Article

Towards a Human Rights Convention on Persons with Disabilities: problems and prospects

by I O Smith

A Human Rights Convention on persons with disabilities is badly needed, and could be established if the international community approached the issue with total conviction and commitment to the cause.

Over the years, persons with disabilities have suffered general neglect, physical and mental assault as well as inhuman and degrading treatment. With inadequate or non existent special facilities at their disposal, their environment became their arch enemy. Discrimination against disabled persons persists in the areas of employment, housing, education, transportation, communication, recreation, health services, institutionalization and voting amongst others. To compound their disability, individuals who have suffered discrimination have often had no legal recourse to redress such discrimination. Without a vocational training of any sort and for want of appreciable means of livelihood, especially in the developing world, many disabled persons have resorted to begging at parks, on busy roads and highways, offices, petrol stations and places of worship, creating unimaginable nuisance and embarrassment to their immediate environment and the society at large. Shelter for some of the disabled persons exists only on the outskirts; and even in forests where they have been dumped like rags. (The policy of many developing countries including Nigeria in respect of disabled persons is that of segregation as opposed to protection. In Nigeria for example, camps had been established in remote arrears to shelter disabled persons somewhere around Ondo State with little or no infrastructure for their upkeep). As the *American Supreme Court* succinctly observed in *U. S.* v. *Carolene Products Co.* (304 U. S. 144 (1938)

> *" Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society".*

The above definition was adopted by the American with Disabilities Act, 42 U.S.C para. 12101(7)). The foregoing observation of the American Supreme Court is a true reflection of the social values prevalent in many jurisdictions all over the world before the last quarter of the twentieth century.

Whilst protection of persons with legal disabilities is a known phenomenon in modern legal systems (both common law and civil law) and forms an integral part of the general law (for the Nigerian example, see Law (Miscellaneous provisions) Act 1945), protection of persons with physical and mental disability depends on the country's prevailing social policy which is determined by political and economic considerations. For example, the recognition, adoption and integration of principles underlining international conventions, covenants and declarations on persons with disabilities are entirely at the political will of sovereign states (see *e.g.* Constitution of the Federal Republic of Nigeria, 1999, s.12(1) and (2)), while the ability of any country to put in place the necessary machinery for the protection of the disabled persons depends largely on economic capacity. One of the problems of the developing world against actualizing the regime of Human Rights in the area of disability is

economic adversity hampering the provision of opportunities for persons with disabilities.

CONCEPTUAL FRAMEWORK OF DISABILITY LAWS

Legal protection of persons with disabilities may be conceptualized either in terms of locating the problems of disability, or in terms of the application of different models of equality to the problem of apparent discrimination on ground of disability. The first involves an overview of the dichotomy between the individual model of disability which relates disability to individual functional limitations, and the social model which relates disability to the physical and social environment. The second involves the establishment of a framework for the construction of anti-discrimination laws for the protection of person with disabilities.

Locating the problems of disability

Protection of persons with disabilities initially took the form of health and rehabilitation laws for war veterans. This came as an aftermath of the two world wars which rendered many soldiers incapacitated and in need of rehabilitation and compensation. The next stage was the passing of social welfare laws generally for persons with disabilities. This medical model, as it is popularly tagged was premised on the need to protect the class of disabled persons through social security, health and general welfare schemes in the form of segregated services and institutions. (Social welfare institutions exist in many jurisdictions in the areas of education, vocational training and health care services). Disabled persons were seen as incapable of coping with major life activities and the society at large. This reasoning formed the basis of many social welfare laws on disabled persons. They were therefore depicted not as subjects of legal rights but as objects of welfare, health and charity programmes (see Threvesia Degener: "A survey of International Comparative and Regional Disability Law Reform", a paper presented at the International Disability Law and Policy Symposium, Oct. 22-26, 2000, p. 6.). The individual models form the basis of social welfare laws in Bolivia (Act No 1678 on the Persons with Disabilities (1995)), China (Laws of the People's Republic of China on the Protection of Disabled persons (1990)), Costa Rica (Decree No. 119101-S-MEP-TSS of 1989), Finland (Act on the Status and Rights of Patients (785/1992).) and Spain (Act on the social integration of the Disabled (1982)), where social welfare laws exist on health and medical care, public employment and the provision of special welfare institutions for persons with disabilities. However, these laws are limited in scope and are mainly reform oriented. They are relics of a war torn age where rehabilitation of disabled war veterans was of paramount consideration.

