ASEAN and the Convention on the Rights of Persons with Disabilities: Using International Law to Promote Social and Economic Development

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This paper examines the potential impact within ASEAN of the Convention on the Rights of Persons with Disabilities (CRPD). Although persons with disabilities should also enjoy the rights provided in previous human rights instruments, a specialist treaty is necessary because many individuals with disabilities are still marginalized, with low rates of education and employment. States parties are thus obligated to remove physical and attitudinal barriers and to actively promote capability and inclusion of all persons with disabilities. Disability rights organizations have urged members of ASEAN to ratify the CRPD. At present, Laos, Malaysia, Philippines, and Thailand are states parties and the Indonesian House of Representatives voted to ratify the treaty in October 2011. Full ratification would build upon progress made during the Asian and Pacific Decade of Disabled Persons, which led to the adoption of the Biwako Millennium Framework For Action Towards an Inclusive, Barrier Free and Rights-Based Society for Persons with a Disability in Asia and the Pacific. Ratification of the CRPD should strengthen governments' efforts to implement the Biwako Millennium Framework because all states parties to the CRPD are obligated to report periodically to the United Nations Committee on the Rights of Persons with Disabilities. This is therefore an opportune time to analyze what the treaty could mean for persons with disabilities in ASEAN.

Keywords: *ASEAN, Convention on the Rights of Persons with Disabilities, persons with disabilities, human rights*

I. Introduction to the Convention on the Rights of Persons with Disabilities: Embracing the Social Model of Disability in the Asia-Pacific Region

The Convention on the Rights of Persons with Disabilities (CRPD)[1] was the first new human rights treaty of the 21st century. Adopted by the United Nations General Assembly in 2006, it was opened for ratification in March 2007, came into force in May 2008, and already has more than

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[1] The CRPD and the Optional Protocol to the CRPD (containing an individual complaints procedure and an inquiry procedure) can be viewed on the website of the recently established United Nations Committee on the Rights of Persons with Disabilities, the body of independent experts that will monitor implementation of the treaty. Available at: http://www2.ohchr.org/english/bodies/crpd/index.htm (accessed 1 Oct. 2011).

100 states parties. Laos, Malaysia, Philippines, and Thailand are states parties and the Indonesian House of Representatives voted to ratify the treaty in October 2011. Brunei Darussalam, Cambodia, and Vietnam are signatories.[2] The core principles of the CRPD are capability, inclusion, and the removal of the physical and attitudinal barriers that prevent people from fully participating in their communities. An estimated 400 million persons with disabilities live in the Asia-Pacific region. Governments have acknowledged in regional meetings on disability that these individuals have the capacity to contribute to social and economic development in their communities and have thus made commitments to adopt more inclusive policies.[3] Unfortunately, the majorities of persons with disabilities are still excluded from education, employment and other economic and social opportunities and, as a result, are among the poorest people in the Asia-Pacific region.

Some commentators have described the CRPD as a "paradigm shift" in human rights law because it has decisively moved away from the medical and social-welfare approaches to disability.[4] These outdated models tended to focus on the "affliction" caused by the particular condition or impairment and the provision of care, treatment, or protection for the "disabled" individual. In contrast, the CRPD endorses the social model, a generic term for a theory of disability that emerged in the 1960s. The social model locates the experience of disability in the social environment; it recognizes that disability is not simply an individual condition but rather a form of oppression that

[2] For a list of the 106 states parties and 153 signatories to the CRPD as of October 2011, see United Nations Treaty Collection, Chapter IV, Human Rights, number 15, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY &mtdsg_no=IV-15&chapter=4&lang=en. For the announcement of Indonesia's vote on ratification, see Ministry of Foreign Affairs, Republic of Indonesia, *Indonesian House of Representatives to Ratify Legal Draft on Convention on the Rights of Persons with Disabilities*, 13 Oct. 2011, available at: http://www.kemlu.go.id/Pages/News.aspx?IDP=5211&l=en.

[3] UNESCAP, Biwako Millennium Framework for Action Towards an Inclusive, Barrier Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific: Note by the Secretariat, October 2002 (hereinafter the "Biwako Millennium Framework"). Available at: http://www.unescap.org/esid/ psis/disability/bmf/bmf.html#Principles (accessed 1 Oct. 2011).

[4] Tara J. Melish, "Perspectives on the Rights of Persons with Disabilities: The UN CRPD: Historic Process, Strong Prospects, and Why the U.S. Should Ratify", 14 *Human Rights Brief* 37 (Winter), 2007.

is perpetuated by physical and social barriers. The CRPD adopts this perspective and addresses persons with disabilities as subjects who are endowed with rights rather than as mere recipients of medical care and charity.[5] Increasingly, activists and policy makers are referring to this as the "rights-based" approach to disability.

