

THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, A CHALLENGE FOR PUBLIC POLICIES

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Abstract

A disability legislation based on human rights acts as a "civilizing factor" in any society that respects diversity and aims to create a society that is really
The adoption and entry into force of the UN Convention on the Rights of Persons with Disabilities marks a profound change in the existing approaches on disability. In the preamble of the document is recognized that "disability is an evolving concept and that results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others" (lit. e). It thus advances legal reform on disability directly involving people with disabilities and using the human rights, the basic message being that people with disabilities should be regarded as "subject" that deserves equal respect and human rights. Public policies must take into account the obligations arising under the paradigm shift from the medical to the social approach based on human rights and the principles and general obligations, provided the CRPD.

Keywords: *disability, barriers, human rights, Convention on the Rights of Persons with Disabilities*

Introduction

The Convention on the Rights of Persons with Disabilities (CRPD), adopted in New York by the UN General Assembly, together with its Optional Protocol in December 2006, all open for signature on March 30th, 2007 and entered into force on May 3rd, 2008, is the main international legal instrument to combat discrimination against people with disabilities. This, especially given the record number of accession signatures: 153 countries have signed the CRPD, 90 countries signed the Optional Protocol; of these, 108 countries have ratified the CRPD, while the Optional Protocol has been ratified by only 63 of them.

Romania signed the CRPD on September 26th, 2007, ratified it, three years later, on November 6th, 2010, by Law no. 221/2010.

CRPD emerged in the context of a paradigm shift, from the medical approach to the disability social approach.

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Disability, a human rights issue

The medical approach considers disability as being a problem of the individual, directly caused by disease, trauma or other health condition that requires medical care, provided as individual treatment by professionals. Disability Management aims to cure or adapt and change individual behavior. Medical care becomes, in this sense, the main issue at political level, the prime response is the modification or the reforming of healthcare policy.¹

In the social approach, disability is primarily a socially created problem, a matter which is primarily related to the full integration of the individual in society, not an attribute of an individual, but a complex of conditions created by the social environment. Therefore, the management of this problem requires social action and shared responsibility of the entire society, in the sense of producing the necessary environmental changes for the participation of persons with disabilities in all areas of social life. Disability management is therefore a matter of attitude and ideology, entailing social change, which, in political terms, becomes a matter of human rights.² Therefore, the emphasis is on how the inadequate physical and social features of the environment lead to constraints on a group of persons.

All people with disabilities are faced with the experience of disability as a social restriction, if such restrictions arise as consequences of the inaccessibility of the built environment, questionable notions on their intelligence and social competence, inability of the general public on the use of sign language, the use of Braille or hostile attitudes of those without visible disabilities³. Interventions are focused on the environment, aiming to eliminate restrictions, barriers impeding participation of people with disabilities in various aspects of social life, disability no longer being seen as an individual problem, but a social fact caused by policy, practice, attitudes and/or the environment.

The movement of persons with disabilities believes that the solution for the problem of disability lies in restructuring society, an achievable goal which can benefit everyone.

According to the CRPD, disability appears as an evolving concept resulting from the interaction between persons with disabilities and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others. In this case, the issue of disability must become an integral part of relevant strategies of sustainable development and discrimination against any person on the basis of disability becomes a violation of the inherent dignity and human worth.

Starting from the idea of the diversity of persons with disabilities, this approach recognizes the valuable contributions - existing and future - made by persons with disabilities to the overall well-being and diversity of the communities to which they belong, and that the promotion of the full enjoyment of human rights and fundamental freedoms by persons with disabilities and their full participation will lead to

¹ CIF – Clasificarea Internațională a funcționării, dizabilității și sănătății, Organizația Mondială a Sănătății, Geneva,, 2001, p. 20.

² Ibidem.

³ L. Manea, *Dizabilitatea ca factor de risc privind accesul la serviciile de educație*, Rev Calitatea vieții, XVII, nr. 1-2, 2006.

strengthening the sense of belonging and significant human, social and economic development of the society⁴.

