

# 5

---

## The Expressive, Educational and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities\*

---

OLIVER LEWIS

### I. Introduction

Addressing dignitaries on the day the United Nations Convention on the Rights of Persons with Disabilities (CRPD)<sup>1</sup> opened for signature, Louise Arbour the then United Nations High Commissioner for Human Rights, said:

At the time of the adoption of the Universal Declaration of Human Rights, Eleanor Roosevelt famously asked: 'Where do human rights begin?' and answered 'In small places, close to home'. This is as true in the area of human rights and disability as with any other area of human rights.<sup>2</sup>

People with psychosocial (mental health) disabilities<sup>3</sup> are among those who suffer most from the compliance gap between lofty declaration and rights reality. This

\* The views expressed in this paper are the author's own. Thanks to Aart Hendriks, Anna Lawson and Kathryn Vandever for feedback on earlier drafts. All remaining mistakes are mine.

<sup>1</sup> Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106 (entered into force 3 May 2008).

<sup>2</sup> L Arbour, Opening address of the High Level Dialogue on the day of the signing of the Convention on the Rights of Persons with Disabilities and its Optional Protocol: From Vision to Action: The Road to Implementation of the Convention, 30 March 2007.

<sup>3</sup> I use the term 'psychosocial disabilities' to mean people labelled or living with mental health problems. The Convention says that '[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. The global disability communities fought to have the phrase 'psychosocial' instead of 'mental' used, but the latter

chapter attempts to suggest how the CRPD, an international human rights treaty agreed unanimously by the global community, may serve as an innovator of change, in small places, close to home.

The chapter examines the CRPD by applying Sandra Fredman's framework of the expressive, educational and proactive roles of human rights.<sup>4</sup> In doing so, it seeks to analyse the values which the CRPD expresses, the forms of communication it encourages, and the range of actions it demands. 'Groundbreaking' and 'landmark' are among the adjectives which have been used to describe the CRPD. It is both of these and more. This is the first human rights treaty to be adopted in the twenty-first century, and it was negotiated more quickly than any other human rights treaty in history, taking four years from start to finish. It involved the greatest level of participation from civil society of any human rights treaty throughout its negotiation process, and benefited from being the first human rights treaty to be the subject of an extensive and co-ordinated internet lobbying campaign.<sup>5</sup> It is the first to oblige States Parties to take measures to eliminate discrimination 'by any person, organization or private enterprise',<sup>6</sup> thus taking international human rights law into the private sphere for the first time. It is by far the longest and most detailed 'status'-based treaty, perhaps making it more likely that it will be implemented.<sup>7</sup>

This chapter suggests that the CRPD has the potential to become a transformative international legal instrument which innovates domestic politics as much as policies.<sup>8</sup> The first part of the chapter argues that the CRPD embodies the expressive role of human rights by encouraging actors to rethink assumptions, evaluate positions and shift existing concepts or paradigms. The global community has agreed on the values to which it aspires, elevating the CRPD into a 'focus

prevailed. There is a significant difference in the terminology used by the Convention and that used by the disability communities and other human rights instruments. Prior to the Convention, 'mental disability' had clumsily been the umbrella term including both people with psychosocial (mental health) disabilities and people with intellectual disabilities.

<sup>4</sup> S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford, Oxford University Press, 2008) 32.

<sup>5</sup> See, eg comments made by K Annan, UN Secretary General, 'Secretary General Hails Adoption of Landmark Convention on Rights of People with Disabilities', UN Press Release, 13 December 2006, Ref SG/SM/10797, HR/4911, L/T/4400, available at [www.un.org/News/Press/docs/2006/sgsm10797.doc.htm](http://www.un.org/News/Press/docs/2006/sgsm10797.doc.htm).

<sup>6</sup> Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106 (entered into force 3 May 2008) Art 4(1)(e).

<sup>7</sup> The CRPD comes in at 9,954 words excluding its title, compared with the other UN treaties protecting the rights of other people due to their 'status': the Convention on the Rights of the Child (Adopted by General Assembly resolution 44/25 of 20 November 1989) contains 7,559 words, the International Convention on the Elimination of All Forms of Racial Discrimination (adopted by General Assembly resolution 2106 (XX) of 21 December 1965) contains 4,739 words, and the Convention on the Elimination of All Forms of Discrimination against Women (adopted by General Assembly resolution 34/180 of 18 December 1979) contains 4,427 words.

<sup>8</sup> For an insightful analysis on how the Convention influences and challenges international human rights law, see F Mégret, 'The Disabilities Convention: Towards a Holistic Concept of Rights' (2008) 12 *International Journal of Human Rights* 261.

for political and grass-roots campaigning, giving a specific and authoritative legitimacy to demands for their fulfilment'.<sup>9</sup>

The second part of the chapter addresses the ways in which the CRPD embodies the educational value of human rights. If the expressive value of human rights is about thinking, the educational value is about talking. The CRPD sets up and encourages communication horizontally: between organisations in the same country, between government departments, between non-governmental organisations (NGOs) across borders and between various states. It encourages information flow vertically: between people with disabilities and their NGOs and the authorities within a state; and internationally between the treaty monitoring body and domestic actors in each state.

The third section of the chapter looks at how the CRPD can be seen as embodying a proactive role of human rights, moving from talking to doing. It does this by outlining how the CRPD creatively sets up domestic policy processes to increase the chances of effective implementation. The CRPD itself obliges States Parties to establish national independent mechanisms to promote and protect the rights of people with disabilities and monitor the implementation of the CRPD. It provides for participation of people with disabilities in the monitoring process at both international and domestic levels, and it obliges States Parties to designate a disability rights focal point at the heart of government to co-ordinate policy. In setting out the expressive, educational and proactive values of the CRPD, the chapter acknowledges the artificiality of separating these values. Permeation between them is both inevitable and encouraged.

Whilst this chapter does not seek to build upon the scholarship of an expressive theory of international law, it is influenced by the literature. Expressive law theory may help explain a government's willingness to ratify and implement treaties.<sup>10</sup> Alex Geisinger and Michael Stein, for example, suggest that states operate a 'need-reinforcement principle' by which states ratify international treaties to signal attraction to a group of states, and over time the group collectively develops shared values.<sup>11</sup> This version of expressive international law works on the assumption that the desire to be seen as a member of an international club is the key reason why states ratify treaties. There is little empirical evidence to back up this assertion, and it would be interesting to conduct research to gather data from civil servants and diplomats who were members of the Ad Hoc Committee which negotiated the CRPD. Expressive law theory takes us only so far, as it accords insufficient weight to the dynamics of domestic politics during treaty negotiation, the decision to sign and ratify which

<sup>9</sup> S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford, Oxford University Press, 2008) 33.

<sup>10</sup> For an expressive law analysis of a specific disability law provision, see MA Stein, 'Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA' (2004) 90 *Virginia Law Review* 1151.

<sup>11</sup> A Geisinger and MA Stein, 'A Theory of Expressive International Law' (2007) 60 *Vanderbilt Law Review* 75, 111.

is negotiated across ministries, and any governmental department's genuine willingness to implement the provisions. In terms of international disability politics, the supposition put forward in this chapter is that it is not a state's desire to be a member of a club which drives CRPD ratification, but rather the pressure from people with disabilities – including within government by politicians and civil servants with disabilities, NGOs of and for people with disabilities, academics and the media. People with disabilities constitute a sizeable voting minority: all incumbent governments want to be re-elected and the sensible ones will have figured out that ratifying this treaty may earn them votes.<sup>12</sup>

An expressive theory of law is a holistic one in which, although not explicitly stated, the three elements—of thinking, talking and doing—are inextricably linked. Alex Geisinger and Michael Stein nearly go as far when they suggest that the '[l]egal process provides not just focal points for co-operation, but also an iterative process of norm development and entrenchment that carries with it strong influence on the behaviour of States'.<sup>13</sup> Thus the development of law, including international law, can itself be a 'paradigm shift'. Additionally it can set up processes through which ideas are developed and action is taken. As an example of how these three elements are cyclically linked, the CRPD arose from an interaction of new ideas, discussions among and between NGOs and state officials, and action through negotiations and drafting, being continually influenced by communication with others, adjusting ideas to reach compromise positions, and so on. Having said that, it is possible that ideas alone instigate conversations. As one public policy theorist has suggested, 'discursive power can determine the very field of action, including the tracks on which political action travels'.<sup>14</sup> The CRPD is inspiring not because it codifies a pre-existing reality, but because it articulates a shared reality which has yet to be explained. It is this new reality of disability rights to which the chapter now turns.

## II. Expressive Value of Human Rights: Thinking

The CRPD succinctly explains the reason for its existence. It is that all existing human rights treaties apply equally to persons with disabilities,<sup>15</sup> yet 'despite these various instruments and undertakings, persons with disabilities continue to

<sup>12</sup> The caveat is that people under guardianship in many countries are prohibited, through the denial or restriction of their legal capacity, from voting. Art 12 (legal capacity) and Art 29 of the Convention compel legislative reform.

<sup>13</sup> A Geisinger and MA Stein, 'A Theory of Expressive International Law' (2007) 60 *Vanderbilt Law Review* 75, 118.