The CRPD is not the first international instrument to address disability. The United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities were adopted by the United Nations nearly two decades earlier; but they are not legally binding and therefore have only limited impact on laws and policies around the world.[6] Other human rights treaties – including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) – can and should be applied to persons with disabilities. These treaties, however, do not address disability in a comprehensive manner and their monitoring committees often lack expertise in the field.[7] Disability rights activists thus argued that a thematic human rights treaty on disability was required, partly to fill a gap in international law but also to bring disability rights issues into the mainstream of human rights discourse.

The CRPD is also considered historic because of the drafting process, which was far more open and inclusive than that for previous human rights treaties. Although treaties are traditionally drafted by diplomats, there was a high level of input from civil society in the drafting process for the CRPD.[8] One of the initial steps in the creation

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[5] *See* Arlene S. Kanter, "The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities", 34 *Syracuse Journal of International Law and Commerce*, 2007, 287; and Rosemary Kayess and Phillip French, "Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities", 8 *Human Rights Law Review* 1, 2008.

[6] *See* the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the United Nations General Assembly, 20 Dec 1993, 48th session, resolution 48/96, annex.

[7] *See* generally, Gerald Quinn and Theresia Degener, et al, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, Geneva: United Nations, 2003.

[8] Melish, above n 4.

of the CRPD occurred in Beijing in 2000, during the first World NGO Summit on Disability. The NGO Summit identified condemned the deplorable conditions in which many persons with disabilities are compelled to live and generated the Beijing Declaration on the Rights of People with Disabilities in the New Century. The Declaration called for an international treaty to "promote and protect the rights of persons with disabilities, and enhance equal opportunities for participation in mainstream society".[9] The Mexican government followed up on the Declaration by introducing a resolution into the United Nations General Assembly. Adopted in December 2001, the resolution established an Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection of the Rights and Dignity of Persons with Disabilities, to consider proposals for drafting a treaty.[10] The resolution expressly invited governments, nongovernmental organizations, and others with an interest in the matter to contribute to the drafting process.

The Ad Hoc Committee held eight sessions from 2002-2006.[11] Governments were urged to consult their citizens with disabilities and to appoint them to their official delegations. A UN Voluntary Fund on Disability assisted by supporting some of the travel costs of NGO representatives who wanted to participate in the drafting sessions.[12] Activists who could not attend in person sent in written submissions, which were published on the Ad Hoc Committee's website along with the working drafts of the treaty. There were vigorous debates on the language of the treaty, both during the meetings and on the website. The Secretary-General of the UN has thus referred to the CRPD as "the first

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[9] Beijing Declaration on the Rights of People with Disabilities in the New Century, adopted 12 Mar 2000 at the World NGO Summit on Disability. Available at www.icdri.org/News/beijing_declaration_on_the_right.htm (accessed 1 Oct. 2011).

[10] General Assembly Resolution 56/168: Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, adopted 19 Dec 2001. Available at www.un.org/esa/socdev/ enable/disA56168e1.htm (accessed 1 Oct. 2011).

[11] *See* the website of United Nations Enable for drafts of the treaty, submissions, lists of attendees, and other documents arising from the eight sessions of the Ad Hoc Committee: http://www.un.org/esa/socdev/enable /rights/adhoccom.htm (accessed 1 Oct. 2011).

[12] Don MacKay (Chair of the Ad Hoc Committee from 2005 onwards), "The United Nations Convention on the Rights of Persons with Disabilities", 34 *Syracuse Journal of International Law and Commerce* 323, 2007, 327-8.

[human rights treaty] to emerge from lobbying conducted extensively through the Internet".[13]

In the Asia-Pacific region, the inclusive drafting process for the CRPD inspired many disability rights organizations to become involved in the process. In theory, the Asian and Pacific Decade of Disabled Persons (which was initially set to run from 1993- 2002) had already proclaimed a regional shift from the medical/social welfare model to the social model of disability. Government leaders had acknowledged and embraced this shift in the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region, which states that "negative social attitudes exclude persons with disabilities from an equal share in their entitlements as citizens".[14] The Proclamation also noted that Asia, as the fastest developing region in the world, should be able to devote resources to educating and empowering persons with disabilities.[15] By September 2001, 41 of the 61 governments in the UNESCAP region had signed the Proclamation, including all ten members of ASEAN.[16] Thus, there was an expectation among activists that the Asian and Pacific Decade of Disabled Persons would generate new policies and legislation, including laws to prohibit disability discrimination.[17]

In practice, however, the first Asian and Pacific Decade of Disabled Persons was somewhat disappointing. In 2002, the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) reported that 40 countries in the world had enacted laws prohibiting disability discrimination but that only nine of these countries were in

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[13] Kofi Annan, "Secretary-General Hails Adoption of Landmark Convention on the Rights of Persons with Disabilities" (delivered by the Deputy Secretary-General on [13] Dec 2006). Available at http://www.un.org/News/Press/ docs//2006/sgsm10797.doc.htm (accessed 10 Oct. 2011).