Jurisdictions influenced significantly by the medical model were those prohibiting discrimination against disabled persons through penal laws replicated in pieces of legislation as in France (Loi 90-602 de 12 Juliet 1990 and *Code Penal relatif aux discrimination* 1992 (Art. 2225)), Finland (Penal Code as of 1995, Chapter 11, Sec. 9 and Chap. 47 sec.3) and Spain (Law on Infringments and Penalties of a social nature, 1988), or exclusively in the criminal code as in Luxembourg (ss.444 and 453-457 Penal Code of 1997). Many of the Penal code laws require the establishment of *mens rea* or bad intention, thus providing escape routes. In normal commercial activities, alleged perpetrators of disability based discrimination are not obliged by law to make extra ordinary provisions for special categaries of persons to facilitate access by them or place them on equal bargaining terms with their able bodied counterparts (except in cases of extortionate bargains amounting to fraud, commercial activities presume equal bargaining position). Thus, while non-provision of wheelchairs by the shop owner for the crippled may be an omission bordering on discrimination, it is insufficient evidence of any bad intention or ill feeling towards persons with disabilities.

The second half of the Twentieth Century witnessed a paradigm shift from the individual model to the social construction of disability. A significant feature of the social model is the rejection a of causal relationship between individual impairment and disability by contending that disabilities are the product of the failure of the physical and social environment to take account of the needs of particular individuals or groups. (See Oliver, M. (1985) *Discrimination, Disability and Social Policy*. The Year Book of, Social Policy (pp. 74-97) London Routledge and Kegal Paul referred to by Aart C. Hendricks: "Disability as a Prohibitive Ground for Discriminnation: Different Definitions – same problems – One Way Out?, a paper presented at the International Disability Law and Policy Symposium 22-26 October 2000 at p.4).

Proponents of the social model conceive disability as the loss or limitation of opportunities to take place in the normal life of the community on an equal level with others due to physical and social barriers. Every society therefore has the responsibility "to eliminate, reduce or compensate for these barriers in order to allow each individual to enjoy full citizenship, respecting the rights and duties of such individual (Waddington L.D (1995) "Working Towards a European Definition of Disability". *European Journal of Health Law*, 2(3), 255-260 referred to by Aart C. Hendricks *op. cit.* at p. 5).

Unlike the individual model, the social model treats individuals on the basis of equality, eschews all forms of segregation, and regards disabled persons as subjects of rights. A social construction of disability is that which focuses on accommodating persons with disabilities into the mainstream of society, rather than focusing on their

physical or mental impairment which requires the making of "pity laws" for their survival. Anti-discrimination laws in modern times are fashioned along the social model, although the application of the concept of equality in formal terms sometimes renders it nugatory.

Application of the concept of equality

The concept of equality is the corollary of the principle of anti-discrimination. It is the antithesis of any form of unfair or less favourable treatment and prohibits any form of discrimination resulting from certain personal characteristics placing any person at a disadvantage. In this formal perspective, the concept of equality constitutes a fundamental human right cognizable in both municipal and international law. The concept of equality is a common phenomenon in modern constitutions and has been recognized as a norm of international law. Many written constitutions and civil anti-discrimination laws contain provisions on the right to be free from discrimination. However, the need to treat persons equally as contained in human rights provisions falls short of achieving the goals of inclusion and participation. A functional concept of equality otherwise known as material equality is that which takes into account both personal and environmental barriers against societal participation and eliminates such barriers by creating opportunities for disabled persons to participate equally with their able bodied counterparts.