Therefore, in order to enable people with disabilities to fully enjoy all human rights and fundamental freedoms, especially in order for them to actively engage in the decision-making processes, in developing policies and programs, including those which concern them directly, particular importance is given to the accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication.

The evolution of civil rights legislation for people with disabilities has determined the transition of national legal paradigms, from a benefits based legislation to one which is based on civil rights. This new dimension of disability approach represented a major milestone on the path to recognition of human rights for people with disabilities, a path that more and more governments seem willing to take⁵.

However, a number of issues still remain unclear. If the approach to disability is a medical one, as reflected in the older laws, only aiming to granting disability benefits, should governments replace these laws with what is called the civil rights legislation? Is there more need for benefits which were traditionally granted as compensation for social exclusion? What are the legal consequences of replacing the medical model of disability with the social one? To begin with, these questions raise the delicate problem on how to distribute resources in society.

Next, as well, these problems are closely related to another problem that affects the outcome of the disability legislation reform: the principle of equality, which raises further questions, such as: equal to whom, to what extent and under what conditions? Is it enough to create an inclusive system in all areas: education, employment, political participation, or do we need to make sure that all these rights can be exercised by persons with disabilities? Is the exercising of these rights guaranteed for example, where schools, workplaces and public buildings are accessible, but public transport is not? Can we talk of equality in cases where workers with disabilities receive the same wage as those without disabilities, but must allocate sixty percent of their earnings to personal assistance services which employees without disabilities do not need?

The reform of the law on disability has begun in all parts of the world. United States and Canada were the first countries to adopt anti-discrimination laws and specific human rights laws for people with disabilities.

CRPD, legal instrument to protect and promote human rights for people with disabilities

With the advent of the CRPD, disability was reclassified as a human rights issue, reforms in this area pursuing to provide equal opportunities for people with disabilities and to expose segregation, institutionalization and their exclusion as typical forms of discrimination based on disability. Disability is a human rights issue⁶,

⁴ CRPD, Preamble, lit. m).

⁵ T. Degener, G. Quinn, *A Survey of International, Comparative and Regional Disability Law Reform*, www.dredf.org.

⁶ *World Report on Disability*, World Health Organisation and World Bank, 2010.

given that people with disabilities are faced with injustice - for example, when they are denied the right to employment, education or political participation because of their disability, or they are subject to violations of their dignity - for example when they are subjected to violence, abuse, prejudice or disrespect because of their disability, or are often denied autonomy - for example, when they are subjected to involuntary sterilization, or are admitted to institutions against their own will or when they are considered legally incompetent because of their disability.

The entry into force of the CRPD and its Optional Protocol marked the beginning of a new phase in the efforts "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."

CRPD is the latest and most detailed recognition of human rights for people with disabilities which emphasizes civil, cultural, political, social, and economic rights of people with disabilities.

Although people with disabilities have always been entitled to the same rights as everyone else, this is the first time that their rights are comprehensively set by a binding international instrument.

CRPD applies human rights to disability, thus making that general human rights are specific to people with disabilities ⁷, and clarifying existing international laws on disability. This document rightfully generated extraordinary expectations regarding support for people with disabilities around the world whose rights have been repeatedly and systematically violated, being a very subtle blend of old and new, which confirms existing rights and reinforces the idea that a group of specific treaties are necessary, at least partly, in order to take into account its irreducible experience to what concerns the exercise of rights. To some extent, CRPD simply reaffirms the applicability of existing human rights to people with disabilities from an anti-discrimination perspective.

The CRPD is partly a way to assert, through the medium of a legal instrument, a number of rights which are already addressed in other human rights treaties, civilian, political, economic, social and cultural rights, who are internationally protected, States Parties having the general obligation "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity".