[14] UNESCAP, Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region. Available at: http:// www.unescap.org/esid/psis/disability/decade/about.asp#Launching (accessed 10 Oct. 2011).

[15] *Ibid*, para 5.

[16] See the List of Signatories to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region (UNESCAP). Available at: http://www.unescap.org/esid/psis/disability/ decade/about.asp#sig (accessed [16] Oct. 2011).

[17] *Ibid*, para 6.

the Asia-Pacific region.[18] Moreover, many of the disability laws in the region tended to adopt a social welfare approach to disability.[19] A good example of this approach is the Law of the People's Republic of China on the Protection of Persons with Disabilities, which was strongly influenced by medical and welfare approaches to disability.[20] The Special Administrative Region of Hong Kong stands out as one of the few jurisdictions in Asia to have enacted, by 2002, an enforceable law prohibiting disability discrimination.[21] In light of this limited legislative progress, it was agreed that the Asian and Pacific Decade of Disabled Persons should be extended for an additional ten years (until 2012). A set of specific targets, known as the Biwako Millennium Framework for Action towards an Inclusive, Barrier Free and Rights-Based Society for Persons with a Disability in Asia and the Pacific was also adopted at that time. One of the targets is to encourage more governments to enact legislation requiring equal opportunities for persons with disabilities. UNESCAP meets biennially to review achievements and to identify actions that may be required to implement the Framework. An intergovernmental meeting held in Bangkok in September 2007 adopted the Biwako Plus Five, which further supplements the Biwako Millennium Framework for Action.[22]

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[18] *Ibid*, para 53.

[19] UNESCAP, *Disability at a Glance: A Profile of 28 Countries and Areas in Asia and the Pacific* (2004), p 3 (methodology of study) and p 12 (data on domestic legislation).

[20] For examples of some of the shortcomings in China's law (which was enacted in 1990 and partly amended in 2008 when China ratified the CRPD), *see* Carole J. Petersen, "China's Ratification of the Convention on the Rights of Persons With Disabilities: the Implications for Hong Kong," 38 *Hong Kong Law Journal* 611-644 (2008). *See also* Carole J. Petersen, "Population Policy and Eugenic Theory: Implications of China's Ratification of the United Nations Convention on the Rights of Persons with Disabilities," 8 *China: An International Journal* 2010, 85-109.

[21] Hong Kong's Disability Discrimination Ordinance (Cap. 487, Laws of Hong Kong) (DDO) was enacted in 1994 and described as "one of the most far reaching antidiscrimination laws for disabled persons" in the region. Theresia Degener, "Report: International Disability Law — A New Subject on the Rise: The Interregional Experts' Meeting in Hong Kong, December 13-17", 18 *Berkeley Journal of International Law*, 2000, 180, 185.

[22] *See* Biwako Plus Five: Further Efforts Towards Inclusive, Barrier-Free and Rights-Based Society For Persons With Disabilities in Asia and the Pacific, adopted at the High-Level Intergovernmental Meeting on the Midpoint Review of the Asian and Pacific Decade of Disabled Persons, 2003-2012, 21 Sep 2007.

The extended Asian and Pacific Decade of Disabled Persons (2003-2012) overlapped with the meetings of the United Nations Ad Hoc Committee on the CRPD. This naturally inspired regional NGOs to make submissions on the content of the draft treaty. In 2003 an Expert Group Meeting was held in Bangkok, with more than 100 government officials and representatives of NGOs.[23] The Bangkok meeting endorsed the important principle that "the lack of provision of reasonable accommodation and/or positive actions to eliminate barriers to full participation" should be considered a form of discrimination" (a concept that would ultimately be reflected in Article 2 of the CRPD, which defines disability discrimination).[24]

The Bangkok recommendations and other regional submissions were presented at the Second Session of the Ad Hoc Committee, held in New York in June 2003. Member States unanimously agreed to begin drafting a proposed convention and a Working Group was established to develop a consolidated draft text. UNESCAP continued to sponsor regional workshops to critique the various drafts of the treaty. Thailand hosted several of these meetings, including workshops on the need to incorporate a gender perspective[25] and a workshop that produced a draft text for the treaty (many elements of which would eventually be included in the final text).[26] An important regional meeting was also held in Beijing, leading to the adoption of the Beijing Declaration on Elaboration of an International Convention to Promote and Protect the

[23] *See* Expert Group Meeting and Seminar on an International Convention to Protect and Promote the Rights and Dignity of Persons with Disabilities, Bangkok, Thailand, 2-4 June 2003.

[24] *See* Bangkok Recommendations on the Elaboration of a Comprehensive and Integral International Convention to Promote and Protect and the Rights and Dignity of Persons with Disabilities, 4 June 2003, para 13e.

[25] *See* "UNESCAP Workshop on Women and Disability: Promoting Full Participation of Women with Disabilities in the Process of Elaboration on an International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities", 18-22 Aug. 2003 and 13 Oct. 2003, Bangkok, Thailand, especially the Summary of Recommendations and Final Report.