Failure to distinguish between formal and material equality has been responsible for endorsement in many jurisdictions, of segregation as the best way of achieving equality between disabled and "normal" persons. (For example, the German Court decoded that the school authorities did not violate the constitutional anti-discrimination clauses in the German Constitution when a girl using a wheelchair was denied access to a regular school on the ground that educational segregation of disabled children was not discriminatory because it was separate but equal: see *Bundesverfassungsgericht,* Urteil vom 8 October *1996, Eurpeaische Grundrechszeitchite 1997*, s. 586). Instead of inclusion and participation, special institutions and facilities are provided for the general welfare and upkeep of persons with disabilities independently and separately from others.

The judicial interpretation of section 15 of the Canadian Chapter of Rights and Freedoms demonstrates the essence of material equality. It reads:

> *"15(1)Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and , in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*
>
> *(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of condition of disadvantaged individual or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religious, sex, age or mental or physical disability".*

In construing the foregoing provisions, the Canadian Supreme court has held that identical treatment may frequently produce inequality and that "to approach the ideal of full equality before and under the law.... the main consideration must be the impact of the law on the individual or group concerned":*Andrews v Law Society of British Columbia (1989)* 1 SCR p. 143 at pp. 164-65 quoted by Arlene B. Mayerson in "the ADA anbd Models of equlaity"a paper presented at an International Disability Law and Policy Symposium, 22-26 October 2000 at p. 8). In one of its recent decisions, the Canadian Supreme court in *Eldridge v British Columbia* ((1997) 151 DLR (4th) p. 577 at p. 616) held that the Province could not satisfy these provisions merely by providing deaf persons with health care services identical to those received by persons without hearing impairment as prescribed by legislation, but more importantly by ensuring that deaf persons could effectively communicate with health care providers so as to receive equal advantage from their health care benefits under the provincial Hospital Act. The court construed the Province's failure to ensure "equal benefit of the law" to persons with disabilities as a violation of the Charter. This Canadian decision is a welcome departure from the American Supreme court's adherence to formal equality under the 14th Amendment of the United States Constitution (See *e.g. Cleburne v. Cleburne Living Centre Inc.* (1985) 473 U.S. p. 432). By adopting the material model of equality, the Canadian Supreme Court paved the way for a better global approach to civil rights protection of disabled persons.

RECOGNITION OF RIGHTS OF PERSONS WITH DISABILITIES WITHIN THE MUNICIPAL LEGAL SYSTEMS

Legal protection of persons with disabilities in many jurisdictions was stimulated by three significant developments at the international level. First was the advent of recognized rights in different international instruments where provisions were made for the protection of rights of persons with disabilities (see e.g. General Recommendations No. 18 Report of the Committee on the Elimination of Discrimination Against Women U.N. GAOR 46th Sess., Supp. No. 38, at 3, U.N. Doc. A/46/38 (1992)). Second was the soft law policy development within the international community ranging from the general Declarations of the United Nations General Assembly (see *e.g.* Declaration on the Rights of the Mentality Retarded Persons (1971) G.A. res. 2856 UN. GAOR, 26th sess., Supp. No. 29 at 93, U.N. Doc. A/8429 (1972): Declaration on the Rights of Disabled persons (1995) G.A. Res. 3447, U.N. GAOR, 30th sess, Supp. No. 34 at 88, UN Doc. A/10034 (1976)) to the United Nations resolutions (see *e.g.* General Assembly of the U.N. Resolution 48/95 (20 December 1993)) culminating in the World Programme of Action

Concerning Disabled persons in 1982 (G.A. Res 37/52, U.N. GAOR 37th sess., Supp. No. 51 at 185, U.N. Doc. A/37/51 (1983)) and subsequently in the adoption of the standard Rules on equalization of opportunities for persons with Disabilities in 1993 (G.A. Res. 48/96, U.N. GAOR, 48th Sess. Supp. No. 49 at 202, U.N. Doc. A/48/49 (1994)). Third, and of immense influence on municipal laws in many jurisdictions, was the American Disabilities Act 1990 which stimulated civil rights regime in many jurisdictions. It has been claimed that more than 40 out of the 189 UN Member States adopted some kind of anti-discrimination law for persons with disabilities. See Theresia Degener, *op. cit.* at p. 11. The result of these developments has been the insurgence of constitutional anti-discriminatory provisions or civil anti-discrimination laws in many jurisdictions for the protection of persons with disabilities.

