

## **Right of Disabled People to Accessible Internet**

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### **Introduction**

Regarding the civil rights of disabled people, I have not come across any test of welfare more potent than that authoritatively enunciated in the UK House of Lords by Lord Slynn of Hadley (a jurist of brilliant distinction). Lord Slynn adopts a purposive and justice-oriented approach to this issue and recommends that a nation should strive to enable a disabled person lead as "normal life" as possible. His Lordship emphasised that "the yardstick of a "normal life" is important; it is a better approach than adopting the test as to whether something is 'essential' or 'desirable'. Social life in the sense of mixing with others, taking part in activities with others, undertaking recreation and cultural activities can be part of normal life. It is not in any way unreasonable that the severely disabled person should wish to be involved in them despite his disability."<sup>1</sup>

In this article, the laws in the international scene, the EU, the US and the UK will be surveyed briefly. The search will be for finding a legal right to accessible internet for people with disabilities. Then the evaluative remarks will be made on how nations are promulgating pro-disabled laws and what action they are taking to enforce these laws.

### **Measures by the UN**

The United Nations has been fully aware of the special needs of over 650 million sensorily and physically disabled people in the world. "Only about 45 countries in the world, however, have legislation aimed at assuring the rights of people with disabilities."<sup>2</sup> Like other transnational bodies and nations, the UN has not matched its immaculate expressions of concern with potent action to eliminate them.

The UN has a legitimate excuse (equally available to other transnational bodies) that its lack of action in some aspects is circumscribed by the means put at its disposal by Member States. However, the individual nations, sometimes whose leaders often utter beautiful pro-disabled rhetoric, have very disappointing record in this area. Some, for instance, buy the argument, "We are under attack. We must prioritise our expenditure on bullets and guns to defend ourselves, rather than spending our foreign exchange reserves on buying white sticks for blind people." This author finds this argument vacuous. He would say, "Buy white sticks and redouble your efforts for bringing about the peace!"

The UN made the E-Accessibility to be theme for International Day of the Disabled Persons (3 December 2006). Mr. Sarbuland Khan, Executive Coordinator of the Secretariat of the Global Alliance for ICT and Development, said, "The new computer-based information technologies have the potential for opening up a world of new opportunities for persons with disabilities."<sup>3</sup>

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<sup>1</sup> Cockburn v. Chief Adjudication Officer and Another; and Secretary of State for Social Security v. Fairey, also known as Halliday, (1997) 3 All ER 844-870 at 860f (also reported: [1997] 1 WLR 799); Prof. Wikeley, referring to the Department's attempt to confine the need for attention to "essential", as opposed to "desirable" communication, said that it "seems at best outdated and at worst grossly insensitive to the position of those with hearing loss." See N. Wikeley, "Cases: Benefits, Bodily Functions and Living with Disability" 61 *MLR* 551-560 at 556). This concept is explored in more detail by this author, see Amir A. Majid, "Anachronistic Judicial Approaches to Disability Benefits Law" (2000) *Denning Law Journal* 93-112.

<sup>2</sup> Thomas Schindlmayr, "We need a global treaty for the disabled", International Herald Tribune, NEW YORK (16 August 2006) - <http://www.iht.com/articles/2006/08/16/opinion/edthomas.php>

<sup>3</sup> Pr, E-Accessibility to be theme for International Day of Disabled Persons 2006, Department of Public Information, UNITED NATIONS, 26 July 2006 - <http://v1.dpi.org/lang-en/resources/details.php?page=667>

With only 45 States, out of its 192 members, having laws protecting the rights of disabled people, it realized that there should be a global treaty on this topic. By its resolution 56/168 of 19 December 2001, The UN established an Ad Hoc Committee charged with the drafting of a treaty on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities. In its eighth session, The Ad Hoc Committee at its 20th meeting, 25 August 2006, adopted the draft Convention on the Rights of Persons with Disabilities, including a draft Optional Protocol, as a whole, without a vote.<sup>4</sup>

In its 61<sup>st</sup> session on 13 December 2006 The UN General Assembly adopted the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention annexed to the resolution. The Convention will be open for signature at United Nations Headquarters in New York as from 30 March 2007. The UN has urged upon Member States “to consider signing and ratifying the Convention and the Optional Protocol as a matter of priority” and has expressed the hope that they will enter into force these instruments “at an early date.”<sup>5</sup>

In the preambular paragraph (y) of the Convention it is observed that legislative protection is needed because persons with disabilities suffer from “the profound social disadvantage.” This Convention in its Preamble again in paragraph (f) recognises “the importance of the principles and policy guidelines contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in influencing the promotion, formulation and evaluation of the policies, plans, programmes and actions at the national, regional and international levels, to further equalize opportunities for persons with disabilities.”<sup>6</sup>

Paragraph 3 of the Standard Rules requires the States to devise “action programmes” which should include, *inter alia*:-

( a ) Measures to design and adapt workplaces and work premises in such a way that they become accessible to persons with different disabilities;

( b ) Support for the use of new technologies and the development and production of assistive devices, tools and equipment and measures to facilitate access to such devices and equipment for persons with disabilities to enable them to gain and maintain employment.