In this case, the question arises, otherwise legitimate: why was this previous assertion of the rights in the case of persons with disabilities necessary? The answer has to do with the fact that, in many cases, these rights have not been, and of course, in many cases, are not yet obvious, because, for a long period of time, people with disabilities have hardly been considered human beings and as a result, they were denied basic rights, being victims of massive discrimination. In this way, the CRPD affirms "the right to have rights ", the solemn, unambiguous and long overdue recognition of absolute equality of persons with disabilities with all others.

The first general principle of the CRPD, which requires "respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and

⁷ F. Megret, *The disabilities convention: human rights of persons with disabilities or disability rights?*, Human Rights Quarterly, 2008.

independence of persons", is revealing in this respect, as it basically represents, the fundamental premise of all arising rights. Apart from the recognition of rights for people with disabilities, the CRPD builds on other twin pillars: equality and non-discrimination.

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

Although CDPD is not specifically described as an anti-discrimination convention in the same mold as the others (Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of All Forms of Racial Discrimination), there is no doubt that a concern about discrimination lies at its center, as the preamble mentions "the need for persons with disabilities to be guaranteed their full enjoyment without discrimination"⁸ and stresses that "(...) discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person."⁹

CDPD also fundamentally changes and enriches the content of existing rights when it comes to people with disabilities, often by rephrasing them. Thus, the anti-discrimination affirmed by CDPD, is more than a solemn reaffirmation of the obvious (or what should be obvious), by highlighting a number of key features of the rights provided in this document, which were nonspecific in the main previous human rights international instruments.

First of all, the treaty clarifies how the rights apply to persons with disabilities: for example, the right to equal recognition before the law assumes that persons with disabilities should have access to "appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity"¹⁰ and that the legal capacity to be protected through " ... measures that provide for appropriate and effective safeguards to prevent abuse, in accordance with international human rights law"¹¹.

Other rights are also significantly reformulated: *the right to liberty and security of persons*, which implies that "the existence of a disability shall in no case justify a deprivation of liberty"¹²; *the right to liberty of movement and nationality* implies that people with disabilities will not, as a result of their disability, be deprived of their nationality, or of "the ability to obtain, possess and utilize documentation of their nationality," or the "right to enter their own country"; *freedom of expression and opinion, and access to information* is specified as including "freedom to seek, receive and impart information and ideas (...) through all forms of communication of their choice". *Respect for privacy* implies being protected "regardless of the place of residence" and specifically includes "the privacy of personal, health and rehabilitation information of persons with disabilities"; *respect for home and the family*, points out that people with disabilities have the right to "decide freely and responsibly on the number and spacing of their children" and "to retain their fertility on an equal basis

⁸ CRPD, Preamble, c).

⁹ CRPD, Preamble, h).

¹⁰ CRPD, art. 12, 3.

¹¹ CRPD, art. 12, 4.

¹² CRPD, art. 14, 1,b.

with others"; content of the rights to *education, health, work and employment, adequate standards of living and social protection* are all spelled out in detail in a way that meets the needs of disabled people.

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

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

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

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

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

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

Finally, CRPD is very close to creating new rights, specific rights for people with disabilities, going beyond simply extending existing rights, by formulating new rights specific to them, not framed as such. The most significant example is the "individual autonomy" which, although is not defined in CRPD, refers to the ability of disabled people to do things on their own without the help of others, and is related to the right

to be "free to make one's own choices". The idea of autonomy is linked to *personal mobility* and *accessibility*, the right to *living independently and being included in the community*, to the measures for "habilitation and rehabilitation", which aim to allow the persons "to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life", but especially to the recognition of legal capacity of persons with disabilities which is actually the climax.

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

CRPD and public policies

CRPD emphasizes the empowerment of society towards people with disabilities. The society is obliged to make efforts to ensure life in dignity and equal opportunities to all its members and must take into account the environment. The environment is the one that decides what effect will have a deficiency on the daily life of a person.