Using the medium of the constitution to entrench rights is a common phenomenon in jurisdictions with written constitutions. The constitutions of Austria (Constitutional law as amended in 1997), Brazil (Constitution of the Federal Republic of Brazil, as of 1993 (Art. 7), Canada (Charter of Human Rights and Freedoms as of 1982 (s.15)), Germany (Basic Law of the Federal Republic of Germany, as amended in 1994 (1996)), Ghana (Constitution of 1992 (Art. 29)), Malawi (Republic of Malawi (Constitution) Act 1994 (s.20)), South Africa (Constitution as of 1996 (s.9)), New Zealand (Human Rights Act of 1993 (s.21)) and Uganda (Constitution of the Republic of Uganda as of 1995 (Art.21)) enable the legislature to take affirmative action to combat disability discrimination. The constitution of Malawi provides for representation of various interest groups (*ibid.*, s.68(2)(i)) including disabled persons in the Senate, while the Constitution of Uganda requires that Parliament shall consist of a certain number of representatives of persons with disabilities (*ibid.*, Art.78(1)(c)). The constitutions of Finland (in s.17), South Africa (s.6) and Canada (s.14) have provisions recognizing the right to use sign language. Sometimes associated with this group is Nigeria with a social policy guided by some constitutional provisions (albeit non-justiciable) contained under the Chapter on Fundamental Objectives and Directive Principles of State Policy. Section 17(2) and (3)(a) of the Constitution of the Federal Republic of Nigeria 1999 provides:

> *"17. (2) in furtherance of the social order:-*
> *every citizen shall have equal rights, obligations and opportunities before the law; the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced.*
>
> *(3) the state shall direct acts policy toward ensuring that:*
>
> *(a) all citizens, without discrimination on any group whatsoever, have the opportunity for security, adequate means of livelihood as well as adequate opportunity to secure suitable employment".*

The aim of the above Constitutional provisions is the creation of equal opportunities for self actualization whichdespite their non justiciability, remain the barometer with which to measure the performance of any government activity in the area of protection for disabled persons.

However, while constitutional anti-discriminatory clauses appear to be the best way forward since in most countries the constitution is the supreme law of the land which may render lower law unconstitutional and void, there are several reasons why constitutional disability discrimination may have limited effect. Some constitutions give no justiciable rights to citizens in areas relating to the state's social policy (*e.g* Chapter 2 of the Nigerian Constitution) so that an anti-discrimination clause may not be invoked by a disabled person in court. Application of constitutional rights is limited to public rights so that while constitutional provisions protect disabled persons against discrimination by state entities, it does not offer protection against discrimination by private employers or private providers of goods and services. Also, constitutional provisions tend to be broad and vague and save for the constitutional law of New Zealand the word 'disability' or 'discrimination' is not defined in any of the constitutional provisions in other jurisdictions and thus leaving vast discretion to the courts to be exercised differently within the scope of their various legal cultures. Some constitutional interpretations may amount to segregation and this is typical of judicial authorities in Germany (see *e.g. AG Flensburg*, decision of 27 August 1992-63C265/92 discussed by Theresia Degener, at pp.13-14) .

A popular approach is the enactment of civil anti-discrimination laws for persons with disabilities. This is typical of the Australian Disability Discrimination Act 1992, the Canadian Human Discrimination Act 1985, the British Disability Discrimination Act 1995, the Americans with Disabilities Act 1990, the Nigerians with Disabilities Decree (now Act) 1993 and a host of others. Compared to criminal and constitution anti-discrimination laws, civil liability discrimination legislation is more detailed regarding the scope of the law. Most of the laws provide definition for what constitute discriminatory practice or equality and they all have provisions on enforcement mechanisms. The civil anti-discrimination laws in modern times exhibit a paradigm shift from the medical model of disability to human rights model of disability. As instruments of social dynamics, civil anti-discrimination law essentially "provide broad principles and institutional arrangements that further the rights of disabled persons and can provide criminal and civil sanctions to deter those who would deny the rights of disabled persons "*Barnes and Oliver, in Disability and Society, vol. 10 No. 1 (1995))*" while providing funds for those purposes. Such laws also have the psychological comfort of conveying to the disabled people that "they are valued members of a community whose dignities are protected".