<sup>14</sup> F Fischer, *Reframing Public Policy: Discursive Politics and Deliberative Practices* (Oxford, Oxford University Press, 2003) viii.

<sup>15</sup> Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106 (entered into force 3 May 2008) preambulatory para (d).

face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.<sup>16</sup> It is worth pointing out that every single member state of the United Nations agreed with this proposition when they voted unanimously in the General Assembly to adopt the CRPD, signalling a globally-agreed consensus on a new understanding of disability.<sup>17</sup> The 'paradigm shift' championed by the CRPD seeks to move societies away from viewing people with disabilities as passive objects of treatment, management, charity and pity (and sometimes fear, abuse and neglect), towards a world view of people with disabilities as active subjects of human rights and dignity.

The then United Nations Secretary General, Kofi Annan, described the adoption of the CRPD as, 'the dawn of a new era—an era in which disabled people will no longer have to endure the discriminatory practices and attitudes that have been permitted to prevail for all too long'.<sup>18</sup> In promoting a shift of attitudes, the CRPD embodies the expressive value of human rights, 'signalling the values a society stands for'.<sup>19</sup> Human rights activists celebrating the adoption of the CRPD soon turned their attention to ratification and implementation, encouraging states to do the same. In her speech on the day of the CRPD's entry into force, to which this chapter has referred above, Louise Arbour set out the urgent need for domestic law reform. In a direct message to her audience of ambassadors she injected a sense of urgency by saying that '[w]e need to get moving on the implementation now, which means transposing the provisions of the CRPD into national laws. Changes to the law help speed up changes of attitude'.<sup>20</sup> In her speech, Arbour hinted at the transformative potential of the CRPD. By doing so she addressed a goal of the expressive value of law, which scholars have claimed seeks to 'affect preferences and behaviour by altering social perceptions and conventions'.<sup>21</sup> In seeking to adjust social perceptions, the CRPD contains a list of principles, which the next section analyses.

<sup>16</sup> *ibid*, preambulatory para (k).

<sup>17</sup> The Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted unanimously by the United Nations General Assembly on 13 December 2006.

<sup>18</sup> UN Press Release: *Secretary General Hails Adoption of Landmark Convention on Rights of People with Disabilities*, 13 December 2006, Ref SG/SM/10797, HR/4911, L/T/4400, available at: [www.un.org/News/Press/docs/2006/sgsm10797.doc.htm](http://www.un.org/News/Press/docs/2006/sgsm10797.doc.htm).

<sup>19</sup> S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford, Oxford University Press, 2008) 32.

<sup>20</sup> UN Press Release, 'Arbour Welcomes Entry into Force of "Ground-breaking" Convention on Disabilities', 4 April 2008, available at: [www.unhcr.ch/hurricane/hurricane.nsf/view01/IAD533A6AB95F873C1257421003A8DA8?opendocument](http://www.unhcr.ch/hurricane/hurricane.nsf/view01/IAD533A6AB95F873C1257421003A8DA8?opendocument).

<sup>21</sup> M Stein, and J Lord, 'Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities' in OM Arnardóttir and G Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden, Martinus Nijhof, 2009).

## A. Articulated Principles

The CRPD lists several principles which flesh out the specificities of the paradigm shift. This itself is innovative, the CRPD being the first international human rights treaty to explicitly list a set of guiding principles. Article 3 of the CRPD sets these out:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Principles (b) on non-discrimination, (c) on participation and inclusion in society, (e) on equality of opportunity and (g) on gender equality are what Gerard Quinn calls the 'legacy values of human rights theory and law'.<sup>22</sup> They are not disability-specific and could apply to disability as they could to, for example, women, persons of ethnic minorities or any other discriminated against 'group'. However, when applied to people with disabilities these regular human rights principles become quite revolutionary. One only has to do a quick internet search to find out about how women and girls with disabilities fare much worse than those without disabilities, or men and boys with disabilities. Similarly, the ways in which persons with disabilities are prevented solely because of their disability from participation and inclusion on an equal basis with others has been well documented. It is of interest to note that the principles firmly reject a 'best interests' or protection approach, a principle contained in the United Nations Convention on the Rights of the Child,<sup>23</sup> and one which is applied in domestic laws throughout the world to provide a legal basis in substitute decision-making for those assessed as lacking functional capacity to make particular decisions. More dubiously 'best interests' is a feel-good vehicle for those making decisions which ignore or override the choices of children and adults with disabilities who have functional capacity to make such decisions.

<sup>22</sup> G Quinn, 'Resisting the 'Temptation of Elegance': Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?' in MO Arnardóttir and G Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden, Martinus Nijhof, 2009).

<sup>23</sup> Convention on the Rights of the Child, adopted by UN GA Res 44/25 of 20 November 1989, Art 3(1).

The CRPD is silent on how the principles laid out in Article 3 are to be used, but the accompanying United Nations website asserts that the principles ‘underlie the CRPD and each one of its specific articles.’<sup>24</sup> This can be understood to mean that the principles represent the moral basis of the CRPD, explaining the reasons for the CRPD’s existence, and providing guidance for national authorities, courts and the treaty monitoring body on how to interpret the CRPD. The principles cut across all substantive CRPD rights so that, for example, the right to education for children with disabilities in Article 24, read in conjunction with the principle of non-discrimination as set out in Article 3, may well be interpreted to mean that education shall not be denied to Roma children with disabilities, or to girls with disabilities. Article 24 may also be interpreted to mean that discrimination against children with a particular disability is also prohibited—thus the right to education applies equally to all children with disabilities, which ‘include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’<sup>25</sup> The two disability-specific principles are Principle (a), which restates autonomy and the right to make one’s own choices, and Principle (d), which celebrates persons with disabilities as part of humanity. These principles may be useful when interpreting controversial or ambiguous topics which were subject to heated debate by the Ad Hoc Committee negotiating the CRPD.

## B. Silence as Expression

An example of a controversial topic on which the CRPD has no explicit provision for or against, is forced psychiatric treatment of persons diagnosed/labelled with a mental illness. Such treatment is lawful in domestic legislation in most countries. The global disability movement fought hard for the CRPD to include an explicit prohibition against forced psychiatric interventions, and the text is quite clear on the prohibition of detention, with Article 14 stating that ‘the existence of a disability shall in no case justify a deprivation of liberty.’ Some negotiating states sought a specific exception to the general right to consent to treatment so as to explicitly allow forced psychiatric treatment. Instead, the CRPD is silent on psychiatric treatment.<sup>26</sup> Instead, Article 25 on the right to health places an obligation on States Parties to

<sup>24</sup> United Nations Enable, *Guiding Principles of the Convention*, available at: [www.un.org/disabilities/default.asp?navid=14&pid=156](http://www.un.org/disabilities/default.asp?navid=14&pid=156).

<sup>25</sup> Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106 (entered into force 3 May 2008) Art 1—Purpose.

<sup>26</sup> I am grateful to Professor Amita Dhanda for enlightening me about the potential implications of the Convention’s silence on forced psychiatric treatment: see A Dhanda, ‘Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?’ (2007) 34(2) *Syracuse Journal of International Law and Commerce* 429 and Annegret Kämpf, this volume, ch 6.

[r]equire health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent.

The principle of consent to treatment is phrased as a state obligation rather than an individual right and the word ‘consent’ remains undefined, leaving open the proposition that consent includes a person’s current functional capacity, or previous functional capacity during which a future wish was expressed (including in the form of an advance directive).

In analysing the range of possible interpretations of the CRPD, their political palatability and operational viability, those interpreting the CRPD may want to utilise the expressive value of human rights. This would mean, for example, interpreting the substantive articles by giving meaning to the principles of respect for autonomy, freedom to make one’s own choices, inclusion in society and acceptance of persons with disabilities as part of human diversity. The gap between the CRPD’s values and the current reality of many mental health laws all over the world may be an example of an area where the CRPD is trying to set out a future reality which has yet to be explained. Ambiguity is awkward for policy-makers and for black-letter lawyers, but it represents a triumph of shared norms over policy detail, whereby those negotiating the treaty agreed on the fundamental principles, but were not able—at that moment in time, on this particular issue—to find consensus on how these principles should play out in the psychiatric emergency room.

Some English-speaking jurisdictions have introduced mental health laws which contain principles such as measures to minimise the restrictions. These include, among others, the principle of ‘least restrictive environment and with the least restrictive or intrusive treatment’, ‘minimum restriction on the freedom of the patient that is necessary in the circumstances’,<sup>27</sup> ‘least restrictive environment’,<sup>28</sup> and ‘minimising restrictions on liberty’.<sup>29</sup> That the CRPD is silent on forced treatment may be viewed as simply naïve, offering domestic policy-makers little guidance on the content of domestic mental health legislation, or indeed offering them plenty of room to be creative and progressive, or it may have been simply a political compromise to finalise the treaty. Whichever of these truths emerges, the CRPD is less open to be criticised for hypocrisy, unlike the United Nations Mental Illness Principles which contain a lofty principle on non-discrimination of persons

<sup>27</sup> Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, Adopted by UN GA res 46/119 of 17 December 1991, Principle 9(1).

<sup>28</sup> See, eg Mental Health Act 2007 (NSW) s 68(a).

