to think of international bodies as treaty makers or norm creators. In fact, *vis-à-vis* disability rights, the United Nations tried that first and failed. Another spin on their role perceives them as information conduits, facilitating the sharing of experiences. The role it has now cut out for itself implicitly incorporates that understanding. So, if at the end of the story there is no overarching treaty, something useful may still have been accomplished.

II. THE BEGINNINGS

A. *What Constitutes Disabilities Law Today?*

The scope of disabilities rights that we would recognize today, especially in the United States, includes: complex issues related to the right to determine whether one will continue to live; issues related to public health, particularly AIDS; issues of incarceration and immigration, particularly relating to people with developmental disabilities; access to public and private facilities: office buildings, sports, stadium, hotels, and housing units built with government funds, including provisions for reasonable accommodations; access to public and private employment including provisions for reasonable accommodations to ensure that *otherwise qualified* individuals are not excluded because of a disability; access to education and targeted assistance in instruction; and access to proper medical care and rehabilitative services.

Contentious issues remain. Who has a *disability*, and what accommodations must be made? But there is consensus within a surprisingly broad swath of United States, Canadian, British and Australian society. This is hard, domestic law. A number of broad movements have precipitated it. Sometimes the thrust has been in a sense "internal" organic development based on longstanding problems. Sometimes there has been an external driver-AIDS or euthanasia. Have any been international?

B. *Fifty Years Ago - the Universal Declaration: Security in the Event of Disability*¹

Even in 1948, disabilities issues were not new. Following World War I and the huge increase of people who suffered disabilities in combat, a number of European states adopted programs to assist people with disabilities.² Most often the programs utilized quotas for the number of disabled employees entities had to hire.

In some states, government entities bore the burden; in others, private employers. Whatever the particular means, governments understood the centrality of giving people access to jobs. The quota approach to jobs endures in much of Western Europe. But there was a realization, even before the close of World War II, that the quotas were not effective. Often they were voluntary, an oxymoron. When there was some kind of enforcement, it was often circumvented.

Despite awareness of the issue, the document we are celebrating, in keeping with its time, is virtually silent on disability as such. Centrally, it sets forth the basic notions of equality. But it only specifically refers to "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth." It only mentions disability in Article 25:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.

But disability is not recognized as a protected classification, like race, religion, gender. This silence is particularly striking, because one of the Americans most closely associated with the Declaration is Eleanor Roosevelt, who had twenty years of personal experience with a high-achieving person with a severe disability. But this silence is not unexpected. In much of the world frankly, most of the world in 1948 and today, people with disabilities were stigmatized and marginalized. Clearly, the time was not ripe, intellectually or politically. Its promise, to the extent it had any content, was completely paternalistic. It says nothing about employment, training or treatment and certainly nothing about access.

1. G.A. Res. 183, U.N. Doc. A/Res/217 A (iii), art.25 (1948).

2. Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 COMP. LAB. L.J. 62 (1996); Eric Besner, *Employment Legislation for Disabled Individuals: What Can France Learn for the Americans with Disabilities Act?*, 16 COMP. LAB. L.J. 399, 401-02 (1995).

C. 1971 Declaration of the Rights of Mentally Retarded Persons³

One of the first overt efforts of the international community was the 1971 Declaration. Although broadly phrased, it is a substantial jump. Article 3 reads: "The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities." There is now an emphasis on integration, promising employment to the fullest extent of "his" capabilities.

D. 1975 Declaration on the Rights of Disabled Persons⁴

This is the first detailed attempt of the UN to articulate rights of people with disabilities generally. It is a major doctrinal step beyond the 1971 Declaration. Article 5 posits an entitlement "to the measures designed to enable them to become as self-reliant as possible." Articles 6 and 7:

Article 6. Disabled persons have the right to medical, psychological and functional treatment, including prosthetic and orthetic appliances, to medical and social rehabilitation, education, vocational training and rehabilitation, aid, counseling, 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.

Article 7. Disabled persons have the right to economic and social security and to a decent level of living. They have the right, according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions.

In a sense, the 1975 Declaration added "disability" as a protected class. Still, note the silence on exactly how the entitlement will be realized. The Declaration provides no guidance. While this might not have been a criticism of the Universal Declaration in 1948, in a document targeted at disability rights in 1975, the guts at this date should have been *what* had to be done.