[26] *See* "Final Report of the Regional Workshop towards a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities", Bangkok, 14-17 Oct. 2003, including the suggested draft of the treaty.

Rights and Dignity of Persons with Disabilities.[27]

The Ad Hoc Committee completed the drafting of the CRPD in 2006. The UN General Assembly approved the text in December 2006, together with the Optional Protocol to the CRPD (a separate but related treaty that contains an individual complaints procedure and an inquiry procedure).[28] The CRPD was opened for ratification on 30 March 2007 and eighty-two nations signed the treaty.[29] This is the largest number of opening signatures ever recorded for a UN human rights treaty.[30] The CRPD obtained its twentieth ratification in April 2008 and came into force in May 2008. In less than five years, it has obtained 106 states parties. This is an impressive ratification rate, and arguably reflects widespread acceptance in the international community of the social model of disability. In contrast, some human rights treaties have been open for ratification for much longer than the CRPD but have far fewer states parties.[31]

II. The Potential for the CRPD to Promote Development in ASEAN

Disability rights organizations from ASEAN have been actively lobbying their governments to ratify the treaty.[32] At present, four

[27] *See* "Beijing Declaration on Elaboration of an International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities", adopted in Beijing, 7 Nov. 2003, at the UNESCAP Regional Meeting on an International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities.

[28] *See* Optional Protocol to the Convention on the Rights of Persons with Disabilities. Available at http://www2.ohchr.org/english/law/disabilities-op.htm (accessed 15 Oct. 2011).

[29] *See* International Convention on the Rights of Persons with Disabilities: Status of Ratifications. Available at http://www2.ohchr.org/english/bodies/ratification /15.htm (accessed 12 Nov 2011).

[30] *See* Rosemary Kayess and Phillip French, above n 5, at 2.

[31] For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families was adopted by the UN General Assembly in 1990 but did not come into force until 2003 and still has only 45 states parties.

[32] For example, in December 2010, Disabled People's International-Asia Pacific (DPI-AP) and the Indonesian Disabled People's Association (PPCI) co-organized a regional conference, which generated the *Jakarta Declaration*, calling upon all ASEAN member states to sign, ratify, and implement the CRPD. Available at http://www.dpiap.org/reports/detail.php?id=0000100&year=2010& month=12) (accessed Oct. 11, 2011).

members of ASEAN (Laos, Malaysia, Philippines, and Thailand) are states parties to the CRPD, while an additional four (Brunei Darussalam, Cambodia, Indonesia, and Vietnam) are signatories to the treaty. Only Singapore and Myanmar have neither signed nor ratified the treaty. No member of ASEAN has ratified the Optional Protocol to the CRPD, which provides for an individual complaints procedure and an inquiry procedure. This means that the "reporting process" will be the primary international enforcement mechanism for the treaty within ASEAN. This section of the paper briefly explains the reporting process and then highlights certain provisions in the CRPD that are most relevant to economic and social development.

When a state ratifies the CRPD it obligates itself to regularly report to the United Nations Committee on the Rights of Persons with Disabilities, which is a committee of independent experts who serve in their personal capacities and do not represent their governments.[33] Pursuant to Article 35 of the CRPD, a government shall submit its initial report to the Committee within two years of the entry into force of the treaty for that state party. This should be a "comprehensive report on measures taken to give effect to its obligations" and should describe the progress that has been made in implementing the CRPD and any barriers to compliance. The Committee will conduct a public review of each state's report, seek additional information where necessary, and issue concluding observations advising the state on how to better implement the treaty. Civil society can also participate in the reporting process by submitting "alternative reports" (also known as "shadow reports") commenting on a government's official report. If local NGOs lack freedom of expression in the state that is being reviewed then the Committee will tend to rely more heavily upon reports submitted by international NGOs.

China will provide a good example of the reporting process because it has already submitted its initial report, together with the reports of the Hong Kong and Macau Special Administrative Regions. We originally expected the Committee to adopt the list of issues for the review of

[33] For links to the monitoring committees for the core UN human rights treaties, see Office of the High Commissioner for Human Rights, Human Rights Bodies, http://www.ohchr.org/EN/HRbodies/Pages/HumanRightsBodies.aspx (accessed Oct. 11, 2011).

these three reports in September 2011 but this process has been delayed to a future session of the Committee in 2012 (reportedly due to the delay in translating mainland China's report into English). However, all three reports are now available in Chinese and English on the website of the Committee on the Rights of Persons with Disabilities.[34] Disability rights groups will have opportunities to register for training programs in Hong Kong, to enable them to write alternative reports and contribute to the Committee's review of China. It is also possible that public enforcement bodies (such as the Federation of Disabled Persons in China and the Hong Kong Equal Opportunities Commission) will submit their own alternative reports, although these are unlikely to be as critical of government as the reports of independent NGOs.