#### The Key Provisions of the Convention on the Rights of Persons with Disabilities

Article 4.1 in its enumeration of “General obligations” viz the accessibility of internet, *inter alia*, enlists the following duties:-

“(f) To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;

“(g) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

“(h) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities.”

Article 9.2 deals with “Accessibility” and requires member States to take “appropriate measures” to:-

“(g) Promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;

“(h) Promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.”

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<sup>4</sup> A/AC.256/2006/4 and Add.); see also: General Assembly, Sixty-first session, Item 67 (b), Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms - <http://www.un.org/esa/socdev/enable/rights/ahc8docs/ahcfinalrepe.doc>

<sup>5</sup> Paragraph 3 of the Resolution adopting the convention, *Id.*

<sup>6</sup> Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Adopted by General Assembly resolution 48/96 of 20 December 1993 - <http://www.ohchr.org/english/law/opportunities.htm>

The drafters of the Convention on the Rights of Persons with Disabilities have taken a minor act of “accessibility” in Article 49 which says “The text of the present Convention shall be made available in accessible formats.”

## **Measures in the European Union**

The Maastricht Treaty and earlier EU instruments, make no mention of disability and provide no clear legal basis for specific action in this field. It has therefore been difficult for the Community to adopt legislation and policy promoting the interest of disabled Europeans, since all such action must be based on the Treaty (i.e. have an appropriate legal basis). Instead the Community institutions (the Commission, the European Parliament and the Council) have had to work with inadequate legal bases which fail to recognise the disability dimension of the numerous Community policies such as free movement of persons, harmonisation of national legislation to achieve the internal market etc. Examples of the problems, that have arisen, are amply demonstrated by the “Invisible Citizens” report; in particular Chapter 1, “Disabled People are Invisible in the Treaties.”<sup>7</sup>

From the disability point of view, probably the most significant change was brought about by the Amsterdam Treaty. It includes a general non-discrimination article which specifically mentions disability. The new provision was included in Article 6a of the Amsterdam Treaty, and became Article 13 in the renumbered Treaty. It reads:-

“Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

The Euro Accessibility Consortium was launched in Paris on 28 April 2003. Its aim is to foster European co-operation towards a harmonised methodology for evaluating the accessibility of Web sites. This initiative is jointly undertaken by 23 organisations and the W3C/WAI. All the signatories of the initiative consider that equal access to the Web is a key factor for the inclusion of people with disabilities in society. As a first step, in February 2004, during a meeting in Madrid (Spain), experts from across Europe agreed on a harmonised approach for evaluating Web site accessibility. The newly produced Euro Accessibility document is part of the evaluation procedure which tests the accessibility of a Web site for elderly people and those with disabilities. This approach confirms Euro Accessibility's commitment to the guidelines developed by the Web Accessibility Initiative and brings harmonisation a step closer in Europe allowing a more inclusive society.<sup>8</sup>

Most disappointingly many Europeans still reap few or no benefits from ICT and there are resilient gaps in ICT use. For instance, 57% of individuals living in the EU did not regularly use the Internet in 2005; only 10% of persons over 65 used Internet, against 68% of those aged 16-24; only 24% of persons with low education used the Internet, against 73% of those with high education; only 32% of unemployed persons used the Internet against 54% of employed persons. Only 3% of public web sites surveyed comply with the minimum web accessibility standards and guidelines, hindering access to web content and services for people with disabilities who comprise some 15% of the EU population.<sup>9</sup>

The EU has aspired to make totally accessible internet and other ICT devices to all of its citizens by 2010. It has said, “Countries will put in place, by 2008, digital literacy and competence actions, in particular through formal or informal education systems, building on existing initiatives. These actions will be tailored to the needs of groups at risk of exclusion, because of their social circumstances or their capacities and special needs, notably the unemployed, immigrants, people with low education levels, people with disabilities, and elderly, as well as marginalised young people, contributing to their employability and working conditions. The current gaps of digital literacy and competence between these groups and the average population should be halved by 2010.