At the time, in most of the world, three models were used:⁵ (1) hope that altruism will guide private behavior we can ignore that one; (2)

3. G.A. Res. 2027, U.N. GAOR, 26th Sess., U.N. Doc. 20.7.1 (i)-(vi) (1971).

4. G.A. Res. 2433, U.N. GAOR, 30th Sess., 2433rd mtg., U.N. Doc. 20.7.1 (i)-(vi) (1975).

government assistance to individuals in, e.g. vocational training (United Kingdom), but also to employers to help them accommodate workers with disabilities; and (3) quota systems requiring employers to hire people. But other legal developments had far outpaced those models.

E. National Level

In contrast to the still-generic language of the 1975 Declaration, at the national level, in the United States at least, some progress, how significant depends on one's viewpoint, had occurred in fleshing out the legal structures needed to implement a program of rights for people with disabilities. In the United States significant legislation preceded the 1975 Declaration:

1. Architectural Barriers Act of 1968:⁶ Requires new federal buildings and those constructed with federal funds to be accessible;
2. Rehabilitation Act of 1973:⁷ Makes it illegal to discriminate on the basis of disability in any US government-funded program or activity; and the
3. Education of All Handicapped Children Act of 1975.⁸

Each of these represents a practical realization of a "rights" approach. The first two effectuate an equality-based right of all citizens to be treated on the individual merits. The third is in the nature of a call on social resources to maximize participation.

There was also some little movement elsewhere. For example, in the Federal Republic of Germany Severely Handicapped Persons Act of 1974,⁹ the statute set a quota of six percent disability for all public and private employers for employers of sixteen or more. The quota can range from four to ten percent. If the quota is not met, the employer is subject to a fine of 200 deutsche marks per month.

5. Lisa Waddington, *Legislating to Employ People with Disabilities: The European and American Way*, 1 MAASTRICHT J.EUR. & COMP.L. 367, 370-75 (1994).

6. 42 U.S.C. §§ 4151-4152 (1968).

7. 29 U.S.C. § 794.9 (1998).

8. 20 U.S.C. §§ 1400-1401 (1975) (now the Individuals with Disabilities Education Act).

9. Schwerbehindertergesetz [SchwbG], v. 30.4.1974 (BGBl. I S.1005); see I.L.O. Legis. Series, Ger. F.R.3 (1974) (English translation).

While this law is said to be one of more effective quota regimes, employment of people with disabilities in Germany actually decreased from 1982 to 1992. And, more crucially, quotas can leave people behind.¹⁰

To summarize, the string of declarations beginning in 1948 and continuing through 1975 probably had essentially zero effect *as law*. But that does not mean they had no impact. They may be viewed as first steps.

III. THE 1980'S: ACCELERATION OF ACTIVITY

In the next decade, the activity that began rather modestly in the 1970's picked up momentum. Still, there was a certain amount of casting about for the proper practical and theoretical approaches. (Even the terminology was still not fixed: "disabled persons" as opposed to the more politically correct "persons with disabilities.") What was going on here was not a law making process the right had been established, but an educational and policy-creating process; both spreading the word to places that had not addressed disabilities issues and experimenting (more accurately setting the stage for experimenting) with forms of solutions. Just listing the initiatives shows how the intensity and focus changed:

A. 1981: United Nations International Year of Disabled Persons.¹¹ This set out to define the rights of people with disabilities, to increase public awareness and encourage the formation of advocacy organizations. This was a time of organizing: *e.g.*, Disabled Peoples International, begun in Singapore in 1981, now has observer status with the ECOSOC, ILO, WHO, *et seq.*;

B. 1983: World Programme of Action Concerning Disabled Persons,¹²

C. 1983: ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention,¹³

D. 1983-1992: United Nations Decade of Disabled Persons. The United Nations began a significant effort directed to a range

10. During this pre-80's period, and into the mid-90's for that matter, the European Union was largely silent. One writer has characterized the Community Charter of Fundamental Social Rights as "more of a statement of social policy than a body of anti-discrimination provisions affecting employment." Donald Dowling, *Worker Rights in the Post-1992 European Communities: What "Social Europe" Means to United States-Based Multinational Employers*, 11 NW. J. INT'L L. & BUS. 564, 613 (1991).