Although the reporting process for international human rights treaties is often criticized as a too "soft" enforcement mechanism, it does constitute an important modification to traditional concepts of state sovereignty, which completely rejected outside intervention in domestic affairs. Helen Stacy has argued that sovereignty is now best viewed as the "measure of care" by a government for its citizens, which in the globalized economy necessarily includes interactions with the international community.[35] Under this theory, state sovereignty is enhanced, rather than undermined, when a national government decides to participate more actively in the UN system of international human rights treaties and enforcement processes.

The reporting process for the CRPD may be challenging for some governments because of the sheer breadth and depth of the treaty obligations. The CRPD is significantly longer and more detailed than previous specialty treaties (such as the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women). Article 4 requires states parties to adopt appropriate legislative and administrative measures to implement the CRPD, and to take into account the human rights of persons with disabilities in all policies and programs.[36] The state is also obligated to modify or repeal laws, regulations, customs

[34] Available at http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session6.aspx (accessed 25 Oct. 2011).

[35] Helen Stacy, "Relational Sovereignty", 55 *Stanford Law Review*, 2002-2003, 2029, 2045.

[36] CRPD, Art 4(1)(a) and (c).

or practices that discriminate against persons with disabilities and to ensure that public authorities and institutions comply with the treaty.[37] Article 8 targets the prejudice and obligates states parties to raise public awareness, while Article 9 promotes increased accessibility in both the public and private spheres.

The Committee on the Rights of Persons with Disabilities will likely stress inclusive education when reviewing states' initial reports. This is one of the most important rights in the CRPD because a person without education will find it almost impossible to obtain meaningful work, live independently, or participate fully in society. A 2002 study, conducted at the conclusion of the first Asian and Pacific Decade of Disabled Persons, found that there was a "continuing and alarmingly low rate of access to education for children and youth with disabilities" in the Asia-Pacific region.[38] Although 70% of nondisabled children in the region were enrolled in school, less than 10% of children with disabilities had access to education.[39]

Pursuant to Article 24 of the CRPD, states parties are obligated to provide an inclusive educational system at all levels, allowing persons with disabilities to develop "their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential" and enabling them to participate effectively in society.[40] Persons with disabilities shall not be excluded from the general education system and are entitled to an inclusive, quality, and free education on an equal basis with other students in their communities.[41] They are also entitled to reasonable accommodations and support within the general education system. The state should provide individualized support measures, in environments that maximize academic and social development but are consistent with the goal of full inclusion.[42]

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[37] *Ibid*, Art 4(1)(b) and (d).

[38] UNESCAP, Biwako Millennium Framework for Action Towards an Inclusive, Barrier- Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific: Note by the Secretariat, October 2002 (hereinafter referred to as the "Biwako Millennium Framework"). Available at: www.unescap.org/esid/psis/ disability/bmf/bmf.html (accessed 25 Apr 2010).

[39] *Ibid.*

[40] CRPD, Art 24(1)(b).

[41] *Ibid*, Art 24(2)(b).

[42] *Ibid*, Art 24(2)(c-e).

The CRPD lists specific measures that should be adopted. For example, physical barriers in schools, buses, and other modes of transportation should be removed. Schools should also employ more teachers who can communicate in sign language and in Braile, as well as teachers who can train others in disability awareness and appropriate educational techniques.[43] It is also important to hire teachers with disabilities, who can serve as important mentors for their students.

School administrators often resist the concept of inclusive education, claiming that it is more efficient to educate children in narrow ability levels. Yet research shows that 80 to 90% of children with disabilities can be integrated into mainstream schools if the schools are accessible and students are given appropriate support.[44] Indeed, it is often less expensive to integrate children with disabilities into the general educational system because a single integrated system lowers administrative and transportation expenses. Moreover, the resources invested benefit the community in general because inclusive education promotes independent living and a more equal and inclusive society. Children who go to school with children of different abilities tend to be more accepting of diversity and less likely to hold stereotypical views of persons with disabilities.[45]

Article 27 of the CRPD addresses the right to employment. Traditionally, many governments around the world have either not encouraged persons with disabilities to work or have employed them in segregated industries (sometimes referred to as "sheltered employment") where they are poorly paid and have no opportunities for promotion. Even governments that have enacted laws prohibiting disability discrimination often maintain discriminatory employment policies because the government officials who are doing the hiring do not fully embrace the law. A prime example is Hong Kong, where

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[43] *Ibid*, Art 24(4)-(5).

[44] United Nations ENABLE, *From Exclusion to Equality: Realizing the Rights of Persons With Disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007), ch 6.

