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The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?

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ABSTRACT

The UN Convention on the Rights of Persons with Disabilities is about more than making sure that existing human rights are applied to persons with disability. It also subtly reformulates and extends existing human rights to take into account the specific rights experience of persons with disability. In fact, the argument can be made that the Convention comes close to creating new rights, or at least very new ways of seeing common rights. This suggests a deeper point about the fragmentation of international human rights law and the increasingly recognized need to take into account the irreducibility of the experience of certain categories of persons. The Disabilities Convention has some interesting lessons to teach about human rights more generally.

I. INTRODUCTION

On 13 December 2006, the much expected United Nations Convention on the Rights of Persons with Disabilities was adopted.¹ The Convention has rightly generated tremendous expectations that it can bring succor to persons

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The author would like to thank Parul Shah and Andrea Hwang for their invaluable research assistance. Comments by Sean Kelly on a previous version of this article were also extremely helpful.

1. International Convention of the Rights of Persons with Disabilities and its Optional Protocol, U.N. GAOR, 61st Sess., Item 67(b), U.N. Doc. A/61/611 (Dec. 6, 2006) [hereinafter Disabilities Convention].

with disabilities the world over whose rights have often been persistently and systematically violated. In this article, however, I want to take a step back from what the Convention will do for persons with disabilities, and inquire instead about some of the changes it portends for the idea of human rights itself.² In other words, I want to examine the Disabilities Convention less as a disability lawyer interested in what human rights can bring to the plight of persons with disabilities, rather as a human rights lawyer interested in how an issue such as disability can help us think about some of the more significant changes underway in the international law of human rights. Specifically, I want to tackle the emergence of an international rights regime tailored to persons of disabilities as an instance—the latest and possibly one of the most sophisticated—of a broader trend, which I describe as the “pluralization of human rights.” I define the “pluralization of human rights” as the phenomenon whereby human rights, as law and ideology, has increasingly recognized the needs of specific groups or categories within humanity as worthy of a specific human rights protection. This it has done most notably through the adoption of specific covenants against racial discrimination (CERD), discrimination against women (CEDAW), children (CRC), migrant workers (CRMW), and indigenous people (DIP).

This phenomenon is hardly ever analyzed as such. Analyses of specific conventions abound, and a diversity of sometimes weighty, sometimes anecdotal reasons are put forward why in a given case a specific international instrument was required. However, in the midst of the ad hoc, often both intensely political and intensely pragmatic, process by which international human rights treaties are adopted, there has been little sense of a broader conceptual shift at work. This rate of change is especially remarkable as there have arguably been few more significant trends in the last thirty years than this intense diversification of human rights’ subject matter.

I am not interested directly in whether this trend is a “good” or a “bad” thing, or whether it is functionally efficient from the point of view of the defense of human rights. Rather, I am interested in the broader theoretical questions this movement poses, and in particular, what its proper explanation is. One minimalist “functional” explanation is that there is no fundamental, principled reason why specific treaties are needed, only circumstantial, largely political and pragmatic reasons. Because certain groups have traditionally been ignored by the mainstream of human rights, one had reached a stage where something more was needed—something, say, in the nature of a strong political gesture—to simply bring attention to the issue.³ I find

2. This article is part of a larger series which aims to analyze the Disability Convention from a variety of rights perspectives.

3. For a classic defense of the need for a new treaty on such a basis, see Lenore Manderson, *Disability, Global Legislation and Human Rights*, 47 *Dev. 29, 30* (2004) (“A convention

that proposition unsatisfactory because at least some group-specific treaties have been more than a wake-up call and have made profound attempts at reformulating rights. Another explanation, which I have explored elsewhere, is that there is something missing in the language and style of “mainstream” international human rights, which requires at least an adaptation of its categories to protect members of certain groups. In that context, the Disabilities Convention is particularly noteworthy for skirting around some of the traditional dichotomies of human rights and proposing a much more holistic concept of what rights entail for certain persons.⁴

In this article, I want to explore a third and related explanation, namely the possibility that the adoption of specific instruments is linked to the irreducibility of the experience of certain group members in terms of their human rights. Specific instruments are needed not only to adapt the existing language of rights, but because there is a dimension of the experience of specific groups that is inherent to them and which almost requires the creation of new rights.