The adoption and entry into force of the document marks a profound change in the existing approaches on disability. In CRPD, the emphasis is not put on the perceived "imperfection" of the person, but on the contrary, disability appears as a "pathology of the society", which is the result of the failure of society to be inclusive and to accommodate individual differences. Society must change and not the person, and CRPD provides a "route" for such a change, the preamble recognizing that "disability is an evolving concept and that it results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others"¹³.

One of the obligations under the CRPD for the States refers to the consultation of people with disabilities and their representative organizations, in developing laws, policies, and programs to implement the document. The Convention also requires public and private organizations to "reasonably accommodate" to the situation of persons with disabilities.

This document is accompanied by an Optional Protocol which, if ratified, provides a complaint procedure and investigation procedure that can be submitted to the committee that monitors the treaty.

CRPD advances legal reform on disability directly involving the persons with disabilities and using the human rights framework. The basic message is that people with disabilities should not be seen as "objects" to manage, but "subjects" that deserves equal respect and human rights¹⁴.

In order to implement the CRPD, States Parties undertake measures to ensure and promote the full realization of all human rights and fundamental freedoms for all

¹³ CRPD, Preamble, let. e).

¹⁴ *World Report on Disability*, World Health Organisation and World Bank, 2010.

persons with disabilities without discrimination of any kind on the basis of disability, by:

- adopting appropriate legislative, administrative and other measures for the implementation of the rights recognized in the CRPD and take into account the protection and promotion of human rights of persons with disabilities in all policies and programs;

- undertaking or promoting research and development of universally designed goods, services, equipment and facilities, which should require the minimum possible adaptation and the least cost to meet the specific needs of persons with disabilities;

- promoting the training of professionals and staff working with persons with disabilities in the field of all rights recognized in the CRPD, so as to better provide assistance and services;

- consulting closely with and actively involving persons with disabilities, including children with disabilities, through their representative organizations;

- raising awareness and understanding of disability - an inclusive society is based on respect and understanding. Therefore, it is important to improve the public understanding of disability. Government, NGOs, media involvement should consider campaigning for changing attitudes.

- Systematic data collection and improving data and information in the field of disability - methodology for collecting data on persons with disabilities should be developed and consistently applied. For this, data must be standardized in order to ensure both the monitoring of progress on disability policy and the implementation at national level of the CRPD.

- monitoring;

- strengthening institutional capacity in the field of disability;

- strengthen the capacity of people with disabilities to understand and ask for their fundamental rights.

Any bill or amending existing legislation must take into account both the obligations arising from the paradigm shift from the medical to the social approach based on human rights, especially of those provided by general cross-cutting articles (for example, art. 1 – Purpose, art. 3 General Principles, art. 4 General Obligations, art. 5 Equality and non-discrimination, art. 9 Accessibility). The aim of social policy should be recast in accordance with art. 1 of the CRPD: "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity." This implies, first of all, amending Article 50 of the Romanian Constitution.

To promote equality, its application should be extended to employment in all areas of social, political, civil and economical fields, so that non-discrimination legislation should clearly state that the unjustified denial of reasonable accommodation is a discrimination. Moreover, public policies should address explicitly the issue of multiple discrimination in accordance with the general principles and art. 6 (Children with disabilities) and art. 7 (women with disabilities) of the CRPD.

For problems with accessibility, states should ensure that public policy respects the principle of accessibility in all sectors (employment, education, transport, ICT, legal, etc.) and sets out the requirements and standards for accessibility.

Reform of legislation on legal capacity is probably the most important issue facing the international legal community at this time. The new legislation should eliminate all guardianship system and automatic loss of rights as a result of under judicial interdiction, so that eliminated the limited access of persons with mental disabilities in a number of fundamental rights and to recognizes the right of persons with disabilities to enjoy legal capacity on an equal basis with others in all aspects of life. The new legislative provisions should ensure that all people with disabilities with the right to vote, the right to get married, educate their children, the right to free choice of place of residence, the right to work, on an equal basis with other citizens.