A review of many of the anti-discrimination laws in relation to persons with disability would however reveal the myopism of the provisions. Many of these laws attributed problems associated with disability to personal characteristics *i.e.* physical abnormalities and mental impairments exclusive of the physical and social environment. While elimination of disability or rehabilitation of persons concerned are the paramount considerations of many discriminatory laws, there is no focus whatsoever on the need for the physical and social environment to integrate persons with disabilities into the mainstream of the society by taking their needs into account. There is also the dilemma in some anti discriminatory laws of which the Americans with Disabilities Act is one, to justify material equality as prescribed by statute in formal equality terms in accordance with the provisions of the constitution such as the "equal protection clauses of the 14th Amendment of the American Constitution which is a direction that 'all persons similarly situated should be treated alike' (*Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 at 439 (1985)).

Recent studies on anti discriminatory laws in relation to disabled persons (see, *e.g.* Barnes and Oliver, *op. cit.* (1995)) reveal that civil rights legislation will not, by itself, solve the problem of discrimination against disabled persons. In the first place, discrimination against disabled persons is institutionalized in the fabric of many societies as evident from the abortion laws, education system, labour market, benefit systems, health and social support services etc where suggestion on ground of disability is pronounced. There is also the problem of differentiation, which differs from, but may be classified as, discrimination. The owner of a taxi cab has a responsibility in law to give his cab to a capable driver and not, to an idiot or a blind person. Weak institutional framework for the administration and enforcement of these laws is also not uncommon.

The principles, demands and goals of persons with disability cannot be accommodated by capitalist social relations with its underlining precept of competition without an enabling assurance. "As the global market becomes more and more dominant, the scope for national level investment and egalitarian reform becomes more limited" (Shakespeare and Watson, "*Making a Differeance: Disability Politics, and Recognition*" (2000)).

Many of the civil rights laws on persons with disability deal with social and economic rights to the exclusion of civil and political rights so that the possibility of equal participation in governance and collective decision making in many areas including their own affairs still eludes them. The result is the erection in modern societies of a superstructure and policies detrimental to the interests of disabled persons.

The disparity in the definition of "disability" in different jurisdictions is an impediment to the recognition of their limited capabilities towards making adequate provisions for their needs and aspirations. The disparity in the construction of different legislative provisions and the different clauses in some organic laws of some jurisdictions make it imperative to formulate policies at the international level to serve as a guide towards legislating against discriminatory policies on disabled persons.

ADOPTING AN INTERNATIONAL CONVENTION AGAINST DISCRIMINATION OF DISABLED PERSONS

The elevation of rights of disabled persons to the status of human rights in international law entrenched by treaty is still elusive. The first three decades of the United Nations, existence were years of neglect for the disabled persons. If disability was addressed as a human rights issue at all in any of its instruments, it was only in connection with social security and preventive health policy (see Universal Declaration of Human Rights, Art.25, G.A. Res. 217, U.N. Doc. A/810 at 71 (1948); International Covenant on Economic, Social and Cultural Rights, Art.12, G.A. Re. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1967)). Even when persons with disabilities became recognized as subjects of human rights declarations in the 1970s, the notion was that of disability within the medical model dependent on social security and welfare and in need of segregated services and institutions (see *e.g.* Declaration on the Rights of the Mentally Retarded Persons, G.A. Res. 2856, U.N. GAOR, 26th Sess, Supp. No. 29 at 93, U.N. Doc. A/8429 (1972) and Declaration on the Rights of Disabled Persons G.A. Res. 3447, U.N. GAOR 30th Sess. Supp. No.34, at 88, U.N. Doc. A/10034 (1976)).