<sup>29</sup> Mental Health Act 2007 (England and Wales), s 8, which inserts into the Mental Health Act 1983 (England and Wales), s 118(2B)(c) compelling the Secretary of State to ensure this principle is addressed when preparing a statement of principles for the Code of Practice.

with mental illness,<sup>30</sup> and then goes on to list five exceptions to the right to consent to treatment without offering any legal or moral justifications for the exceptions.<sup>31</sup>

The law's communication process has been described as creating 'a normative framework, a vocabulary and a set of open concepts to structure normative discussion'.<sup>32</sup> The CRPD's silence on forced psychiatric treatment provides space and time for reflection and communication, perhaps demonstrating the inter-connectivity between the expressive and the educational roles of human rights.

The CRPD's existence is predicated upon the supposition that, 'the typical welfare response ... of maintaining rather than empowering persons with disabilities has been relatively immune from pressure to change'.<sup>33</sup> However strong the vision and rhetoric of the CRPD, governments and other actors may find themselves stuck in repeating the behaviours of the past, thwarting change. A filtration of ideas from the grassroots disabilities movement is a good start, but ideas alone will be insufficient to ensure an internalisation of a new disability politics. States' inability or unwillingness to accord persons with disabilities sufficient power to set, implement, monitor and adjust policies was one of the reasons the CRPD was needed. It also represents the greatest risk that it will remain unimplemented. Empowering individuals with disabilities can be achieved by the inclusion of CRPD beneficiaries into the domestic policy cycle. This means moving beyond the rhetoric of paradigms and principles, and engaging vigorously and respectfully with those who hold opposing views to unleash the CRPD's potential.

### III. Educational Value of Human Rights: Talking

The playwright and political activist Harold Pinter was once asked a question on the actions which individuals who feel compelled to do something about injustices should take. He answered, '[t]o speak. The appropriate response is simply to look for the truth and tell it'.<sup>34</sup> If the expressive value of human rights aims at seismic shifts in societal thinking, then the educational role of human rights gets us talking, speaking truth to power. The adoption of the CRPD

<sup>30</sup> Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, Adopted by UN GA Res 46/119 of 17 December 1991, Principle 1(4).

<sup>31</sup> *ibid*, Principle 11(1).

<sup>32</sup> W van der Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues' (2001) 20 *Law and Philosophy* 31.

<sup>33</sup> G Quinn, 'Resisting the "Temptation of Elegance": Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?' in MO Arnardóttir and G Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden, Martinus Nijhof, 2009).

<sup>34</sup> Harold Pinter interviewed by Harry Burton, British Library, 8 September 2008.

provides closure on an intensive global conversation about the notion of disability, the rights of people with disabilities, and the duties on states and others towards them. It is a dusk as well as a dawn.

A substantial amount of time and resources will need to be spent in structuring normative discussion on how the CRPD is to be interpreted, on finding new ‘institutional champions’ at domestic levels,<sup>35</sup> and educating key stakeholders about what the paradigm shift actually means. Stakeholders will hold a variety of views about CRPD interpretation, and those putting forward views may well assume that their own view is correct, and other interpretations are wrong. Appropriate forums to allow communication to take place in an open dialogue will be crucial to exploring the various interpretations out there and persuading each other of the pros and cons of different viewpoints.<sup>36</sup> The public policy theorist Jan Kooiman suggests that communication between stakeholders is crucial because, ‘[n]o single actor, public or private, has all the knowledge and information required to solve complex dynamic and diversified problems; no actor has sufficient overview to make the applications or needed instruments effective.’<sup>37</sup> This is as true for disability as it is for any other area of public policy. In this section of this chapter, it is suggested that the CRPD encourages a culture of continuous communication by creating bodies at both the United Nations level and state level, and by placing obligations upon those bodies to specifically seek out the views of persons who have experienced disabilities.

### A. Transposing International Norms

Given the stark gap between the text of the CRPD and the reality on the ground, education at various levels clearly needs to take place. The United Nations High Commissioner for Human Rights has called for states to ‘transpose international

<sup>35</sup> G Quinn, ‘Resisting the ‘Temptation of Elegance’: Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?’ in MO Arnardóttir and G Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden, Martinus Nijhof, 2009).

<sup>36</sup> These discussions will need to start at a basic level and those holding discussions should be prepared for unexpected re-opening of the paradigm shift. For example, in December 2008 the author was a co-trainer at a three-day Council of Europe sponsored training seminar on disability rights for staff of various national human rights institutions across Europe. The training schedule had to be adjusted to allow for an unexpected and lengthy debate on why people with disabilities should have the right to vote. Although Art 29(a) of the CRPD unambiguously provides the right of persons with disabilities to vote and stand for election, several participants—who are all charged with monitoring the rights of persons with disabilities—initially laughed at the proposition that persons with mental health problems should have the right to stand for parliament, and after much explanation they remained less than convinced of the merits of the provision.

<sup>37</sup> J Kooiman, ‘Social-political Governance’ in J Kooiman (ed), *Modern Governance: New Government-Society Interactions* (London, Sage, 1993).

obligations into meaningful programmes for change at the national level'.<sup>38</sup> It is suggested that there are three elements to such a transposition. First, stakeholders need to understand the CRPD's vision and ask themselves 'What are the elements of this aspiration?' In doing so they will reach back to the expressive role of human rights, be aware of the paradigm shift, and conduct an appreciative inquiry into the sort of changes the CRPD envisions. Secondly, the participants in the conversation will need to assess the current human rights situation of people with various disabilities and analyse the reasons for any gap in compliance, asking the questions 'Where are we now?' and 'What has caused this situation?'. They will have to reach out and hold conversations with a range of groups and individuals, actively listening to their needs and wishes. Thirdly, there will need to be some sort of majority (of whom?!) opinion about the steps which stakeholders need to take in order to make CRPD provisions a reality; in other words they will need to answer questions such as, 'What needs to change?' How are these changes going to be made, by whom, and by when?' In pursuing these discussions, participants may not reach a consensus (although an open discussion certainly makes this more likely), but they may well be able to better understand each others' positions, explore the reasons underlying deeply-held views, critically appraise their own and others' viewpoints, and find ways of accommodating competing claims.<sup>39</sup>

Taking one of the CRPD's provisions as an example, Article 12 on legal capacity contains two provisions which will require quite significant shifts in thinking, a series of conversations, and steps to bring norms and behaviours into compliance. The Article sets out first, that everyone with disabilities has the right to legal capacity, and secondly that those who need support in exercising their legal capacity to make decisions get such support. Recognising that '[r]especting the legal capacity of persons with disabilities is fundamental not only as a right in itself, but also as a basis to protect other human rights', Louise Arbour went on to set out the challenge of implementation:

What do these provisions mean for lawyers, for notaries, for institutions, for support-oriented organizations, for justice departments, for courts? To make this right a reality, it will be important to identify good practices in legislative and policy approaches and to examine how these rights and obligations can be incorporated into different legal and developmental contexts.

Let me give some examples about the educative value of the CRPD in this regard. During 2008 and 2009 my colleagues at the Mental Disability Advocacy Center (MDAC) have been working in Hungary and the Czech Republic with other civil

<sup>38</sup> L Arbour, Opening address of the High Level Dialogue on the day of the signing of the Convention on the Rights of Persons with Disabilities and its Optional Protocol: From Vision to Action: the Road to Implementation of the Convention, 30 March 2007.

<sup>39</sup> On the naivety of consensus, see W van der Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues' (2001) 20 *Law and Philosophy* 31, 56.

society organisations on Article 12 implementation, and advocating at governmental level for the requisite changes. Exchanges of opinions and ideas have taken place horizontally, in coalitions of non-governmental organisations (NGOs). MDAC, a legal advocacy organisation which is not a disabled people's organisation, carried out research on the extent to which these two countries' guardianship arrangements complied with international law. Following the publication of those reports, MDAC worked with a range of NGOs, including disabled people's organisations, national umbrella organisations, local service providers and small self-help groups. Coalition members reached out to mainstream human rights NGOs. People with disabilities in the coalitions shared their experiences, ideas and concerns. MDAC lawyers listened to these personal testimonies and framed them as legislative issues. In parallel, colleagues were in contact with NGOs and other experts internationally to gain an understanding of the CRPD's provisions. They also identified best practice in other countries such as Canada, evaluated these programmes and adapted them to the different contexts. In parallel, horizontal exchanges also happened across ministries in these countries, and the governments engaged in discussions, for example, through the European Union's Disability High Level Group, which was established partly to act as a forum for countries to share promising practices.

The advocacy coalitions reached out to central government, taking their research on legislative compliance together with their proposals on how to bring law and services into compliance with Article 12. In this vertical exchange of views, government officials in both countries were initially hesitant to work so closely with civil society, but were soon receptive to ideas when it became clear that the NGOs brought CRPD knowledge together with the testimony of people with disabilities, whose rights could be better protected by domestic implementation. Officials also noticed that NGOs have technical assistance which went above and beyond the competencies of civil servants. The NGOs set out in detail how the government could bring laws into compliance with the CRPD. At the time of writing (November 2009), the Hungarian parliament became the first in the world to enact CRPD-inspired root and branch legal capacity reforms (which abolishes plenary guardianship, and introduces supported decision-making), and the Czech government had agreed with the majority of the submissions made by the NGO coalition. These examples are provided to demonstrate how NGOs can take a proactive role in encouraging states to transpose international law into the domestic arena. There are examples from other parts of the world too.