[45] For a review of this research, see Susan Peters, *Inclusive Education: an EFA Strategy for All Children* (World Band, Nov 2004), especially Section IV. Available at: http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/5476641099079993288/InclusiveEdu_efa_strategy_for_children.pdf (accessed 10 Oct. 2011).

several branches of the disciplined services (e.g. the police, fire services, immigration, customs and excise, and correctional services departments) were refusing to hire applicants who had relatives with mental illness even after the Disability Discrimination Ordinance had been enacted. The Hong Kong Equal

Opportunities Commission ultimately had to sue the government in order to persuade it to comply with its own law.[46]

The CRPD recognizes the right of persons with disabilities to work on an equal basis with others, which is defined as "the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities." At a minimum, the Committee will expect states parties to adopt domestic legislation that prohibits discrimination on the basis of disability in all phases of employment, including recruitment, hiring, salaries, promotional opportunities, and other conditions of employment. The treaty also requires safe and healthy working conditions and mandates that persons with disabilities be allowed to exercise their labour and trade union rights on an equal basis with others. In practice, one of the most important obligations in Article 27 will be the obligation to ensure that reasonable accommodation is provided to persons with disabilities in the workplace. This is consistent with the definition of discrimination in Article 2, which states that "the denial of reasonable accommodation" is a form of disability discrimination, which the state is obligated to prohibit and remedy.

The CRPD also contains many provisions protecting the civil liberties and political rights of persons with disabilities. For example, Article 14 states that States Parties shall ensure that persons with disabilities, on an equal basis with others, enjoy the right to liberty and security of person. Persons with disabilities must not be deprived of their liberty unlawfully or arbitrarily, and the existence of a disability shall in no case justify a deprivation of liberty. These provisions in the CRPD open the door for the Committee on the Rights of Persons with Disabilities to question governments on detention procedures, civil commitment proceedings, and conditions inside medical and detention

[46] For analysis of the case, *see* Carole J. Petersen, "The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong," 32 *Hong Kong Law Journal*, 2002, 103.

facilities. I anticipate that the Chinese government will be asked about these subjects when its initial report is reviewed by the Committee on the Rights of Persons with Disabilities. The UN Committee Against Torture has already expressed concerns regarding Chinese criminal law, which allows authorities to administer "compulsory medical treatment" to persons with medical illness who commit crimes. In particular, the Committee against Torture noted "with concern that this provision has been misused to detain some people in psychiatric hospitals for reasons other than medical."[47] China has commenced the process of amending its Mental Health Care law and will thus likely supplement its initial report to the Committee on the Rights of Persons with Disabilities when it is reviewed, which will likely take place in 2012.[48]

Article 29 of the CRPD further provides that persons with disabilities have the right to participate in political and public life and Article 13 provides that they must have access to justice. Similarly, Article 21 of the CRPD provides that States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice. Some governments may interpret Article 21 as simply requiring accessible technologies to facilitate communication. I expect, however, that the Committee on the Rights of Persons with Disabilities will interpret it more broadly. The Committee will also expect to receive at least some "shadow reports" from independent NGOs operating within each state party. If independent NGOs are not permitted by their governments to submit alternative reports then the Committee will look to international NGOs for that alternative perspective. Many international NGOs are now documenting violations of the rights of persons with disabilities around the world.[49]

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[47] *See Concluding Observations of the Committee Against Torture: China*, 41st Session (Nov. 3-21, 2008), CAT/C/CHN/CO/4, Dec. 12, 2008), at p. 14.

[48] See, for example, Xinhua, "China to Enact Mental Health Care law in 2001." Available at http://news.xinhuanet.com/english2010/china/2011-03/10/c_137714 [48].htm (accessed 15 Oct. 2011).

[49] *See,* for example, Human Rights Watch, *Locked Doors: The Human Rights of People Living with HIV/AIDS in China*, Sept. 2003, available at http://www.unhcr.org/refworld/docid/3fe478e27.html (accessed 26 Sept. 2011).

Finally, the CRPD also establishes standards regarding the enforcement mechanisms for the rights stated in the treaty. In particular, Article 13 requires state parties to ensure that persons with disabilities enjoy "effective access to justice" on an equal basis with others, including any procedural and age-appropriate accommodations that may be required to facilitate their effective role as participants in legal proceedings.[50] If a person with a disability is not in a position to exercise full legal capacity, then the state party has an obligation to ensure that any measures affecting the exercise of legal capacity "respect the rights, will, and preferences of the person, are free of conflict of interest and undue influence" and are "proportional and tailored to the person's circumstances".[51] Article 13 is clearly relevant to the right of a person with a disability to enter legal relationships and contracts (such as an employment contract). However, the concepts in Article 13 are also important in the context of access to education, where a range of adults – parents, teachers, and social workers – may seek to make decisions regarding a child's educational goals and environment. Sometimes even loving parents will be overly protective of a child with a disability or may choose to concentrate the family's resources on the education of the nondisabled siblings. If a government has ratified the CRPD, it has undertaken a duty to ensure that the right to education of children with disabilities is not undermined by these competing goals.