11. See generally GA Res., U.N. GAOR.

12. G.A. Res., U.N. GAOR, 37th Sess., Supp. No. 51 (1982).

13. International Labour Organization, *C159 Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983*, (last visited on Apr. 3, 1999) <<http://ilolex.ilo.ch:1567/scripts/convde.pl?query=c159+query1=159+submit=Display>>.

of projects involving disabilities. It culminated in several significant documents in the area;

E. 1984: Special Rapporteur for Human Rights and Disability;

F. 1987: United Nations rejected proposed Convention on the Elimination of All Forms of Discrimination Against Disabled Persons;¹⁴

G. 1989: Convention on the Rights of the Child;¹⁵

H. 1989: Tallinn Guidelines for Action on Human Resources Development in the Field of Disability¹⁶ were set into place as well; and

I. 1991: General Assembly adopted the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care.¹⁷

This for the first time, albeit in a limited context, tried to put into law programs needed to achieve equality. Article 23 reads in pertinent part:

[m]entally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community....effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

Despite all this activity at the United Nations level, so far as I can tell few states were actually doing anything about disabilities, other than the United States. More important, states did not seem to believe they were under a legal obligation to do anything. Certainly, the defeat of the Convention in 1987 stresses the non-binding nature of the various

14. See generally THERESIA DEGENER, *Disabled Persons and Human Rights: The Legal Framework*, in HUMAN RIGHTS AND DISABLED PERSONS 12 (Theresa Degener & Yolán Koster-Dreese eds., 1995).

15. See generally 1989 CONVENTION ON THE RIGHTS OF THE CHILD.

16. See generally G.A. Res. 38/28.

17. See generally U.N. Doc. A/44/755 (1989).

declarations. Most of Europe still used quotas.¹⁸ Often these were riddled with loopholes, calling into question their sincerity.

In 1981, The Council of Europe adopted a resolution on the employment of people with disabilities.¹⁹ Focusing on quotas, but also on integration, recommended specific action, but could order nothing. This does not mean states were not serious, but their pursuit of this kind of justice remained sporadic.

In 1986, a Council of Europe Recommendation²⁰ articulated a number of ideas previously seen in the Rehabilitation Act and later incorporated into the Americans with Disabilities Act, but was downgraded from a directive to a recommendation.²¹ A later conclusion, based on the 1986 Recommendation, recognized the lack of progress in moving people with disabilities into the workforce.²²

A state might have statutes that nominally fulfilled international norms, but may not have enforced the law. In 1988, Israel had enacted a statute modeled on the former EAHC Act,²³ but a study in 1992 found that no body of law had developed around it.²⁴

The 1985, Canadian Human Rights Act²⁵ covers discrimination based on disability, but does not require, for example, accommodations. This permits courts to develop remedies.

In many states, people with disabilities, especially developmental disabilities, are denied basic rights, for example, the right to vote, marry, or to have children.

We should not be too sanctimonious in the United States; however. At this point, most protections extended only to federal programs.

18. E.g., Law No. 87-517 J.O., July 12, 1987, at 7822; D.S.L. 1987, 282. This is supplemented by criminal penalties Law No. 90-602, J.O., No. 162, July 12, 1990, at 8272, D.S.L.1990, 321.

19. Resolution of March 11, 1981, 1981 O.J. (C 77) 21. 27 (referring to 1981 Year of Disabled Persons).

20. Council Recommendation of 24 July 1986 on the Employment of Disabled People in the Community, 1986 O.J. (L 225) 43.

21. See generally Josh Bernstein, *The Enforcement of European Directives on Employment of the Disabled*, 30 TEX. INT'L L.J. 603 (1995).

22. Conclusions of the Council of June 12, 1989 on the Employment of Disabled People in the Community, 1989 O.J. (C 173) 1.

23. Special Education Law of 1988, [1988] S.H. 1256, at 114.

24. Stanley S. Herr, *Human Rights and Mental Disability: Perspectives in Israel*, 26 ISRAEL L. REV. 142, 154-60 (1992).

25. CANADIAN HUMAN RIGHTS ACT, R.S.C. ch. H-6 (1985) (Can.)

However, some states had gone farther²⁶ and substantial programs to aid people with identified disabilities existed.²⁷

IV. THE 1990'S: INCREASING ATTENTION TO EFFECTIVENESS

In the 1990's, rights began to take on a more concrete aspect. A number of countries put programs into place that gave meaning to the bare rights mentioned in prior documents.²⁸ They are as follows: United States-1990 ADA;²⁹ Australia-Disability Discrimination Act 1992;³⁰ New Zealand-Human Rights Act of 1993;³¹ United Kingdom-Disability Discrimination Act of 1995;³² Canada-Employment Equity Act 1995;³³ Israel-Equal Rights of Persons With Disabilities Law.