This explanation, is an intriguing possibility, not only in and for itself, but also because of the way it may be seen as clashing with a certain claimed unity of the human rights project. To summarize my intuition here: I see human rights as fundamentally making a point about the *sameness and unity* of human beings. From these ideas are derived those of equality and universality. It is this sameness, this belonging to a unique species, which forms the hard core of human rights normative ambition. Group-specific treaties conversely, if my hypothesis is correct, can be seen as at least partly making a point about *difference and pluralism*. Difference and pluralism are obviously in tension with the ideas of equality and universality.

From thereon, the most theoretically interesting question arising out of this “pluralization” is, in my view, the way it at least potentially and implicitly challenges the idea that human rights are about promoting equal rights for all, by suggesting that human rights may *also* be about delving deeply into issues of identity, survival, and dignity of particular groups. I see the pluralization of human rights as having been intensely ambiguous on this question (beginning with the fact that it is rarely asked), for reasons that probably have to do with human rights politics, but also some of the tensions at the root of the human rights project.

The problem pluralization poses implicitly in terms of the tenor of rights can be seen as the following: If the rights of human beings are the rights of

provides the highest level of a statement of principles upon which basis member governments might maximize and protect individual capabilities. It represents a consensus about what is right and proper in any society; it provides legitimacy to efforts to fight for and protect individuals’ rights.”).

4. Frédéric Mégret, *The Disabilities Convention: Towards a Holistic Concept of Human Rights?*, 12 INT’L J. HUM. RTS. 259 (2008).

all human beings, then it follows that these rights should also be the same for all human beings. While there may, therefore, be a need for *functionally* specialized conventions (civil and political rights versus economic and social; torture; disappearances), fundamentally, there should be no need for “group-specific” conventions. The only rationale for having group-specific conventions is as a purely corrective, stop-gap measure if these groups, despite the undeniable applicability of human rights to them, have for some reason been left aside. If this conception is correct, then in a sense all that is needed is an anti-discrimination treaty to make the point as clear as possible. Indeed, the prevailing model behind a treaty like the Convention on the Elimination of Racial Discrimination is, as its title indicates, that of “anti-discrimination.” It does not aim to grant members of racial groups or members of certain racial groups (e.g. oppressed ones) rights that they would not already have. Rather, such treaties have the ambition of making good on the promise of human rights, by making it clear that discrimination on the grounds of race is particularly abhorrent.⁵ However politically important they may be, there is no major conceptual or ontological need for such treaties, merely a contingent, historical and practical need.

An alternative, much more complex and contentious account of what is at stake with the pluralization of human rights, is that the vision of human rights as being the same for all is both helpful and insufficient. Even though the unity of rights captures a fundamental intuition, certain groups do need separate restatements of how rights apply to them, either because they have specific needs to enjoy their rights, different versions of the same rights, or possibly even slightly different rights. Indeed, one might claim that the mere existence of group-specific international rights instruments suggests that there is something specific about these groups, which is not, but perhaps most importantly, *cannot* be taken adequately into account by human rights instruments that have the ambition of covering the whole human genre.

What I want to do in this article, therefore, is locate the Disabilities Convention somewhere along these divisions, and see how it can help us develop a better understanding of what is at stake. Is the Convention merely making it clear that existing human rights should apply to persons with disabilities, and possibly making it clear *how* the rights should apply? Or is it actually creating rights that are specific to persons with disabilities? If so, how might one properly characterize these rights, i.e. as disability rights or, maybe, as “human rights that are specific to persons with disabilities,” or even as some intermediary category?

5. See generally, International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 Dec. 1965, art. 5, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, (*entered into force* 4 Jan. 1969) [hereinafter CERD].

I do not want to make any broad claims that the Disabilities Convention is profoundly different from other previous group-specific international human rights instruments, but one of my hypotheses is that the Convention radicalizes some of the trends already evident in those earlier treaties. Yet, by and large, the instinctive response to the question of whether the Disabilities Convention has created “new” rights, by many involved in the effort to promote it, has been a denial a little too emphatic to be entirely convincing. It is common wisdom in certain circles, for example, that the Disabilities Convention has not created new rights. Contra this vision, my contention will be that the answer to the question of whether the Convention is creating new rights is certainly more complex than simply an outright denial that any new right is being created. Although downplaying the degree of novelty of a treaty in the context of tense negotiations among states may be a fair strategy, it does not do justice to the multilayered normative reality of as rich an instrument as the Convention.