Article 13 of the CRPD does not express a preference for a particular method of providing access to justice. Formal processes (such as litigation and formal investigations by human rights commissions) can educate the public, develop the law, and provide successful complainants with a sense of vindication. However, not all states parties to the CRPD have an independent judiciary or legal profession, which are important in human rights litigation. Moreover, regardless of one's legal tradition, many persons alleging unlawful discrimination prefer a more consensus-based procedure, such as confidential mediation. In general, governments should try to provide a mix of both formal and informal dispute resolution mechanisms.

Countries that are new to the field of disability rights may look to enforcement models in the region for guidance. For example, when

[50] CRPD, Art 13(b).

[51] CRPD, Art. 12(4).

Hong Kong enacted the Disability Discrimination Ordinance and created the Hong Kong Equal Opportunities Commission, it relied principally on Australian federal law as its model. One must be careful, however, when borrowing from other legal systems as numerous factors – including cultural differences in negotiating style,[52] the independence of judges, the availability of legal advice, and the presence or absence of an independent enforcement agency – will affect the workability of any given enforcement model. In Hong Kong we conducted interviews with disability rights organizations in 2002 and found that many activists felt frustrated by the emphasis on conciliation and wanted to see more cases go to court.[53] This came as a surprise to many experts who had assumed that Hong Kong Chinese would always prefer conciliation to litigation. In the past decade, the Hong Kong Equal Opportunities Commission has made many adjustments to its conciliation procedures in an effort to streamline the process for its clients. It has also gained more experience with formal investigations, through a major investigation of accessibility in public buildings. The data from Hong Kong demonstrates the importance of having an effective enforcement body, one that has the power to receive compiaints and to litigate at least some cases. Strategic litigation helps to educate the public and to establish precedents, as well as to encourage compliance with the law.

III. A Role for the ASEAN Intergovernmental Commission on Human Rights?

The ASEAN Intergovernmental Commission on Human Rights

[52] For an analysis of cultural differences in negotiating styles and a review of the literature on this issue, *see* John Barkai, "Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution", 8 *Pepperdine Dispute Resolution Law Journal*, 2008, 403. Professor Barkai argues that an interest-based model of negotiations is not exclusively Western, so long as interests are defined to include cultural interests. *Ibid*, at 404.

[53] For a summary of our interview results and the remedies obtained during conciliation, *see* Carole J. Petersen, Janice Fong and Gabrielle Rush, *Enforcing Equal Opportunities: Investigation and Conciliation of Discrimination Complaints in Hong Kong*, Hong Kong: Center for Comparative and Public Law, 2003; and also Carole J. Petersen, "A Progressive Law with Weak Enforcement? An Empirical Study of Hong Kong's Disability Law", 25 *Disability Studies Quarterly* (4), 2005.

represents an important step in the longstanding campaign to develop an effective ASEAN human mechanism.[54] In 2008, after years of lobbying by NGOs, a new ASEAN Charter was ratified, which identified "respect for and protection of human rights" as a core purpose of the organization. It also committed members to create an ASEAN human rights body.[55] However, the Charter continues to emphasize sovereignty, territorial integrity, and non-interference in domestic affairs.[56] Thus it still reflects ASEAN's traditional commitment to "the cardinal principle of nonintervention in the internal affairs of member states".[57]

In 2009, ASEAN formally established the Intergovernmental Commission on Human Rights (AICHR).[58] The terms of reference make it clear that the AICHR will be primarily promotional and advisory in nature, as it will not receive individual complaints and lacks any significant enforcement powers. Moreover, as an *inter-governmental* commission, the AICHR is not independent of the governments that established it. This was a disappointment for the nongovernmental Working Group for an ASEAN Human Rights Mechanism and other activists who lobbied for the ASEAN human rights mechanism.[59]

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[54] For the history of efforts to establish an ASEAN human rights mechanism, see generally the website of the Working Group for an ASEAN Human Rights Mechanism, (available at http://www.aseanhrmech.org/) and Andrea Durbach, Catherine Renshaw & Andrew C. Byrnes, "A Tongue But No Teeth? The Emergence of a Regional Human Rights Mechanism in the Asia Pacific," 31 *Sydney Law Review* 211 (2009) (discussing ASEAN and also efforts to establish a sub-regional mechanism for the Pacific islands).

[55] ASEAN Charter, Art. 1, para 7, *available at* http://www.asean.org/22073.htm (last visited Aug. 10, 2011).

[56] ASEAN Charter, Preamble.

[57] Li-ann Theo, "Implementing Rights in ASEAN Countries: 'Promises to keep and miles to go before I sleep'", 2 *Yale Human Rights & Development Law Journal*, 1999, 1, 2.

[58] Association of Southeast Asian Nations, *Cha-Am Hua Hin Declaration on the Intergovernmental Commission on Human Rights* (Oct. 23, 2009), *available at* http://www.asean.org/22769.htm (accessed Aug. 11, 2011).