## B. Bringing New Actors into Disability Rights Discourse

As noted, the educational value of human rights encourages communication between actors, bringing together people holding diverse views who may share common ground at a deeper value-based level. Most people agree on the concept of equality but may differ on how the concept should manifest itself across policy

*The Expressive, Educational and Proactive Roles of Human Rights* 109

areas. The CRPD encourages such communication, giving primacy to persons with disabilities and their respective organisations.<sup>40</sup> Through its inclusive approach, the CRPD may encourage groups who have not previously done so to work with each other. A small example is lawyers (attorneys as well as academic ones) in English-speaking jurisdictions. Disability lawyers tend to focus on discrimination-in-employment law, whereas mental health lawyers usually do not cover employment at all, but focus on detention and forced treatment. Perhaps the CRPD will bring these groups together? Another example is of 'mainstream' human rights organisations which have traditionally been slow to recognise that human rights of persons with disabilities is actually a legitimate topic of human rights. Human Rights Watch is among the most respected human rights organisations in the world but until summer 2009, when it came out with a report looking at corporal punishment of students with disabilities in the United States,<sup>41</sup> it paid little attention to the rights of persons with disabilities. Its Executive Director acknowledged this in 2002, writing that

[t]here is little doubt that a disability is a 'status' entitling one to protection under, for example, the anti-discrimination provision of Article 26 of the International Covenant on Civil and Political Rights. In some cases involving children, the human rights movement has begun to take on the cause of people with disabilities. But an embrace of this broad sector of humanity has barely begun. Remedying this failure is a major challenge facing the movement.<sup>42</sup>

In 2009 Human Rights Watch announced that it had obtained funding to start some specific programming on the rights of persons with disabilities, and it is hoped that Human Rights Watch will contribute to raising the visibility and credibility of the rights of persons with disabilities within the 'mainstream' human rights community and its donors.

Seeking out and bringing on board partners was evident when the CRPD was being negotiated by states and NGOs at the United Nations. Louise Arbour has reflected that the process was a 'significant learning process' and one which has 'helped us forge partnerships with new actors beyond our typical human rights

<sup>40</sup> Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106 (entered into force 3 May 2008) Art 4(3).

<sup>41</sup> Human Rights Watch, *Impairing Education: Corporate Punishment of Students with Disabilities in US Schools* (New York, Human Rights Watch, 2009) available at [www.hrw.org/sites/default/files/reports/us0809webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us0809webwcover_0.pdf)

<sup>42</sup> K Roth, 'Foreword' in Mental Disability Rights International, *Not on the Agenda: Human Rights of People with Mental Disabilities in Kosovo* (Washington DC, Mental Disability Rights International, 2002). Art 26 of the International Covenant on Civil and Political Rights states: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

partners—in particular persons with disabilities and their representative organizations.<sup>43</sup> She has pointed out that the involvement of her office in the negotiation process instigated a process of changing the way the United Nations works—from office layout to the choice of technology.

The CRPD has secured the attention of United Nations officials who had previously not addressed the rights of persons with disabilities. For example, in December 2007, the Office of the United Nations High Commissioner for Human Rights organised a seminar on disability and torture, which was attended by two members of the United Nations Committee against Torture, and Manfred Nowak who holds the mandate of United Nations Special Rapporteur on Torture.<sup>44</sup> Within a year Nowak had produced a report in which he stated that the CRPD ‘provides a timely opportunity to review the anti-torture framework in relation to persons with disabilities.’<sup>45</sup> The report cited examples of how persons with disabilities are subjected to neglect, severe forms of restraint and seclusion, as well as physical, mental and sexual violence. A reframing of the anti-torture framework is necessary, Nowak claims, so that ill-treatment which is perpetrated in public institutions as well as in the private sphere, begins to be recognised as torture or other cruel, inhuman or degrading treatment or punishment.

In many states across the world, NGOs are using the CRPD as a catalyst to reach out to others, discuss the benefits for their constituents of adopting a human rights based approach, and build constituencies for advocacy. The need to develop one’s own and other people’s understanding of disability and to bring new actors into the disability rights field should go hand in hand with the attempt to do something over and above CRPD’s aims, namely to reduce world poverty.

### C. Poverty and Disability

The educational value of the CRPD has the potential to encourage communication to highlight the intimate link between disability and poverty and to implement inclusive poverty reduction strategies. The key actors in these conversations are host governments, donor governments, other donors and civil society organisations, including disabled people’s organisations. The statistics are astonishing. The United Nations estimates that approximately 80 per cent of the 650 million people with disabilities worldwide live in developing countries, and of these some 426 million live below the poverty line, often representing the 15 to 20

<sup>43</sup> L Arbour, Statement to the General Assembly Ad Hoc Committee, 8th session, New York, 5 December 2006.

<sup>44</sup> For more information, see: [www2.ohchr.org/english/issues/disability/torture.htm](http://www2.ohchr.org/english/issues/disability/torture.htm).

<sup>45</sup> M Nowak, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 28 July 2008, A/63/175 at [41].

per cent most vulnerable and marginalised poor in such countries.<sup>46</sup> The drafters of the CRPD wanted funding to flow between States Parties by inserting a provision which recognises ‘the importance of international cooperation for improving the living conditions of persons with disabilities in every country, particularly in developing countries.’<sup>47</sup> The CRPD encourages communication between and among states in co-operation with regional and intergovernmental organisations and civil society, in order to, amongst other things, ensure international development programmes are inclusive of and accessible to people with disabilities, facilitate capacity-building and sharing of best practices, co-operate in research, share information, and provide economic and technical assistance.<sup>48</sup> That the CRPD is a human rights treaty as well as a development tool may be one of the reasons why so many low- and middle-income countries have swiftly ratified the CRPD.

A recent report of the United Nations Economic and Social Council has found that

[t]here is a strong bidirectional link between poverty and disability. Poverty may cause disability through malnutrition, poor health care, and dangerous living conditions. Case studies in developing countries show that higher disability rates are associated with higher rates of illiteracy, poor nutritional status, lower immunization coverage, lower birth weight, higher rates of unemployment and underemployment, and lower occupational mobility.<sup>49</sup>

More explicitly, disability needs to become a focus for the United Nations’ Millennium Development Goals<sup>50</sup> for these goals to stand any chance of being achieved. The United Nations Commission for Social Development 2008 report puts it bluntly:

The high numbers of persons with disabilities who are disproportionately represented among the world’s most marginalized groups have a profound significance with respect to the achievement of the Millennium Development Goals, which thus far seems to have gone largely unnoticed in the international discourse on the Goals. The Millennium Development Goals, in fact, cannot be achieved if persons with disabilities are not included in these efforts. We are now at the halfway point to the target date of 2015, yet in The Millennium Development Goals Report 2007,<sup>51</sup> persons with disabilities as a

<sup>46</sup> A O’Reilly, *The Right to Decent Work of Persons with Disabilities*, revised edn (Geneva, International Labour Office, 2007).

<sup>47</sup> Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106 (entered into force 3 May 2008) preambulatory para (l).

<sup>48</sup> *ibid.*, Art 32.

<sup>49</sup> United Nations, Economic and Social Council, *Mainstreaming Disability in the Development Agenda* Report for the Commission for Social Development, 46th Session 6–15 February 2008, ref E/CN.5/2008/6, 23 November 2007, available at: [www.un.org/disabilities/default.asp?id=358](http://www.un.org/disabilities/default.asp?id=358), at [3].

<sup>50</sup> The Millennium Development Goals are eight goals aimed to be achieved by 2015 that respond to the world’s main development challenges, available at: [www.undp.org/mdg/basics.shtml](http://www.undp.org/mdg/basics.shtml).

<sup>51</sup> United Nations, Department of Economic and Social Affairs, *The Millennium Development Goals Report 2007* (New York, United Nations, 2007).

group are not mentioned, and the issue of disability is briefly mentioned twice. The Human Development Report 2006<sup>52</sup> discusses persons with disabilities within the development context of sanitation. It is hoped that current efforts to integrate disability within the United Nations system will increase the importance of persons with disabilities in such reports in the future.<sup>53</sup>

Article 32 of the CRPD is dedicated to international co-operation and highlights action-oriented measures which states can undertake to support inclusive development. The Article ensures that development programmes become inclusive and accessible to persons with disabilities, putting to bed the idea that the only way to increase the wealth of disabled people is by focusing on disability-specific programming. A consequence of the CRPD's insistence that disability be mainstreamed into all development programmes,<sup>54</sup> is that

once a country ratifies the CRPD, it will need to be reflected in its national development framework such as the Common Country Assessment, United Nations Development Assistance Framework, and Poverty Reduction Strategy Papers. It is through these broad-reaching approaches to development that the CRPD will become a reality on the ground and in the daily lives of individuals.<sup>55</sup>

Thus, the CRPD sets up a communication process among people leading on different policies. The treaty's focus on poverty reduction may well have a direct impact on domestic implementation, as well as on the methods with which international and domestic actors communicate with each other. Boosted communications in the mainstream will result in persons without disabilities being exposed to those with disabilities. Such exposure may help reduce stigma and discrimination against persons with disabilities.