The Convention does not make such an analysis particularly easy. It is a complex piece of drafting susceptible to many readings because there is little sense of hierarchy between different provisions and different articles vary diametrically in tone and level of precision. But, I want to show how the Disabilities Convention is a very subtle mix of the old and the new, which confirms existing rights even as it amplifies upon, evolves from and even departs from them in the sort of creative ways required by the issue of disability. In fact, I will lean towards arguing that the Convention reinforces the idea that group-specific treaties are needed at least in part to take into account the irreducible experience of these groups in terms of rights.

Specifically, I will contend that the Convention does four things at once that prolong and attempt to make sense of the dialectics of rights and disability. First, it is true that the Convention does, to an extent, merely restate the applicability of existing human rights to persons with disability from an anti-discrimination perspective (“affirmation,” section II). If the only purpose of the Convention was to restate existing rights, however, one could question why there was a need for such an international human rights instrument; or maybe why the Convention was not cast as the “Convention on the elimination of discrimination against persons with disabilities.” Accordingly, the Convention also fundamentally enriches and modifies the content of existing rights when it comes to people with disability, often by thoroughly reformulating them (“reformulation,” section III). In some cases, the Convention actually comes up with new categories of rights that significantly prolong a number of existing rights (“extension,” section IV). Finally, the Convention also comes very close to creating new rights. These rights inhere in the experience of disability and are arguably, at least in the particular form in which they are presented, specific to persons with disabilities (“innovation,” section V).

II. AFFIRMATION: DISABILITY RIGHTS “AS HUMAN RIGHTS”

In part, the Convention is a way of stating in one instrument a number of things that are scattered in half a dozen other human rights treaties. In that respect, it can be most usefully compared to CERD, a classic anti-discrimination convention, which specifies at length all the rights that are supposed to be guaranteed to all, regardless of race, and which incorporates a broad range of internationally protected human rights, both civil and political, and economic, social, and cultural.⁶

The goal of the Disabilities Convention is stated as “promot[ing], protect[ing] and ensur[ing] the full and equal enjoyment of *all human rights and fundamental freedoms by all persons with disabilities.*”⁷ Elsewhere in the Convention the foremost “general obligation” of states parties is listed as “undertak[ing] to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities.”⁸

At various points in the Convention, different rights are simply “reaffirmed,” or the Convention obliges states to “recognize” or to “guarantee” them. The rights that are the object of this solemn re-recognition include: life;⁹ recognition everywhere as persons before the law,¹⁰ liberty and security of person,¹¹ respect for physical and mental integrity,¹² liberty of movement, to marry and found a family,¹³ education,¹⁴ the highest attainable standard of health,¹⁵ to work,¹⁶ an adequate standard of living,¹⁷ social protection,¹⁸ and to take part . . . in cultural life.¹⁹ Freedoms include: freedom from torture or cruel, inhuman or degrading treatment or punishment,²⁰ freedom to choose one’s residence and to a nationality,²¹ freedom of expression and opinion,²² and freedom from arbitrary or unlawful interference with his or her privacy.²³ Political rights are also listed as a category.²⁴ Each of these rights has been

6. *Id.*

7. Disabilities Convention, *supra* note 1, art. 1 (emphasis added).

8. *Id.* art. 4.1.

9. *Id.* art. 10.

10. *Id.* art. 12.1.

11. *Id.* art. 14.1(a).

12. *Id.* art. 17.

13. *Id.* art. 23.1(a).

14. *Id.* art. 24.1.

15. *Id.* art. 25.

16. *Id.* art. 27.

17. *Id.* art. 28.

18. *Id.* art. 28.2.

19. *Id.* art. 30.

20. *Id.* art. 15.1.

21. *Id.* art. 18.

22. *Id.* art. 21.

23. *Id.* art. 22.

24. *Id.* art. 29.

recognized for decades in either the Universal Declaration,²⁵ the International Covenant on Civil and Political Rights,²⁶ or the International Covenant on Economic, Social and Cultural Rights,²⁷ if not all three.