Also, legislative changes are required in the admission of the possibility of contesting the procedural acts, including judgments, decisions of courts by incapable person, the way it is administered guardianship and the possibility of automatic periodic review of the decision on putting under the interdiction.

In an effort to harmonize legislation with the provisions of the CRPD, there is also need for a system-aided decision-making to help the disabled person to make his or her own decisions as a flexible protective measures to ensure respect for autonomy, the will and preferences of the person. This system of decision-making through support mechanism should replace decision-making by substitution (guardian).

And in terms of participation in political and public life to consider all measures to ensure that persons with disabilities, including intellectual disabilities are not deprived of their right to vote or be elected.

Educational policies need rethinking so that people with disabilities receive the support required, within the education system, to facilitate their effective education, which requires effective individualized support measures in environments that maximize academic and social development in accordance with the objective of full integration, including reasonable accommodation of the individual's requirements. People with disabilities should be encouraged to develop skills to facilitate their full and equal participation in education and as members of the community. There should be identified measures to ensure the facilitation of learning Braille, alternative systems of writing, augmentative and alternative means, communication and orientation means and formats and mobility skills, facilitating learning sign language and the promotion of the linguistic identity of persons with hearing disabilities. Educational policies must consider appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels. Such training shall incorporate disability awareness issues and use modes, means and formats appropriate augmentative and alternative communication, educational techniques and materials to support persons with disabilities.

CRPD requires not only revision of the law governing the right to work so that all people with disabilities to be employed, but also developing policies and identifying appropriate measures to promote the employment of people with disabilities in the private sector, promoting opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business, promoting vocational and professional rehabilitation, job maintenance and reintegration programs for people with disabilities.

The right to "standards of living and social protection appropriate" involves the development of policies that require appropriate measures to ensure access for people with disabilities and their families living in poverty to assistance from the state for expenses related to disability, including training, counseling, financial assistance and appropriate respite care. In this respect, the Romanian legislation should be amended or supplemented so as to be recognized as a clearing of the benefits enjoyed by people with disabilities, so that these (allowance and supplementary budget) will not be considered income when determining other social benefits, minimum pension, etc.

So, it takes effort from authorities to fully and effectively align the national legislation and practices to CDPD standards to ensure that all persons with disabilities enjoy all rights on an equal basis with others in all aspects of life

Conclusions

First of all, it should be highlighted that the debate of ideas on disability ended.

The paradigm shift from a human rights perspective is now almost universal.

Most countries have begun to address disability as a human rights issue. Moral authority of the Standard Rules allowed changing the legitimate paradigm that demonstrates that it is possible and beneficial for both individuals and their communities. If a broader message of the disability rights movement exists, such message is that effective citizenship requires equal access for all dimensions of life.

Secondly, recognizing that the conceptual paradigm shift is one thing, and reality is another, there is a great diversity of legal approaches, given the diversity of world cultures and legal systems. Overall significance of the concept of "reasonable accommodation" is a crucial element that occurs in all applicable laws and clearly, the most important thing to be done is to educate people with different legal cultures on the nature and functionality of this concept, without which, the laws will either fail or not achieve as much as they could have.

Thirdly, regional organizations - such as the Council of Europe and the European Union - can act as facilitators for the transfer of ideas from the field of equality and human rights towards national policies, thus capitalizing on their moral, legal and political authority.

It should also be noted that, including discrimination on the public agenda, although important, does not cover the full spectrum of issues affecting the full respect of human rights of persons with disabilities. Anti-discrimination law is an indispensable tool, but it must be recognized that although the legislation may provide rights for people with disabilities, measures are necessary in order to ensure the full exercise thereof.

A disability legislation based on human rights acts as a "civilizing factor" in any society that respects diversity and aims to create a society truly open to all.