Prerequisites to rebalancing global inequalities by redistributing financial and informational resources include elements of the educational value of human rights: willingness by states to share information with other states; an appreciation by development agencies of the damage caused by inappropriate grant-making (such as renovating children's institutions instead of investing into community-based services); an increased effort by United Nations and regional bodies to facilitate exchange; and more transparent processes to allow civil society organisations to participate and hold states to account. Exchanging information, of course, only goes so far. People's lives will change only if action is

<sup>52</sup> United Nations, Department of Economic and Social Affairs, *The Human Development Report 2006* (New York, United Nations, 2006).

<sup>53</sup> United Nations Commission for Social Development, *Mainstreaming Disability in the Development Agenda* Report for the Commission for Social Development, Forty-sixth Session 6–15 February 2008 ref E/CN.5/2008/6, 23 November 2007 available at: [www.un.org/disabilities/default.asp?id=358](http://www.un.org/disabilities/default.asp?id=358).

<sup>54</sup> Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106, preambulatory para (g) also emphasises 'the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development'.

<sup>55</sup> United Nations Enable, *Relationship between Disability and Development*, available at: [www.un.org/disabilities/default.asp?id=33](http://www.un.org/disabilities/default.asp?id=33).

taken as a result of the information exchange, and it is the proactive value of human rights which this chapter now considers.

#### IV. Proactive Value of Human Rights: Doing

Having laid out the expressive value of human rights which presents a new paradigm for the conceptualisation of disability, and the educational value of human rights which opens up conversations inside and between organisations and states, it is the proactive value of human rights which turns thinking and talking into action. The pre-existing international human rights landscape applies to people with disabilities, but as the CRPD points out,

despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.<sup>56</sup>

The drafters of the CRPD made it their aim to plug the compliance gap between rights and implementation, and they inserted into the text several structural features which make it likely that the CRPD will be implemented to a greater extent than other human rights treaties.

##### A. Specificity of Action

The drafters were acutely aware that the need for the CRPD was that international human rights treaties and their mechanisms had failed people with disabilities. The CRPD contains a wealth of action points which states will find difficult to ignore. Whereas the United Nations Convention on the Rights of the Child obliges States Parties to take ‘all appropriate legislative, administrative, and other measures’ to ensure that children are protected against all forms of discrimination,<sup>57</sup> it does not actually specify what these appropriate measures should be.

The CRPD does not hold back on specificity, making it easier for States Parties to understand their obligations, and for the United Nations Committee on the Rights of Persons with Disabilities, as well as domestic bodies, to hold States Parties to account. The CRPD goes much further than the Convention on the Rights of the Child, obliging States Parties to ‘modify or abolish existing laws,

<sup>56</sup> Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106 (entered into force 3 May 2008) preambulatory para (k).

<sup>57</sup> Convention on the Rights of the Child, adopted by UN GA Res 44/25 of 20 November 1989 Art 2(2).

regulations, customs and practices that constitute discrimination against persons with disabilities,<sup>58</sup> to refrain from acting in any way which is inconsistent with the CRPD,<sup>59</sup> to take ‘all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise,’<sup>60</sup> to promote training of professionals and staff working with persons with disabilities about the CRPD,<sup>61</sup> and (quite remarkably) to ‘take into account the protection and promotion of the human rights of persons with disabilities in *all* policies and programmes.’<sup>62</sup> States Parties are therefore under a duty to take broad action across government to ensure that rights are protected, respected and fulfilled in public and private spheres and considered in all policies and services.

## B. Independent Mechanisms

It is commonly acknowledged in human rights that it is easy for states to ratify treaties, because they need not do anything about implementation, placing at risk the potential of international law to bring positive changes to people’s lives. The CRPD guards against backsliding by establishing an independent body at United Nations level, and by obliging States Parties to establish/designate an independent monitoring body at domestic level. These two mechanisms will be examined in turn.

Despite numerous innovative proposals put forward by a variety of organisations, the CRPD has quite a mundane arrangement at the United Nations level to monitor state compliance. The CRPD establishes a Committee on the Rights of Persons with Disabilities,<sup>63</sup> which consists of 12 experts (increasing to 18 after 80 ratifications of the CRPD)<sup>64</sup> who ‘shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the Convention.’<sup>65</sup> When nominating prospective members, States Parties are encouraged to ‘closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.’<sup>66</sup> The CRPD calls for States Parties to ‘consider’ the prospect of achieving ‘equitable geographical distribution, representation of the different

<sup>58</sup> Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106 (entered into force 3 May 2008) Art 4(1)(b).

<sup>59</sup> *ibid*, Art 4(1)(d).

<sup>60</sup> *ibid*, Art 4(1)(e). Note how the CRPD views State intervention into the private spheres as unproblematic.

<sup>61</sup> *ibid*, Art 4(1)(i).

<sup>62</sup> *ibid*, Art 4(1)(c), emphasis added.

<sup>63</sup> *ibid*, Art 34(1).

<sup>64</sup> *ibid*, Art 34(2).

<sup>65</sup> *ibid*, Art 34(3).

<sup>66</sup> *ibid*, Art 4(3), to which Art 34(3) invites States Parties to give due consideration when nominating their candidates.

forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities.<sup>67</sup> The members serve for four years, except for six members from the first batch who serve for two years only, ensuring a staggered turnover.<sup>68</sup>

The role of the Committee is two-fold. First, the Committee receives reports by States Parties on measures taken to implement the CRPD. The reports ‘may indicate factors and difficulties affecting the degree of fulfilment of [CRPD] obligations.’<sup>69</sup> These reports must be submitted within two years of the entry into force of the CRPD in each particular State Party,<sup>70</sup> and thereafter every four years.<sup>71</sup> The CRPD uses rather tentative language when it invites States Parties ‘to consider [preparing their reports] in an open and transparent process and to give due consideration to ... closely consult[ing] with and actively involv[ing] persons with disabilities, including children with disabilities, through their representative organizations.’<sup>72</sup> The Committee will consider these reports, and ‘shall make such suggestions and general recommendations on the report as it may consider appropriate.’<sup>73</sup> Interestingly enough, the CRPD places an obligation on States Parties to ‘make their reports widely available to the public in their own countries and facilitate access to the suggestions and general recommendations relating to these reports.’<sup>74</sup> This is worth dwelling on a little. The CRPD is the first United Nations human rights treaty to contain an obligation on States Parties to make widely available to the public either their own report on compliance or the treaty monitoring body’s suggestions and recommendations relating to that report. This is another example of how the CRPD pioneers a new participatory politics and promotes a dynamic of domestic discussion and participation. Presumably the obligation to make reports widely available means producing the reports in various formats—for the public without disabilities, and various accessible formats for people with disabilities who require different formats. So the reports would at a minimum have to include: easy-to-read format for children with disabilities, easy-to-read format for adults with intellectual disabilities, large print, Braille, and electronic versions. The public also consists of people without disabilities. One can read into the CRPD an implicit obligation that the government takes the responsibility to translate its report and the Committee’s suggestions and recommendations into indigenous languages accurately and promptly, and to issue all of the above-mentioned formats in each of these languages.

The second role of the Committee applies only in relation to those states which have ratified the Optional Protocol to the CRPD. The Committee can receive and

<sup>67</sup> *ibid*, Art 34(4).

<sup>68</sup> *ibid*, Art 34(7).

<sup>69</sup> *ibid*, Art 35(6).

<sup>70</sup> *ibid*, Art 35(1).

<sup>71</sup> *ibid*, Art 35(2).

<sup>72</sup> *ibid*, Art 35(5), citing Art 4(3) on participation.

<sup>73</sup> *ibid*, Art 36(1).

<sup>74</sup> *ibid*, Art 36(4).

consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction of that state who claim to be victims of a violation by that State Party of any CRPD provision.<sup>75</sup> The Optional Protocol sets out various procedural rules, including the requirement that the victim(s) must exhaust domestic legal remedies before submitting the communication to the Committee. After considering the Applicant's and the respondent state's positions in a given communication the Committee may make recommendations and suggestions to the respondent state.<sup>76</sup> In addition to dealing with individual communications the Committee can also instigate an 'inquiry' where it receives information 'indicating grave or systematic violations' of the CRPD.<sup>77</sup> The Committee can ask a state to include in its periodic reports under Article 35 of the CRPD any measures which it has taken in response to such an inquiry.<sup>78</sup>

The rather mundane international arrangement for monitoring compliance is compensated for by innovative domestic monitoring mechanisms. The CRPD follows a recently-established trend in international human rights treaties to oblige States Parties to establish domestic mechanisms for monitoring implementation. The obvious parallel is the Optional Protocol to the United Nations Convention against Torture (OPCAT) which obliges States Parties to 'maintain, designate or establish ... one or several independent national preventive mechanisms for the prevention of torture at the domestic level.'<sup>79</sup> These national preventive mechanisms may be ombudsman offices, national human rights institutions or fresh bodies. States must give them the power to enter places of detention in order to examine the rights of persons deprived of liberty, make recommendations to the authorities on each place of detention and make recommendations on draft legislation.<sup>80</sup>

The CRPD takes this idea and runs with it, obliging States Parties to 'maintain, strengthen, designate or establish ... a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present [CRPD].'<sup>81</sup> In carrying out this obligation states must take into account the Paris Principles,<sup>82</sup> which set out minimum standards for the functioning, composition, financing, guarantees of independence and pluralism, and methods of operation of national human rights institutions. Although the national monitoring mechanisms are seen as quite innovative, during the negotiations of the CRPD, states rejected even more creative proposals

<sup>75</sup> Optional Protocol to the Convention on the Rights of Persons with Disabilities, Art 1.