Why should this affirmation of previous rights be necessary in the case of persons with disabilities? The simple answer is that it has not always been, and certainly still is not, in many instances, obvious. For a long time, some persons with disabilities were hardly considered human and were, as a result, denied basic rights.²⁸ Persons with disabilities may have always been theoretically entitled to human rights, but in both law and practice they have often been denied them. Persons with disabilities have been victims of genocide,²⁹ eugenism,³⁰ and have suffered from massive discrimination resulting from a denial of their basic rights.³¹

In this respect, the Convention's contribution is more than conveniently bringing the human rights of persons with disabilities under the same roof. Rather, there is a more fundamental and principled push to make it clear that existing rights are applicable to persons with disabilities. The Convention stands in affirmation of the "right to have rights:" an official, unambiguous and long overdue solemn recognition of the absolute equality of persons with disabilities with all other persons.

The very first general principle of the Convention, which mandates "respect for inherent dignity" of persons with disabilities,³² is revealing in that sense. The inherent dignity of all human beings is, after all, the fundamental premise from which rights traditionally flow. One is reminded of Arvonne

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25. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, pt. 1), U.N. Doc. A/180 (1948), *reprinted in* 43 AM. J. INT'L L. 127 (SUPP. 1949) [hereinafter UDHR].
 26. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, (*entered into force* 23 Mar. 1976) [hereinafter ICCPR].
 27. International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, (*entered into force* 3 Jan. 1976) [hereinafter ICESCR].
 28. JOANNA RYAN, *THE POLITICS OF MENTAL HANDICAP* (1987).
 29. Sally M. Rogow, *Persecution and Genocide of Children and Young People with Disabilities in Nazi Germany*, 26 DEV. DISABILITIES BULLETIN (1998); Stephen C. Baldwin, *Genocide & Deafness*, 4 THE VOICE 7, 7–11 (May–June 1988); Sally M. Rogow, *Child Victims in Nazi Germany*, 8 J. HOLOCAUST EDU. 71 (1999).
 30. A. Brauner, *A Final Solution for People with a Mental Disability—History of the Ideas of Eugenism and Euthanasia and of their Practice in the National-Socialist Germany*, 1 EUR. J. ON MENTAL DISABILITY 3–11 (1994); EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE* (2003).
 31. For an interesting case study of persons with mental disabilities, see AMNESTY INTERNATIONAL, *BULGARIA: FAR FROM THE EYES OF SOCIETY: SYSTEMATIC DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES* (2002), *available at* <http://www.amnesty.org/en/library/info/EUR15/005/2002>.
 32. Disabilities Convention, *supra* note 1, art. 3(a).

Fraser's classic article, "Becoming Human,"³³ on the topic of women's rights. The Disabilities Convention is the most unmistakable international recognition of persons with disabilities' full humanity.

Apart from recognizing rights for persons with disabilities, the Convention is also noteworthy for relying on what might be described as its twin pillars: equality and non-discrimination. Often linked to the project of (re)affirming certain rights, for example, is the insistence that persons with disabilities should enjoy them "on an equal basis with others" (the expression is repeated no less than thirty-five times). The idea of equality confirms the application of human rights to persons with disabilities, rather than creating new rights.

Although the Convention is not specifically described as an anti-discrimination Convention in the same mold as CEDAW and CERD, there is no doubt that a concern about discrimination is at its core. As the 2002 UN Report states: "the disability rights debate is not so much about the enjoyment of specific rights as it is about ensuring the equal effective enjoyment of all human rights, *without discrimination, by people with disabilities*."³⁴ The Preamble of the Convention mentions the "need for persons with disabilities to be guaranteed their full enjoyment without discrimination"³⁵ and stresses that ". . . discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person."³⁶ Non-discrimination, furthermore, is presented as one of the Convention's "General Principles."³⁷ States are to ensure and promote the full realization of the human rights for persons with disabilities without discrimination.³⁸

When it comes to prohibiting discrimination on the ground of disabilities, it is worth noting that this is less obvious than it might be in existing human rights instruments. On the one hand, one would think that persons with disabilities, as arguably the largest minority in the world,³⁹ are a particularly

33. Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, 21 HUM. RTS. Q. 853 (1999).

34. *Human Rights of Persons with Disabilities*, Commission on Human Rights 58th Sess., U.N. Doc. E/CN.4/2002/18/Add.1 (2002) (emphasis added).

35. Disabilities Convention, *supra* note 1, pmb1. c).

36. *Id.* pmb1 (f).

37. *Id.* art. 3.