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<sup>7</sup> <http://www.ebuindigo.org/gat2-en.htm>

<sup>8</sup> [http://www.edf-feph.org/en/policy/is/is\\_news.htm](http://www.edf-feph.org/en/policy/is/is_news.htm)

<sup>9</sup> Based on Data supplied by i2010 – First Annual Report on the European Information Society, COM(2006)0215, and on web accessibility from the study for the 2005 UK Presidency of the EU “eAccessibility of public sector services in the EU”; Article 3 of the Declaration of the Ministers of the European Union (EU) Member States and accession and candidate countries, European Free Trade Area (EFTA) countries and other countries, adopted on 11 June 2006 - [http://64.233.183.104/search?q=cache:fssL2LLMxkYJ:europa.eu.int/information\\_society/events/ict\\_riga\\_2006/doc/declarati on\\_riga.pdf+riga+declaration+eu+june+2006&hl=en&gl=uk&ct=clnk&cd=2](http://64.233.183.104/search?q=cache:fssL2LLMxkYJ:europa.eu.int/information_society/events/ict_riga_2006/doc/declarati on_riga.pdf+riga+declaration+eu+june+2006&hl=en&gl=uk&ct=clnk&cd=2)

Progress on this target should be measured on the basis of available indicators and further work in the context of i2010.”<sup>10</sup>

## Measures in the US

It is widely acknowledged that the US leads the world in the preservation and promotion of civil rights of disabled people. Indeed, even advanced countries like the United Kingdom can learn from the US in this field to devise effective legislative regime and actual steps to be taken for promoting the welfare of disabled people; certainly this is beyond doubt in some areas.<sup>11</sup> The most recent development in this context took place on 6 September 2006. The California Federal Court held in *NFB v Target* that the websites must be accessible to disabled people and to ensure that fact the businesses were under a duty to make “reasonable accommodation” as required by the Americans with Disabilities Act (ADA) 1990.

The suit, *NFB v Target*, was filed as a class action on behalf of all blind Americans who are being denied access to target.com (the NFB, the NFB of California, and a blind college student, Bruce “BJ” Sexton). The court held: “the ‘ordinary meaning’ of the ADA’s prohibition against discrimination in the enjoyment of goods, services, facilities or privileges, is that whatever goods or services the place provides, it cannot discriminate on the basis of disability in providing enjoyment of those goods and services.”<sup>12</sup>

The court rejected Target’s argument that only its physical store locations were covered by the civil rights laws, ruling instead that all services provided by Target, including its Web site, must be accessible to persons with disabilities. The Federal Judge, Marilyn Hall Patel, recognized that accessibility of a website by the use of a “mouse” is not acceptable to visually impaired users.<sup>13</sup>

The accessibility of websites is becoming a top issue and a rising star on the political agenda. The actions like in the *Target* case can even force the website publisher to readjust its site. The ADA regulation has also made it clear that the individual with a disability cannot be charged for the auxiliary aid provided by a state or local court; it says:-

“A public entity may not place a surcharge on a particular individual with a disability . . . to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual . . . with the nondiscriminatory treatment required by the Act.”<sup>14</sup>

Section 504 of the Rehabilitation Act of 1973 provides, “no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>15</sup> Since the promulgation of Section 504 of the Rehabilitation Act in 1973 almost all of the US police departments (indubitably receiving financial assistance from one or more federal agencies) have been subject to giving equal treatment to all disabled people e.g. those who are deaf or have hearing difficulties.<sup>16</sup>

The Department of Justice (DOJ) Regulation states that the bodies covered by the 1973 Act, employing fifteen or more persons, “shall provide appropriate auxiliary aids to qualified handicapped persons with impaired sensory, manual or speaking skills where a refusal to make such provision would discriminatorily impair or exclude the participation of such persons in a program receiving Federal financial assistance.”<sup>17</sup>

Section 504, the ADA, and the Title II regulation also require public entities which provide emergency telephone service to be accessible to deaf callers. “Telephone emergency services, including 911 services, shall provide direct access to individuals who use [TTYs] and computer modems.”<sup>18</sup>

Progressive approach was taken in the US to the matter of deaf jurors in the cases of *Guzman* and *Dempsey*.<sup>19</sup> In the *Dempsey* case the American federal court was specifically concerned with the presence of the

10 Article 20 of the Riga Declaration, *Supra* N.9.

11 Amir A. Majid, “Disability Per Se is not Bar to Jury Service” (2007) *Journal of Legal Technology Risk Management* I, 10-27.