<sup>76</sup> *ibid*, Art 5.

<sup>77</sup> *ibid*, Art 6.

<sup>78</sup> *ibid*, Art 7(1).

<sup>79</sup> *ibid*, Art 17.

<sup>80</sup> *ibid*, Art 19.

<sup>81</sup> Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106 (entered into force 3 May 2008) Art 33(2).

<sup>82</sup> National Institutions for the Promotion and Protection of Human Rights, UN GA res 48/134, 20 December 1993.

put forward by both the International Disability Caucus (comprising all sorts of disability NGOs) and the grouping of National Human Rights Institutions.<sup>83</sup>

The national independent mechanisms foreseen by the CRPD will in many countries likely be crucial in conjoining the government to focus on effective implementation. The CRPD inventively mandates States Parties to ensure that these independent mechanisms do three quite different things: ‘to promote, protect and monitor implementation of the [CRPD].’ To get round the linguistic ambiguity, my reading of this sentence is that the duties to promote and protect refer to the rights of people with disabilities and not to promoting or protecting implementation.

What sorts of activities would fall under these three headings? Promoting human rights of persons with disabilities means anything which ‘valourises’ the paradigm shift.<sup>84</sup> This would include activities in the public arena and in the corridors of power to promote the ratification of the CRPD (if the state has not already done so), and encouraging ratification without reservations or interpretative declarations which unravel the CRPD. Promoting rights means getting out of the office and meeting key officials to encourage them to take action to ensure the full and effective implementation of the CRPD. Other activities would include awareness-raising campaigns for the general public including delivering messages to the public through the media.<sup>85</sup> It would also include organising training for people working with and caring for people with disabilities,<sup>86</sup> and capacity-building of organisations of and for persons with disabilities so that they can better participate in public policy-making on issues which affect them, as envisioned by the CRPD.<sup>87</sup> Promoting human rights means working with

<sup>83</sup> For an analysis of these proposals, see G Quinn, ‘Resisting the ‘Temptation of Elegance’: Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?’ in MO Arnardóttir and G Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden, Martinus Nijhof, 2009). These included a direct obligation on the national monitoring mechanism not just to hold the government to account with regard to the CRPD, but also domestic disability policies, and that the national body should make legislative recommendations. The proposal for an international monitoring body included a set of facilitative, solution-oriented activities rather than a passive role which receives reports from States Parties. It also contained an elaborate mechanism to ensure that the Committee contained experts with disabilities proposed not by states, but by the Office of the UN High Commissioner for Human Rights.

<sup>84</sup> Thanks to Gerard Quinn for this phrase and for encouraging me to delve into domestic monitoring mechanisms.

<sup>85</sup> In the CRPD, ‘States undertake to adopt immediate, effective and appropriate measures’ (Art 8(1)) on awareness-raising, with measures including ‘encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention’ (Art 8(2)(c)).

<sup>86</sup> Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106 (entered into force 3 May 2008) Art 4(1)(i) requires states ‘to promote the training of professionals and staff working with persons with disabilities in the rights recognized in the present Convention so as to better provide the assistance and services guaranteed by those rights’.

<sup>87</sup> *ibid.*, Art 33(3)—this is addressed below.

education systems to integrate disability into human rights education in primary and secondary schools. It also means encouraging law faculties and human rights institutes to include the rights of persons with disabilities as part of their regular human rights teaching and research.

As already noted, the CRPD places a general obligation on states '[t]o take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes.'<sup>88</sup> So too should an Ombudsman office or national human rights institution ensure that in addition to carrying out specific programming to promote and protect the rights of persons with disabilities, they integrate and mainstream disability into all areas of existing work. For example, they need to promote disability rights within thematic areas such as the prevention of torture, promotion of sexual and reproductive rights, freedom of expression, election monitoring, domestic violence and hate crime. Mainstreaming also means dealing authentically with double (and triple, and more) discrimination by ensuring that people with disabilities feature as part of work regarding all discriminated-against groups: women, refugees, people of ethnic or religious minorities, lesbian, gay, bisexual and transgender people, children and young people, elderly people, poor people, detained people and so on. The national monitoring mechanisms need not do this alone; they can call for assistance from sister organisations abroad, working in concert to share practices and to develop ideas.

So much for promoting rights. Protecting rights has more of a hard-edged feel. This may include providing legal advice and assistance to individuals and—depending on the mandate of the independent mechanism—representing them in domestic courts or before the United Nations Committee on the Rights of Persons with Disabilities in individual complaints under the Optional Protocol. The independent mechanism could seek to advance jurisprudence by piggy-backing on litigation by intervening as a friend-of-the-court by submitting an *amicus curiae* brief. Protecting rights means reacting in a speedy and appropriate manner to cases revealed by the media. It means vigorously holding governments to account and ensuring that independent bodies are seen and heard to be doing so. It also means travelling the breadth and width of the country to monitor the rights of people with disabilities where they live, including in places of detention such as psychiatric facilities and social care institutions, as well as in smaller group homes. There is an inevitable crossover here between the role of the CRPD independent mechanisms, and the national preventive mechanism of places of detention under the Optional Protocol to the United Nations Convention against Torture (OPCAT), noted above. Coordination between the two bodies will be necessary, as will cross-fertilisation of skills and experience. In some countries

<sup>88</sup> *ibid*, Art 4(1)(c).

they will be different departments of the same Ombudsman's office or national human rights institution, in which case cross-departmental cooperation is called for.

If the independent body is doing its job properly, it will come head-to-head with governmental authorities. Part of being an independent human rights structure means speaking truth to power. In the area of human rights, truths can be uncomfortable, and some governments go to great lengths to crush criticism. It is vital that legislation protects the independence of national human rights structures to prevent their budgets being slashed by government, to prevent summary dismissal of staff, or raiding of premises.

The third function of the national independent body as set out in the CRPD is to monitor the implementation of the CRPD. This is an unusual task, unparalleled in international human rights law. It is quite remarkable that states negotiating the CRPD agreed that they would each establish and finance a body at arms-length to government with the mandate to monitor how well the government is implementing the CRPD. Such a task will be challenging even for well-established independent mechanisms. The CRPD is detailed and complex and most existing national human rights institutions are already overloaded even without this significant additional mandate.

Monitoring the implementation of the CRPD will mean carrying out an array of concrete activities distinct from those falling under the headings of promoting and protecting the rights of persons with disabilities. The first activity when monitoring anything is likely to be to establish the 'current reality'. Each national independent mechanism will have to analyse how national laws and policies compare with the CRPD and publish a base-line report which highlights areas on which the independent body needs to focus, and, flowing from this, a work-plan with measurable objectives. Monitoring CRPD implementation also means tracking draft legislation which has or ought to have an impact on people with disabilities, analysing it through the lens of the CRPD, and coming out with a view as to its CRPD compliance. A legislative scrutiny role such as this will feed into or from a parliamentary human rights committee (where such a body exists).

Conducting analyses of actual and draft laws and policies for Convention compliance requires staff working for the independent mechanism to have a high level of understanding of the CRPD, the skills to conduct such analyses, and the resources to ensure that analyses are available in a variety of formats. In building its own capacity such a mechanism might want to draw on the expertise of disabled people's organisations, other NGOs and academics. The independent mechanism will need to develop and adopt indicators or precise standards against which laws or practice can be measured. A useful early task for the United Nations Committee on the Rights of Persons with Disabilities is to develop—with the participation of persons with disabilities and their NGOs—a reporting template with basic indicators of compliance, and make it clear that they expect States Parties to use this template when compiling their reports under Article 35

of the CRPD. This will help the national independent mechanisms to carry out their base-line analyses, and to repeat these periodically so that information is tracked through time. Assessing compliance at various points in time is a vital tool to be able to comment on whether a particular state is, to the maximum of its available resources, progressively realising the economic, social and cultural rights set out in the CRPD.<sup>89</sup>

A compliance analysis requires data. The lack of meaningful data and statistics is a major problem in some countries where governments fail to collect and collate national data on disability rights issues, such as (if we are analysing compliance with Article 12 of the CRPD) how many people in a particular country have been deprived of legal capacity. States Parties are obliged by the CRPD to ‘collect appropriate information including statistical and research data to enable them to formulate and implement policies to give effect to the present CRPD.’<sup>90</sup> The data should be disaggregated, so as to monitor potentially discriminatory practices, and the independent monitoring body would be wise to ensure that it makes its expectations clear at the outset, so that the government can start collecting the appropriate data.