A. *United Nations: Expanding Understanding*

1. 1993: Standard Rules on the Equalization of Opportunities for Persons with Disabilities³⁴

The 1987 midway report on the Decade on Disabilities showed that very few states had adopted policies or programs. Therefore, it focused its activity. Partly in recognition of the difficulty of achieving consensus on a legal regime and on the importance of national solutions, partly because existing human rights documents guaranteed the rights of those with disabilities, in 1993 the Economic and Social Council passed a resolution adopting standard rules to equalize opportunity for people with disabilities. The twenty-two rules concerning disabled persons consist of four chapters of preconditions for equal participation, target areas for equal participation, implementation measures, and the monitoring mechanism and cover all aspects of the life of a disabled person. They are quite progressive and lay out in broad scope what action states should take to establish legal regimes for people with disabilities.

Note the progression from 1948 protection of people with disabilities to 1993 finding ways to ensure participation in society. It is fair to inquire

26. *E.g.*, California Civil Code § 54.1 (disabilities included in basic anti-discrimination statute).

27. *E.g.*, Developmental Disabilities Act of 1984, 42 U.S.C. § 6001.

28. A source for the status of the human rights situation in countries other than the United States is the web site of The Department of State, *Country Reports on Human Rights Practices for 1996*, (last visited Apr. 2, 1999) <<http://www.usis.usemb.se/human/human96/>>.

29. 42 U.S.C. §§ 12101-12121 (1990).

30. Act No. 135, 1992, as amended.

31. Human Rights Act of 1993.

32. Disability Discrimination Act, 1995 Ch. 50 (Eng.).

33. Employment Equity Act, 42-43-44 Elizabeth II, 1994-95, Ch. 44.

34. G.A. Res. 48/96, A/RES/211 (III) (1993).

into the synergy, if any between international efforts and domestic laws/movements. Here, one of the central functions of the international body was the preparation, from 1995 to 1996, of a Global Survey on Government Action on Disability Policy.³⁵ Although only 83 states (of 185) responded, a number of NGO's were queried and responded, so there is information on 126 countries.

Frankly, the report is disheartening. Of the eighty-three responding states, only thirty-nine had enacted new disability legislation since the 1992 Report, which the reporter found surprising, since he assumed no doubt correctly that most states did not have legislation as advanced as the Report.³⁶ And only a few states had rights-based legislation, as opposed to welfare based legislation.³⁷

And, the problem was not limited to states. In 1997, Special Rapporteur wrote regarding the situation with governments and the United Nations: "The panel noted with some alarm the tendency to disregard the specific needs of individuals with disabilities within Governments, the United Nations and professional groups. This signifies the continued low priority status assigned to the individuals with disabilities on the ladder of progress."³⁸

While United Nations organizations like UNESCO, the WHO and the ILO had disabilities programs, the development agencies did not include a disability component.

The factors militating against action are obvious-the lack of resource leads, even among the many states that have updated their laws. While much of the world languishes in poverty, this is hardly surprising. But, often fixes are not very expensive. Moreover, attitudes impede progress in a large number of states. About ten to twelve percent of the states responding reported that they do not guaranty basic civil rights-marriage, the right to vote, the right to health care to people with disabilities, especially mental disabilities.

As you might expect, the news is mixed. Some part of the progress that has occurred is certainly attributable to United Nations initiatives; some is certainly due to a generalized appreciation of these issues and economic conditions in developed states that permit them to address the issues. What may be as much a driver as any legal obligation is the asking of questions by a United Nations body-it concentrates the mind, so to speak.

The United Nations has also pursued more defined projects like:

35. See generally BENGT LINDQVIST, GOVERNMENT ACTION ON DISABILITY POLICY, A GLOBAL SURVEY (1997).

36. *Id.* at 16.

37. *Id.* at 11.

38. See generally U.N. Doc. A/52/56, at 16 (Dec. 23, 1996).

1. Education 1994 - UNESCO World Conference on Special Needs Education at Salamanca, Spain more than 90 countries were represented. The Conference adopted the Salamanca Statement and Framework for Action, which builds on and develops the guidelines in Rule 6 of the Standard Rules.
2. HIV/AIDS 1997 - International Guidelines on HIV/AIDS and Human Rights, U.N.C.H.R. Res. 1997/33, U.N. Doc. E/CN.4/1997/150 (1997).