38. *Id.*

39. Theresia Degener relies on this idea. I am not sure it is an entirely adequate description: women are a larger group, although the question of whether they are a minority is more complex. The total number of discriminated racial, cultural or national minorities is probably higher, although no single "group" probably reaches 500 million disabled people. The idea should probably be taken not too strictly and as emphasizing simply that there is a very substantial number of people who are disabled in the world today. See Theresia Degener, *Disabled Persons and Human Rights: The Legal Framework*, in HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS 9 (Theresia Degener & Yolán Koster-Dreese, eds. 1995).

obvious target group for discrimination. Discrimination is not defined in the ICCPR, but it is defined in CEDAW and CERD along more or less the same lines, such that discrimination is any distinction, exclusion, restriction or preference based on certain grounds which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life.⁴⁰ This definition seems particularly helpful in the case of persons with disabilities whose very disability is reinforced by discriminatory barriers to their inclusion in society.

On the other hand, it must be said that international human rights instruments have traditionally not done as much as they could to make differential treatment of persons with disabilities a clear-cut case of discrimination. The ICCPR, for example, prohibits discrimination “on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁴¹ These clearly illustrate that, in theory, disability is not excluded. But, it is troublesome, to say the least, that none of the enumerated criteria seem to include disability. Indeed, despite the chance to correct this in its General Comment on discrimination, the Human Rights Committee failed to take up that opportunity, and even seemed to reify the list.⁴² Nor have persons with disability traditionally been considered a minority.⁴³

Although it is not actually encouraged by international human rights law, discrimination against persons with disabilities was bizarrely not explicitly condemned. Its unambiguous prohibition by the Convention is one particularly clear-cut example where that treaty, in stating the obvious, is also effecting change. Only more recent international human rights instruments (such as the European Charter of Rights)⁴⁴ have corrected this omission.

This first analysis of the Disabilities Convention thus reveals it as having made a very significant step in recognizing that persons with disabilities are entitled to the same rights as all human beings. However, if that was all that the Convention did, it would merely be a functional correction to lapses of

40. CERD, *supra* note 5, art. 1; Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, 34th Sess., Supp. No. 46, art. 1, U.N. Doc. A/34/46 (1979), (*entered into force* 3 Sept. 1981) [hereinafter CEDAW].

41. ICCPR, *supra* note 26, arts. 2, 26.

42. *General Comment 18: Non-Discrimination*, Human Rights Committee, 37th Sess., (1989), *reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 (1994), at 26 (lamenting that a number of constitutions do not include all of the grounds of discrimination contained in the ICCPR).

43. Degener, *supra* note 39, at 11–12.

44. Charter of Fundamental Rights of the European Union, art. 21, 2000 O.J. (C 364) 1.

the past, rather than a treaty engaging in a novel exercise of developing the concept of rights in relation to a particular group.

III. REFORMULATION: DISABILITY RIGHTS AS HUMAN RIGHTS “WITH A DIFFERENCE”

Although the restatement/anti-discrimination part of the Disabilities Convention does not do much in terms of renewing the genre of human rights, the Convention also goes further than this solemn reaffirmation of the obvious (or what should be obvious). This it does by outlining a number of key characteristics of the rights listed in the Convention that are not otherwise specified in the major international human rights instruments.

First, the Convention brings substantial extra semantic texture to certain rights, by clarifying the way they are to apply to persons with disabilities. Simply restating rights would, in certain cases, have been insufficient because it is the very abstract blandness of these rights' previous formulations that has often left people with disabilities without the requisite protection. For example, in the UDHR and the ICCPR, the rights to “recognition everywhere as a person before the law”⁴⁵ and to equality before the law,⁴⁶ are enunciated as such without further description. The Disabilities Convention specifies that the right to equal recognition before the law means that persons with disabilities must have access to “the support they may require in exercising their legal capacity,”⁴⁷ and that this legal capacity must be protected by “appropriate and effective safeguards to prevent abuse in accordance with international human rights law,” then spells out in detail what sorts of considerations these safeguards should take into account.⁴⁸

Other rights are also succinctly but significantly reformulated: the right to liberty and security of persons implies that “the existence of a disability shall in no case justify a deprivation of liberty;”⁴⁹ the right to liberty of movement and nationality⁵⁰ implies that persons with disabilities shall not, as a result of their disability, be deprived of their nationality, or their “ability to obtain, possess and utilize documentation of their nationality,” or of the “right to enter their own country.”⁵¹ Freedom of expression and opinion⁵² is specified as including the “freedom to seek, receive and impart information

45. UDHR, *supra* note 25, art. 6; ICCPR *supra* note 26, art. 16.

46. UDHR, *supra* note 25, art. 7.

47. Disabilities Convention, *supra* note 1, art. 12.3.

48. *Id.* art. 12.4

49. *Id.* art. 14.1(b).