Evaluating policy implementation is no easy task, and the national monitoring body—as well as the United Nations Committee on the Rights of Persons with Disabilities itself—will need to be well-resourced. Difficulties which these bodies may face include evaluating several initiatives in parallel; dealing with governmental ‘initiativitis’, whereby policies change quickly without proper evaluation or sometimes explanation; evaluating policies serving multiple policy objectives which rely on the input of various departments, services and organisations; and dealing with the incredible breadth of legislation and policies which implement the CRPD: from inclusive education of children with visual disabilities to the disability inclusivity of international aid, from accessibility of police stations to the sexual and reproductive rights of adults with intellectual disabilities in group homes. The scope of the topics covered by the CRPD could easily become overwhelming for those responsible for monitoring and evaluating its implementation.

The United Nations Committee on the Rights of Persons with Disabilities will need to be the watchdog of watchdogs, monitoring the performance of the national monitoring bodies, as well as compiling and sharing information about ‘best practices’ among them. To give meaning to the proactive role of human rights, the national monitoring bodies should ensure the participation of people with disabilities, as well as draw on the expertise of people within their own

<sup>89</sup> *ibid*, Art 4(2). It is not clear which of the CRPD rights fit into the seemingly neat box of ‘economic, social and cultural rights’. For a discussion of this point, see F Mégret, ‘The Disabilities Convention: Towards a Holistic Concept of Rights’ (2008) 12 *International Journal of Human Rights* 261, 265–6.

<sup>90</sup> Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106 (entered into force 3 May 2008) Art 31.

country and gather information from abroad. In combining information-sharing with carrying out concrete activities, such bodies will demonstrate the connectivity between the educational role and the proactive role of human rights.

### C. Participation by People with Disabilities

One of the CRPD's principles is ' [f]ull and effective participation and inclusion in society.'<sup>91</sup> Specifically the CRPD guarantees participation in political and public life by reaffirming the right to vote and stand for office.<sup>92</sup> Participation in public life, however, means more than voting every few years. The CRPD sets out the right to participation in strong terms, and locates this obligation in Article 4(3) on general obligations:

In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

As noted above, the duty on the state to ensure participation of persons with disabilities in legislative and policy reforms is extended to the process for states to nominate candidates for the United Nations Committee on the Rights of Persons with Disabilities. When nominating their candidates, 'States Parties are invited to give due consideration' to consulting with and actively involving persons with disabilities through NGOs.<sup>93</sup> When States Parties elect the members of the Committee they are asked that consideration be given to the 'participation of experts with disabilities'.<sup>94</sup>

The CRPD guarantees that persons with disabilities and their organisations are involved in monitoring its implementation.<sup>95</sup> This means that the domestic independent monitoring bodies (discussed in sub-section B above) must find ways of reaching out to people with disabilities and including them in their work. Participation of persons with disabilities in the monitoring of the CRPD will likely result in the monitoring being more relevant, accurate and sensitive to the needs of those whose rights the CRPD aims to advance.

Across the world, people with disabilities have been denied access to information and therefore denied power. Those in positions of influence and wealth (for example, disability service providers, psychiatrists, lawyers, family members and carers, not to mention pharmaceutical companies) have traditionally been the

<sup>91</sup> *ibid*, Art 3(c).

<sup>92</sup> *ibid*, Art 29.

<sup>93</sup> *ibid*, Art 34(3).

<sup>94</sup> *ibid*, Art 34(4).

<sup>95</sup> *ibid*, Art 33(3) says that, '[c]ivil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.'

policy-making power players, lobbying governments to adopt policies which are professionally and financially beneficial. The CRPD is premised on the belief that

persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them,<sup>96</sup>

and in doing so the treaty seeks to repatriate power towards those who have most to gain from Convention implementation. The CRPD organises this power redistribution by creating a general obligation to ensure participation, an obligation which should be read into each CRPD provision. The general obligations need also to be read into the various bodies which the CRPD establishes and which are referred to in this chapter, namely the Conference of States Parties to the Convention,<sup>97</sup> the Committee on the Rights of Persons with Disabilities,<sup>98</sup> the focal point(s) in the domestic executive structure,<sup>99</sup> and the national independent monitoring bodies,<sup>100</sup> in all of which '[c]ivil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully.'<sup>101</sup> An insistence that people with disabilities and their NGOs participate in monitoring the CRPD's implementation makes it more likely that implementation will actually happen. It is also more likely that the United Nations Committee on the Rights of Persons with Disabilities and the domestic independent monitoring bodies receive relevant, informed and accurate information from civil society so that they in turn can provide specific, measurable and time-bound objectives for States Parties to bring their laws, policies and practices in line with CRPD requirements. The CRPD's insistence on ensuring the participation of persons with disabilities suggests a post-hierarchical politics, one in which there is greater transparency, ownership of results, and likelihood of implementation.

Research has suggested that participation allows for a greater and more varied set of voices to be brought into decision-making processes in order to counteract the dominance of previously more powerful voices. It has also indicated that participation increases the effectiveness of service delivery. A group of British researchers puts it succinctly in observing that, '[e]ffective governance requires an informed, engaged citizenry which votes in elections, participates in decision making and works with service providers in designing, delivering and monitoring

<sup>96</sup> *ibid*, preambulatory para (o).

<sup>97</sup> *ibid*, Art 40.

<sup>98</sup> *ibid*, Art 34.

<sup>99</sup> *ibid*, Art 33(1).

<sup>100</sup> *ibid*, Art 33(2).

<sup>101</sup> *ibid*, Art 33(3).

services'.<sup>102</sup> In other words, participation in CRPD processes goes beyond superficial attempts at political correctness: it is beneficial for persons with disabilities, and for politicians and civil servants too.<sup>103</sup>

#### D. Co-ordinating Implementation

As well as establishing independent mechanisms at the domestic and international levels and insisting on the participation of people with disabilities at both those levels, the CRPD demands executive co-ordination of implementation at both intergovernmental and governmental levels.

The CRPD is the first United Nations human rights treaty to require the States Parties to 'meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the present CRPD'.<sup>104</sup> The Conference can be convened however regularly the States Parties decide, but no less regularly than every two years.<sup>105</sup> Although most other treaties have a provision for calling a Conference of States Parties, the CRPD is the only one to mandate its Conference to consider implementation.<sup>106</sup> Early indications are that the Conference of States Parties to the CRPD will be held more or less annually, and will be inclusive of civil society organisations.<sup>107</sup> The Conference of States Parties is serviced not by the Geneva-based Office of the High Commissioner for

<sup>102</sup> SR Andrews, R Cowell, J Downe, S Martin and T Turner, *Promoting Effective Citizenship and Community Empowerment: A Guide for Local Authorities on Enhancing Capacity for Public Participation* (London, Office of the Deputy Prime Minister, 2006).

<sup>103</sup> For a discussion on participation in the mental health arena, see O Lewis and N Munro, 'Civil Society Involvement in Mental Health Law and Policy Reform' in M Dudley, D Silove and F Galeeds (eds), *Mental Health and Human Rights* (Oxford, Oxford University Press, forthcoming 2010).

<sup>104</sup> Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106 (entered into force 3 May 2008) Art 41(1).

<sup>105</sup> *ibid.*, Art 41(2).

<sup>106</sup> Although a Conference of States Parties is envisioned in Art 51 of the International Covenant on Civil and Political Rights (adopted by GA Res 2200A (XXI) of 16 December 1966), Art 29 of the International Covenant on Economic, Social and Cultural Rights (adopted by GA Res 2200A (XXI) of 16 December 1966), Art 29 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by General Assembly resolution 39/46 of 10 December 1984), Art 50 of the Convention on the Rights of the Child (adopted by GA Res 44/25 of 20 November 1989), Art 90 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted by GA Res 45/158 of 18 December 1990), Art 34 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by GA Res 57/199 of 18 December 2002), all of these treaties limit the formal mandate of such a conference to a consideration of proposed amendments to the treaty by States Parties. Curiously neither the International Convention on the Elimination of All Forms of Racial Discrimination (adopted by GA Res 2106 (XX) of 21 December 1965) nor the Convention on the Elimination of All Forms of Discrimination against Women (adopted by GA Res 34/180 of 18 December 1979) contain provision for a Conference of States Parties.

<sup>107</sup> The second Conference of States Parties was held over three days in September 2009. The agenda included panels, dialogues and side events, all discussing the subject 'Legislative measures to implement the Convention on the Rights of Persons with Disabilities'. There was significant participation of NGOs.

Human Rights (which services the Committee on the Rights of Persons with Disabilities), but by the Department for Economic and Social Affairs based in New York. This reflects, perhaps, the fact that the Conference is governmental, whereas the Committee is supposed to be independent.