B. Domestic Developments

In the EU, few states have adopted any kind of rights-based legislation, although this is changing. A few states have put anti-discrimination language in the constitutions; one has a statute that extends such protections. The EU has, however, devoted a substantial amount of resources to disabilities issues.

1. Legislative Framework³⁹

All countries promote the employment of people with disabilities through financial incentives for employers. These include compensation for reduced productivity; reimbursement of the costs of adapting the workplace; and bonus payments.

Most promote employment through legal requirements such as quota systems. Germany⁴⁰ and Portugal⁴¹ include an anti-discrimination clause in their Constitution.⁴²

39. Pdraig Flynn, *Pathways to Integration and Disabled Persons*, SEMINAR IN LUXEMBOURG (Sept. 26, 1997).

40. F.R.G. CONST. art. 3(3). "No one may be disadvantaged or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions. *No one may be disadvantaged because of his handicap.*" (Emphasis added).

41. PORT. CONST. art. 71.

1. Citizens who are physically or mentally disabled shall enjoy all the rights and be subject to all the duties contained in this Constitution, except to the extent that their disability renders them unfit to exercise or perform them.

2. The State shall implement a national policy for the prevention of disability, and for the treatment, rehabilitation and integration of disabled persons, shall educate the community to be aware of its duties of respect for them and solidarity with them, and shall ensure that they enjoy their rights to the full extent subject to the rights and duties of their parents or guardians.

3. The State shall provide assistance to associations of disabled persons.

42. As does South Africa. S.AFR. CONST. art. 3: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language and birth." (Emphasis added).

Others have framework legislation providing a basis for the integration of disabled people through vocational rehabilitation, vocational training and work placement. Spain has a general human rights statute regarding people with disabilities.

2. EU Programs

There has been a good deal of talk, a good deal of study and programs, but little that is legally enforceable.

The Single European Act is generally silent on disability. Under the Maastricht Treaty, the EU lacks the ability to enact legislation binding on all members in this area, but has sponsored two action programs, Helios I and II, in the area.⁴³ Helios II produced a set of guidelines of good practice, designed to promote policy development.

The European Union From 1994 to 1999 dedicated about 1.3B ECU to projects for people with disabilities. About 0.5B EU was spent on the Horizon program from 1994 to 1998 to develop innovative employment programs for people with disabilities.⁴⁴

Council Resolution of 20 December 1996 on Equality of Opportunity for People with Disabilities⁴⁵ uses the right words, but is purely hortatory.

V. CONCLUSION

Fifty years ago, the Universal Declaration mentioned those with disabilities briefly; it was strictly paternalistic. And candidly nothing much came of it directly. Broad, anti-disability discrimination norms still don't exist as such at the international level, in the strict sense that there is no claim available.

But that does not mean there has been no progress; indeed, it might not even be particularly important. Or that the Declaration has not had some influence. What it may have accomplished was to help establish a background set of expectations that the international community recognizes certain rights, and it is important to work out ways those rights can be realized and cannot be abridged on an irrelevant or invidious basis.

Norms do exist as positive law in some states, a growing number. The Declaration was certainly a precursor of the 1975 Declaration and the

43. Council Decision 88/231 of 18 April 1988 Establishing a Second Community Action Program for Disabled People (Helios), 1988 O.J. (L 104) 38; Council Decision 88/231 of 25 February 1993 Establishing a Third Community Action Program to Assist Disabled People (Helios II), 1993 O.J. (L 56) 30.

44. European Union, *Employment-HORIZON, Better Employment opportunities for people with disabilities*, (last visited Apr. 2, 1999) <http://europa.eu.int/comm/dg05/esf/en/public/sr_hor/sr_hor.htm> .

45. European Union, *Communication of the Commission on Equality of Opportunity for People with Disabilities, A New European Community Disability Strategy*, (last visited Apr. 2, 1999) <<http://europa.eu.int/comm/dg05/soc-prot/disable/com406/indexen.htm>> .

language in the Children's Convention. It was part of the program that evolved into the Standard Rules. If the best the United Nations can do at the moment is the Standard Rules, they at least communicate *best practices*. And this may be what the structure inaugurated by the Declaration does best: communicate notions of rights and practical ways of advancing them among the states of the world. Maybe the best one can expect is not *super-legislation*, but a *super-internet*.