12 *National Federation of the Blind v. Target Corporation* (2006) Northern District of California Case No. C 06-01802 MHP - [http://www.dralegal.org/downloads/cases/target/062\\_order\\_deny\\_PI\\_grant\\_part\\_MTD.txt](http://www.dralegal.org/downloads/cases/target/062_order_deny_PI_grant_part_MTD.txt)

13 *Id.*

14 29 U.S.C. 794.

15 28 C.F.R. 42.503(f).

16 Majid, *Supra* N.11, generally.

17 <http://www.nad.org/site/pp.asp?c=foINKQMBF&b=101219>;

18 28 C.F.R. §35.162.

"additional person" in the jury room. Finding that the presence of an interpreter was not a ground for a new trial, the Tenth Circuit District Court had ruled that "the presence of the interpreter in the jury deliberation room was not a problem for jury confidentiality, and had no inhibiting or other influence on the jury."

In *Guzman*, Judge Bud Goodman had robustly stated, "Like members of any other cognizable group, the deaf are a part of our community and must be considered, evaluated, and finally either accepted or rejected for service as individuals just as any other citizen. The grounds for exempting the deaf from jury service have vanished. People who are otherwise qualified cannot be challenged from cause under New York statutory law or the Constitution of this state or of the United States, solely on the basis of deafness." <sup>20</sup>

The UK is still considering the issue of deaf jurors despite most vigorous campaign for permission for them to act as jurors. Commenting on the case of a deaf person who was not allowed to sit on a jury, Barrister Enright boldly stated, "In the final analysis, the notion that decisions about honesty cannot be determined by the deaf or the blind may be nothing more than the arrogance of the able-bodied." <sup>21</sup> Realistically observing some problems which may arise in rare cases, he says, "difficulties are avoided by discussion between lawyers and the list office - where there is a will there is a way." <sup>22</sup>

## **Measures in the UK**

The key statutory provision about the imposition of legal responsibility viz web accessibility is in S.3 of the Disability Discrimination Act (DDA) 1995. The Act specifically provides in section 19 (1) that it is unlawful for a provider of services to discriminate against a disabled person:-

(a) in refusing to provide, or deliberately not providing, to the disabled person any service which he provides, or is prepared to provide, to members of the public;

(b) in failing to comply with any duty imposed on him by section 21 in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service;

(c) in the standard of service which he provides to the disabled person or the manner in which he provides it to him; or

(d) in the terms on which he provides a service to the disabled person.

S.19 (3) of the Disability Discrimination Act 1995 mentions 8 strands of activities covered by the legal obligation under S.19 (1) but abysmally fails to include the websites. (S.19 (3) says:- The following are examples of services to which this section and sections 20 and 21 apply:-

(a) access to and use of any place which members of the public are permitted to enter;

(b) access to and use of means of communication;

(c) access to and use of information services;

(d) accommodation in a hotel, boarding house or other similar establishment;

(e) facilities by way of banking or insurance or for grants, loans, credit or finance;

(f) facilities for entertainment, recreation or refreshment;

(g) facilities provided by employment agencies or under section 2 of the Employment and Training Act 1973.

Paragraph 2.17 of the Code of Practice (revised) - Rights of Access to Goods, Facilities, Services and premises gives clarification of this provision thus:-

"It is important to remember that it is the provision of the service which is affected by Part III of the Act and not the nature of the service or business or the type of establishment from which it is provided.

"In many cases a service provider is providing a service by a number of different means. In some cases, however, each of those means of service might be regarded as a service in itself and subject to the Act."

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19 *New York v. Guzman*, 478 N.Y.S.2d 455, 125 Misc. 2d 457 (1984); *U.S. v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987).

20 *Guzman*, at 467

21 Sian Enright, "News - The Deaf Juror and the 13th Man" *New LJ* 1700 (19 November 1999)

22 *Id.*



By way of example, the Code deems the provision of a flight reservation and booking service to the public by an airline company through its "website" to be covered by the Act. So, indirectly it covers the electronic databases and the internet.

The British disabled students were not covered by the non-discrimination laws in many key areas. They had to wait until the Special Educational Needs and Disability Act 2001 (SENDA) was passed. This Act established legal rights for disabled students in pre- and post-16 education by amending the DDA to include education. The Act ensures that disabled students are not discriminated against in education, training and any services provided wholly or mainly for students. This includes courses provided by further and higher education institutions and sixth form colleges.