During the 1970s and the 1980s the United Nations General Assembly passed a number of resolutions culminating in 1982 with the World Programme of Action Concerning Disabled Persons(WPA), but no proposal for a binding treaty on the human rights protection of disabled persons found majority support within the General Assembly.

Perhaps as a compensatory alternative, the United Nations made provisions for Standard Rules for the Equalization of Opportunities (G.A. Res 48/96 U.N. GAOR 48th Sess. Supp. No. 49, at 202, U.N. Doc. A/48/49 (1994)). Rule 15 is particularly interesting. It provides that:

> *"States have a responsibility to create the legal basis for measures to achieve the objectives of full participation and equality for persons with disabilities..... States must ensure that organizations of persons with disabilities are involved in the development of national legislation concerning the rights of persons with disabilities, as well as in the on going evaluation of that legislation..... Any discriminatory provisions against persons with disabilities must be eliminated. National legislation should provide for appropriate sanction in*

case of violation of the principle of non-discrimination".

This and other rules were adopted by the United Nations General Assembly and intended as a basic international standard for future programs, laws and policies on disability. The combination of the civil rights approach of disability activists and the material equality notions of international human rights is evident in the rules' introduction which strongly emphasizes both equality of opportunity and integration.

There is no doubt that the rules address disability as a civil rights issue within a clear context of material equality and social responsibility, but they remain non–binding and lack domestic enforcement mechanisms. However, while the rules remain non–binding United Nations instruments because they cannot be signed and ratified by individual nation states, they could eventually attain binding force in international law, if enough states apply them with the intention of establishing an "international customary" rule (see *United States v Nicaragua* (1985) ICJ Rep.). The soft law policy developments at the international level already discussed may not have offered a solution yet in the sense of achieving a positive globalization policy on the protection of disabled persons against inequality or discrimination, but they have gone a long way towards sensitizing the international community and the component sovereign states towards recognizing the need for a Human Rights Convention.

Adopting a Human Rights Convention against Discrimination of Disabled Persons would be a significant advance in the creation of a binding obligation, and a binding obligation so created would influence and activate the formulation of policies and making of laws against discrimination of disabled persons. Such a treaty "would result in claims on governments and organizations for additional attention and resources within the Human Rights division of the United Nations" (See Theresa Degener, above), would provide opportunity to add specific content to the Human Rights of persons with disabilities, and address hitherto unexplored areas. It would provide opportunities for disability rights organizations to promote human rights for persons with disabilities in domestic contexts and act as a catalyst for empowering and mobilizing the global disability rights movements. A human rights treaty on disability would put the disability agenda within the United Nations Human Rights Programme, thereby underscoring the fact that disability is primarily a human right rather than a social welfare issue.

Efforts are being geared at the international level towards initiating the process for the adoption of an international treaty dealing specifically with the human rights of disabled persons. Action by sovereign states in the past few years has taken the form of resolutions traditionally tabled on the rights of persons with disabilities at the United Nations Human Rights Commission in Geneva, sponsored initially by the Philippines and, in the past few years, by the Republic of Ireland. During the Commission's 56th session in March – April 2000, Ireland tabled a resolution that, *inter alia* , called for the drafting of an international convention. The Resolution read in part:

> *"1. Considers that the next logical step forward in advancing theeffective enjoyment of the rights of persons with disabilities requires that the Commission for Social Development should, as a matter of urgency examine the desirability of an international convention on the rights of people with disabilities, and their form and content of such an instrument, and solicit input and proposals from interested parties, including particularly the panel of experts".*

The resolution received considerable support but not enough to secure its passage. This Resolution will be tabled again in 2002 with the hope that Ireland will get the required support.

With the institutionalization of the human rights regime by the international community through a plethora of international instruments and co-operation at the regional and global levels, the passing of a Resolution by sovereign states for the adoption of an international treaty on human rights of disabled persons would have been taken for granted as automatic. But curiously, sovereign states have so far demonstrated a negative attitude.