The CRPD encourages states to talk to each other and (possibly) make decisions on implementation, through the Conference of States Parties. At the domestic level, it requires that States Parties, ‘designate one or more focal points within government for matters relating to the implementation of the present CRPD.’<sup>108</sup> The purpose of the focal points is to co-ordinate action across ministries, departments and agencies to deliver a coherent disability policy. Central government has a duty under the CRPD to ensure that its provisions are implemented everywhere within the state’s jurisdiction (even in federal states). It has a further duty to co-ordinate action across local and regional authorities. The drafters of the CRPD (which were, after all, state representatives themselves) were aware that many of the rights violations suffered by people with disabilities are caused by failures in communication and co-ordination of policy. This proposition is supported by empirical evidence which suggests that a key element in policy implementation failure is that many actors do not talk to each other and do not co-ordinate policy delivery.<sup>109</sup>

That the CRPD sets out *how* States Parties should organise the executive branch of government in order to implement the treaty is an audacious constitutional masterstroke. The CRPD insists on ‘joined-up’ government, a new concept for many countries which govern by departmental machine. Governments may like to consider adopting the following objectives for their disability rights focal point(s):<sup>110</sup>

- To create an integrated, holistic approach to the development and delivery of disability policy;
- To overcome departmental barriers and the problems of ‘silo’ management;
- To reduce transition costs from overlapping policies and initiatives;
- To deliver better policy outcomes by ensuring the participation of and contributions from people with disabilities;<sup>111</sup>
- To encourage greater coordination and integration of service delivery among providers at the local level;

<sup>108</sup> Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106, UN Doc A/Res/61/106 (entered into force 3 May 2008) Art 33(1).

<sup>109</sup> S Barrett, ‘Implementation Studies: Time for a Revival? Personal Reflections on 20 Years of Implementation Studies’ (2004) 82 *Public Administration* 249. Barrett suggests that the three other factors deemed to contribute to implementation failure are lack of clear policy objectives; inter- and intra-organisational value and interest differences; and relative autonomies of implementing agencies coupled with limits of administrative control.

<sup>110</sup> Adapted from J Newman, ‘Joined-up Government: The Politics of Partnership’ in *Modernising Governance: New Labour, Policy and Society* (London, Sage, 2001).

<sup>111</sup> This is a requirement under CRPD Arts 4(3) and 33(3).

- To develop innovative approaches to policies and services by eliciting the contributions of various partners;<sup>112</sup> and
- To increase the financial resources flowing into the disabilities sectors.<sup>113</sup>

A pre-requisite to pursuing joined-up government will be for politicians overseeing these focal points to provide leadership towards Convention implementation. Despite strong political backing, an enabling approach to delivering disability policy may be undermined by the strong traditions of rational planning and the continued centralisation of power associated with mechanical models of the ‘policy-action dynamic’. It is crucial therefore that the effectiveness of CRPD focal points is closely monitored by civil society, by the relevant state’s independent monitoring body, and by the United Nations Committee on the Rights of Persons with Disabilities.

In many countries the focal points are being set up within traditionally low-power ministries, such as ministries of social affairs, or ministries of employment. In placing the focal points in these ministries, states perpetuate the myth that disability policy is a soft social issue, or that its only aim is to reduce discrimination in employment. The CRPD is a cross-disciplinary treaty which, of course, does cover public policy areas of employment and social affairs, but goes much broader into policy areas of education, criminal justice, civil justice, family, foreign affairs,<sup>114</sup> international development, home/interior affairs, data protection, data and statistics. Given that the CRPD’s main goal is to achieve equality and non-discrimination, it may be more prudent for activists to suggest that the relevant government’s focal point is housed by the ministry of justice which, in many countries, has power and authority across a variety of other ministries. It will be interesting to see what the United Nations Committee on the Rights of Persons with Disabilities says about the ideal mother ministry for the focal points.

A further pre-requisite to pursuing a ‘holistic’ approach of policy co-ordination will be for all actors to be clear about the role of government. Such clarity is needed when coordinating policy, ensuring the participation of persons with disabilities, and delivering policy and services. In hierarchical models of governance, the government sets the agenda, develops the policy and implements

<sup>112</sup> This could mean facilitating the sharing of promising practices within the country, and importing practices from outside the country—perhaps by working with sister focal points in other countries or via organisations such as the UN or international NGOs.

<sup>113</sup> This could be achieved, for example, by quantifying the needs of persons with disabilities, ensuring that ministries contribute to providing the funding, developing partnerships which can deliver on providing appropriate services. Such partnerships these could, depending on the local circumstances, involve State bodies, quasi-State agencies, private companies, and non-profit organisations.

<sup>114</sup> For example, people entering the United States risk not being allowed in the country if they fail to tick the box certifying that they do not have a major mental illness. Another example is that it could be argued that the Convention requires embassies to be accessible for persons with disabilities, and another example is that embassies act as polling stations, and Art 29 of the Convention requires voting procedures to be accessible.

it or orders others to do so. In encouraging an alternative politics, the CRPD sets up potential conflicts which will have to be managed. The policy theorists Erik-Hans Klijn and Joop Koppenjan suggest that in a network-like situation, the government may choose not to join in discussions at all.<sup>115</sup> Alternatively the government could communicate with other public agencies and NGOs, or they may choose to play the role of process manager facilitating iterative discussions, or they may choose to be a network builder using their resources and their credibility as legitimately elected representatives of the majority. Klijn and Koppenjan warn that if government is inexperienced (which will inevitably be the case for the majority of CRPD focal points around the world) there is a risk that behaviours will revert to established and safer routines in which 'misunderstandings and conflict among actors can prove to be costly in terms of effectiveness and efficiency, but especially with regard to the reliability and legitimacy of governments.'<sup>116</sup> This may be especially the case in countries with active focal points, with civil servants who want to combine the roles of a body which has a political 'opinion' with a more neutral process manager role or a network builder role. In time we will be able to assess how well the focal points manage their new and complex role. It is hoped that the Conference on States Parties will take the lead in sharing promising practices in executive coordination.

The politics of power has inevitably surfaced in this section on the proactive value of human rights. Power exists also in formulating ideas and discussions between stakeholders, so it is a consideration which runs through the expressive, educational and proactive roles of human rights. This section has looked at the structures established at the international and domestic levels to ensure policy coordination and those set up to monitor the implementation of the CRPD. The strong participation of people with disabilities in these mechanisms will re-balance power and ensure that policies and monitoring methodologies are relevant and owned by disability communities. Ownership will happen if governments acknowledge the disenfranchisement of persons with disabilities and their respective organisations, and ensure that these citizens are empowered to participate in and have the capacity to intervene on an equal basis with others in the policy cycle. The combination in the CRPD of substantive rights coupled with process requirements is unusual in human rights treaties. Its innovative implementation mechanisms may well contribute to closing the gap between rights rhetoric and reality.

<sup>115</sup> EH Klijn and FM Koppenjan, 'Public Management and Policy Networks: Foundations of a Network Approach to Governance' (2000) 2(2) *Public Management* 135.

<sup>116</sup> *ibid.*, 154.

## V. Conclusion

This chapter has suggested that a way of conceptualising the potential of the United Nations Convention on the Rights of Persons with Disabilities to effectuate social change is through the framework of the expressive, educational and proactive roles of human rights. The interdependence of these roles mirrors the rights enshrined in the CRPD as well as the institutions established by the CRPD at United Nations and domestic levels to ensure implementation. Interdependence itself is a core feature of human rights law and practice. The CRPD is now one of the nine core United Nations human rights treaties, but as Gerard Quinn has suggested, we should think of it

less as a means for coercing States and more as a powerful tool for enabling its revolutionary insights to percolate into the political process (by 'persuasion' and 'socialisation') and hence transform the political process to the point that justice and rights for persons with disabilities is seen as the primary departure point and not as an annoying distraction.<sup>117</sup>

Political processes are likely to be transformed if persons with disabilities, their family members and carers, providers of services, governmental authorities, and a range of civil society actors are open to thinking about ideas which may initially be uncomfortable. Political processes are likely to be transformed if people talk to those whose views may have been marginalised and with whom they have previously not talked or with whom they have vehemently disagreed. Political processes are likely to be transformed if programmes outside their drafters' comfort zones are implemented. In other words, the expressive, educational and proactive roles of human rights may be relevant to this Convention's implicit goal of changing the politics which have marginalised people with disabilities worldwide.

Creative problem solving will mean that policy-makers will have to take risks, and try out programmes, for example to put in place supported decision-making to comply with Article 12 of the CRPD. On such issues the 'correct' thing to do may be to take risks and put in place services for which there are no best practices, but rather promising practices which will have to be evaluated over time. Some of these programmes will work; others will flop. The United Nations Commission for Social Development has lent its weight to the notion of programme experimentation and knowledge-transfer, suggesting that, '[n]ew and innovative thinking and collaboration are required to utilize the CRPD so as

<sup>117</sup> G Quinn, 'Resisting the "Temptation of Elegance": Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?' in MO Arnardóttir and G Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden, Martinus Nijhof, 2009).

to bring the maximum benefit to persons with disabilities and society.<sup>118</sup> The negotiation process was an example of innovative collaboration, and the resultant text of creative thinking.

The CRPD attempts to redistribute power and creates new forums for stakeholder communication, policy co-ordination and implementation monitoring. These are all reasons to be optimistic that this Convention, more than others, will be implemented in small places, close to home. Implementation will depend on the genuine willingness of policy-makers to embrace a new kind of politics, an embrace which no treaty can guarantee.

<sup>118</sup> UN Commission for Social Development, *Mainstreaming Disability in the Development Agenda*, E/CN.5/2008/6, prepared for the Commission's 46th Session, 6–15 February 2008 (23 November 2007), available at: [www.un.org/disabilities/default.asp?id=358](http://www.un.org/disabilities/default.asp?id=358), at [30(b)].