It is unlawful to treat a student "less favourably" for reasons of disability. If an individual is at a "substantial disadvantage" due to the way in which a body provides its educational services, responsible bodies are required to take reasonable steps to prevent that disadvantage. Included in the reformative measures taken by universities and colleges, as well as their organs, is the duty to make accessible to disabled students their websites.

The Disability Discrimination Act had many complexities – statutory restrictive disability definition and the justifications exempting the employers and producers of goods from the Act. The layers of weakness in the provisions of the DDA had inspired Lord Lester of Herne Hill to say in the House of Lords that the Act is "so full of holes that it is more like a colander than a binding code."<sup>23</sup>

This author criticized the Act and had said that it had hit disabled people like a "poisoned arrow" by placing them in a junior zone of legal protection, as compared with British women under the Sex Discrimination Act 1975 and ethnic minority people under the Race Relations Act 1976.<sup>24</sup>

In view of the glaring pitfalls in the 1995 Act, hoping that the new Labour executive would give its prompt attention to this issue, this author recommended thus: "A total re-vamping of the DDA is the only way forward for conferring sound, meaningful and enforceable rights on disabled people."<sup>25</sup>

Indeed, a number of reforms have taken place in the previous eleven years; the minimum number of employees quota has gone, the students have been covered and Disability Rights Commission (last year merged in the Commission for Equality and Human Rights) was established. Receiving Royal Assent on 7 April 2005, the UK Disability Discrimination Act 2005 (amending the Disability Discrimination Act 1995) brought about major positive and progressive improvements in this field.

The 2005 Act imposed a general duty by S.3 (1) on every public authority in the UK to accord equal treatment to people with sensory and/or physical disabilities. It imposes a mandatory duty on public authorities to "eliminate unlawful discrimination", prevent "harassment of disabled people", promote "equal opportunities for disabled people", promote "positive attitude towards disabled persons" and promote "participation of disabled people in public life." This legal obligation is dubbed as the "disability equality duty" (DED) which came into force on 4 December 2006. Section 3 (1) (d) is the most important legal protection promulgated hitherto in the UK. The authorities are obliged to take steps for achieving these goals, "even where that involves treating disabled persons more favourably than other persons."

As a p/t Immigration Judge, the author is a member of the "Ministerial Reference Group" on Disability Equality in the Judiciary. This Group is headed by the Department of Constitutional Affairs Minister, Ms Harriet Harman, QC, and is currently involved in substantial progressive work. The UK PM, Tony Blair, may be in bad books of many people for his support of the US action in Iraq and Afghanistan but he cannot be denuded of the credit for the progressive measures he is taking to improve the fate of disabled people, particularly in the DCA at the ministerial level. Some policies are already adopted and enforced, if the group kept on working with present potency, this author hopes a lot to be changed for the better for disabled people in the fields of accessibility of court buildings, legal services, recruitment and training of law professionals and selection, appointment and support of disabled judges. Of course, the accessibility of electronic sources will be fully focused on by this group, encouraged by the fact that electronic mechanisms are already used by the mainstream court machinery.

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23 Amir A. Majid, "The Disability Discrimination Act and the Proposed Commission" 81 *New Beacon* 957, 4-8 (1997)

24 *Id.*

25 *Id.* For further amplifications of the flaws of the regime created by the 1995 Act, see Amir A. Majid, "National Disability Council - Blunt Sword of the DDA", 147 *NEW LAW JOURNAL* 1164-1166; 1218, 1222 (1997); Amir A. Majid, "The UK Disability Discrimination Act - Definitional Maze and Enforcement Barriers" 36 *Braille Forum* 8, 33-38 (1998).

## Final Remarks

*Ad summum* one can say unambiguously that disabled people, as shown by arguments proffered above, have a legal right to accessible electronic databases, the internet generally and the services delivered through various websites.

However, with the exception of the US, the immaculate declarations of realizing the goal of accessibility of electronic sources for disabled people, it is shocking that results of real progress are not visible. This is particularly so in the EU which is expected to be a leader in this field. Whilst thousands of trees are cut to produce tons of paper (multi-lingual translations not ignored) to declare pro-disabled policies, only 3% public websites have become accessible to disabled people.<sup>26</sup>

The UK also has to focus on “action.” Even though the Disability Discrimination Act 2005 has been a progressive Act for disabled people, it is feeble in providing for binding duties for accessibility of ICT source and services provided through them. Most disappointingly, in the entire text and schedules “28, 387 words), there is no mention of “electronic”, “internet” or “website.” This author hopes that the broad statutory regime will cover these aspects and in the future the drafters of such legislation show more imagination.

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<sup>26</sup> *Supra* N.9