[59] Ms. Pooja Patel, Asian Forum for Human Rights and Development (FORUM-ASIA), Statement delivered at the 16th Regular Session of the UN Human Rights Council (Mar. 22, 2011) (criticizing the lack of protection measures in the terms of reference of the recently established AICHR), *available at* http://www.forumasia.org/index.php?option=com_content&task=view&id=2693&Itemid=32 (accessed Aug. 11, 2011).

At this stage, it is difficult to assess the AICHR as its first year was taken up primarily by procedural matters and preparatory work. However, the AICHR has promised that 2011 will be a more active year, a period of "implementation" for human rights in ASEAN.[60] One of the primary responsibilities of the AICHR is to develop an ASEAN Human Rights Declaration. At its fifth meeting (held in Jakarta in April 2011), the AICHR adopted the Terms of Reference for AICHR's Drafting Group for the ASEAN Human Rights Declaration.[61] During its sixth meeting (held in Vientiane, Laos), the AICHR appointed the members of the Drafting Group, which started meeting in July, 2011.[62] The AICHR stated that it hopes to receive a draft of the ASEAN Human Rights Declaration by December 2011 and to adopt it sometime in 2012.[63] While the Declaration will almost certainly be nonbinding on member states, it could ultimately lead to the adoption of a binding ASEAN treaty on human rights.

There is some concern that the drafting project may cause the debate on "Asian values" to resurface or give ASEAN governments an excuse for declining to implement well-established international norms. For example, an ASEAN Human Rights Declaration might endorse very strong "emergency powers" for governments or generally incorporate language from reservations that were filed by ASEAN governments when they ratified international human rights treaties.[64]Nongovernmental organizations are working hard to ensure that the drafting process includes civil society and is not dominated by governments. Unfortunately, it appears that many important discussions

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[60] Press Release, Fourth ASEAN Intergovernmental Commission on Human Rights, Solo, Indonesia (Feb. 10-13, 2011), *available at* http://www.asean.org/ 26208.htm (accessed Aug. 11, 2011).

[61] Press Release, Fifth ASEAN Intergovernmental Commission on Human Rights Jakarta, Indonesia (Apr. 25-29, 2011), *available at* http://www.asean.org/26208. htm (last visited Aug. 25, 2011).

[62] Press Release, Sixth Meeting of the ASEAN Intergovernmental Commission on Human Rights (AICHR), Vientiane, Laos (July 2, 2011), *available at* http://www.aseansec.org/26456.htm (last visited Aug. 10, 2011).

[63] *Id.*

[64] For an analysis of the reservations that ASEAN governments have filed when ratifying international human rights treaties, see generally Suzannah Linton, "ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children," 30(2) *Human Rights Quarterly*, 2008, 436-93.

are being held behind closed doors and NGOs have rightfully called for greater transparency.

The Drafting Group may wish to review the history of the drafting of the CRPD: the Ad Hoc Committee was deliberately inclusive of civil society (more so than any previous human rights treaty drafting process) and produced a treaty that has been ratified at a rapid rate. The Drafting Group might also look to the CRPD for an example of a treaty that embraces a truly holistic approach to rights. The drafters of the CRPD sought to change not only how we think about disability but also how we conceive of rights and the role of the state in promoting them. In particular, the CRPD rejected the false distinction between "negative" and "positive" rights.[65] Article 21, on freedom of expression, provides an excellent example: this right is often characterized as a "negative" right on the theory that governments can respect it simply by refraining from placing restrictions on citizens' right to express their opinions. However, the CRPD expects governments to play a more active role. It requires governments to ensure that persons with disabilities can meaningfully exercise their right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice. This means that states parties should provide information in accessible formats and facilitate the use of sign language, Braille, and other alternative means of communication. When defined in this manner, freedom of expression becomes a much richer concept, one that has meaning for citizens with different abilities and resources.

Article 21 is just one example of how the CRPD takes a holistic approach to rights. Additional examples can be found throughout the treaty (e.g. in the provisions on political participation, the right to form a family, and the right to nationality and liberty of movement). Similarly, the drafters of the ASEAN Human Rights Declaration could

[65] Frédéric Mégret makes this argument in "The Disabilities Convention: Towards a Holistic Concept of Rights", 12(2) *International Journal of Human Rights*, 2008, 261. *See* also Frédéric Mégret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?," 30 *Human Rights Quarterly* 494, 2008, at 516 (arguing that the CRPD innovates on traditional human rights concepts by establishing "disability human rights", rights that are specific to persons with disabilities yet still rooted in the universality of rights and therefore not in a "ghetto" of disability rights).

adopt a holistic approach and draw inspiration from the egalitarian way that rights have been defined in the CRPD. I also hope that the ASEAN Human Rights Declaration will embrace the core principles of the CRPD -- capability, inclusion, and the removal of physical and attitudinal barriers. This would help to empower persons with disabilities, as well as to promote economic and social development in their communities.

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