Many factors have been responsible for this negative attitude. While many sovereign states appear to have adopted a human rights regime, lip service is usually paid to enforcement of such rights, especially when enforcement would undermine political or economic interests. Equalisation of opportunity tends to change the notion of the free market economy which is now the global economic model and creation of such opportunities may involve general welfarist considerations against which many sovereign states may not be ready to channel resources. The concern of many sovereign states is that the abundance of existing human rights treaty obligations has created "treaty fatigue" because member states are already burdened by and unable to fulfill, their existing obligations. These problems-coupled with lack of consensus on the nature, scope and limitations of such rights-constitute serious impediments to the attainment of the noble goal.

CREATING A HUMAN RIGHTS CONVENTION ON PERSONS WITH DISABILITIES

Given the premise that protection of minority rights is fundamental to the international human rights regime, and that freedom from discrimination on any ground whatsoever is the bedrock of international relations, it may not be out of place to presume that the behaviour of states in international law is in favour of protecting the minority rights of persons with disabilities and prohibiting any form of discrimination against them. What is required is pressure at the international level to rekindle hope for the

birth of a new Human Rights Convention on persons with disabilities.

One fundamental problem to be overcame in formulating the structure of a new Convention is that of defining the scope of disability. This is because of the diverse nature of human disability and its relativity in time and place. While municipal laws may offer a useful guide, it may be necessary to consider an open-ended definition to operate within the context of some functional key words to streamline the scope of such definition. Also, it may be necessary to lay a foundation for the scope of disability-based discrimination. By way of suggestion, General Comment No. 5 on how to interpret and implement the International Covenant on Economic, Social and Cultural Rights (1966) adopted by the United Nations Committee on Economic, Social and Cultural Rights in 1994 in relation to disability-based discrimination may be a good starting point. It provides:

> *'disability-based discrimination' may be defined as including any distinction, exclusion, restriction or preference ,or denial of reasonable accommodations based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights."*

There is a need to accommodate persons with disabilities within the mainstream of society, and this can be done by ensuring the provision of amenities and enabling infrastructure; in other words, emphasizing the social model of disability. If the proposed new Convention is to meet the aspirations of disabled persons worldwide and eschew discrimination amongst them, the peculiarities of the developing world must be addressed. Out of the 600 million persons with disabilities all over the world, two out of three live in developing countries. Bogged down with poverty and huge indebtedness to the developed world, the developing countries do not have the means of providing the basic amenities or creating the appropriate and conducive atmosphere required for admitting persons with disabilities into the mainstream of society. There is an obligation on the part of the developed world to make necessary aids available to them shall be meeting the reasonable expectations of all disabled persons worldwide.

However, meeting the reasonable aspirations of persons with disabilities may be a mirage even under the proposed Convention. There is a barrier in the form of the constitutions of various states to the application of conventions within their territorial jurisdictions. There is therefore the need for sovereign states to give consideration to individual state responsibility and adopt the letter and spirit of any such conventions in formulating policies and enacting laws for the protection of the rights of disabled persons.

CONCLUSIONS

The need for a Human Rights Convention for the Protection of Persons with Disabilities cannot be overemphasized. The main objective is the elevation of rights already known to municipal laws in many parts of the world to the status of human rights at the international level, with a sharp focus on the integration of persons with disabilities into the main stream of the society. Protection of minority rights in various international instruments justifies this need, while the behaviour of sovereign states fortifies it. The problems facing its emergence are enormous, but not insurmountable. All it requires on the part of the international community is a total conviction and commitment to the cause. Standing up to the challenges of socio economic dimensions must be seen as the collective responsibility of the international community within the spirit of general international obligations.

The trend at the regional level is inspiring and may eventually pave way for a United Nations Convention at the global level. In 1999 for example, the organization of American States (OAS) adopted the inter American Convention on the Elimination of all forms of Discrimination Against Persons with Disabilities. Also, the relevant laws and policies of the Council of Europe and the European Union reflect the pattern of change taking place within their respective member states, and also help to augment and drive the process of reform across the continent.

There is no doubt that hopes are rising and the chances are that the resolution of the international community calling for an international Convention will be carried in the years ahead.

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