50. UDHR, *supra* note 25, art. 13; ICCPR, *supra* note 26, art. 12.

51. Disabilities Convention, *supra* note 1, art. 18.1.

52. UDHR, *supra* note 25, art. 19; ICCPR, *supra* note 26, art. 19.

and ideas . . . through all forms of communication of their choice.”⁵³ Respect for privacy⁵⁴ is to be protected “regardless of place of residence or living arrangements”⁵⁵ and specifically includes “the privacy of personal, health and rehabilitation information of persons with disabilities.”⁵⁶ The right to respect for home and the family⁵⁷ emphasizes that persons with disabilities shall have the right to “decide freely and responsibly on the number and spacing of their children” and “retain their fertility on an equal basis with others.”⁵⁸ The content of the rights to education,⁵⁹ health,⁶⁰ work,⁶¹ and adequate standard of living,⁶² are all spelled out in detail in a way that caters to the needs of persons with disabilities.⁶³

In all of these cases, a number of problematic features in what one might term persons with disabilities “access” to rights are implicitly highlighted. Rather than being left to the interpretation of states, these concerns are woven into the definition of those rights, so as to leave no doubt regarding their exact scope. None of these elements had previously been mentioned in existing human rights treaties, so they are, in a sense, specific to persons with disabilities. The point is not to depart from human rights standards, but rather make clear how these standards are to be understood if persons with disabilities’ rights are not to remain an abstraction.

Second, the Convention makes a very significant effort to highlight, sometimes in considerable detail, how the rights it proposes to protect are to be implemented and guaranteed. This explicitness about means stands in contrast to traditional international human rights law. Classically, human rights have been marked by a sort of indifference of rights towards means. Rights are proclaimed in performative fashion, as goals imposing an obligation on the state to either deliver that goal or strive toward it with a certain intensity. Typically, the question of their implementation is left largely to the discretion of states, partly because international human rights ideology shuns involvement in political controversies about the “right” political system. This sort of attitude towards right is evidenced most clearly in such instruments as the UDHR and the ICCPR. At best, the precise implementation of rights is an issue left to monitoring mechanisms’ normative output, but instruments such as the ICCPR clearly shy away from moving into the realm of policy.

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53. Disabilities Convention, *supra* note 1, art. 21.
 54. UDHR, *supra* note 25, art. 12; ICCPR, *supra* note 26, art. 17.
 55. Disabilities Convention, *supra* note 1, art. 22.1.
 56. *Id.* art. 22.2.
 57. UDHR, *supra* note 25, art. 16; ICCPR, *supra* note 26, art. 23.
 58. Disabilities Convention, *supra* note 1, art. 23.1(c).
 59. ICESCR, *supra* note 27, art. 13.
 60. *Id.* art. 12.
 61. *Id.* art. 6.
 62. *Id.* art. 11.
 63. Disabilities Convention, *supra* note 1, at arts. 24, 25, 27, 28.

Some international human rights instruments have gradually shown the way to adopting more vigorous implementation language, especially in cases where there is an understanding that significant social policies may be at stake. The ICESCR, for example, hesitates between the bare affirmation of rights and forays into policy,⁶⁴ although it does ultimately steer very clear of anything that might be interpreted as taking a stance in favor of a particular socio-economic model.

Even this mixed model suggested by the ICESCR tends to fail in one key respect when it comes to specific groups because of its inability to take into account the extent to which these groups may require different types of implementation measures. Both the ICCPR and the ICESCR have implicitly adopted a rigorously egalitarian model which fails to take into account the fact that certain groups are not in the same starting position as others when it comes to rights, for example, when they have suffered from situations of historical discrimination. These treaties' relative silence when it comes to group-specific implementation thus makes it all the more easy for states, left to their own devices, to adopt similar measures for all individuals within their population. While possibly not expressly imposing an undifferentiated treatment of all within the population, international human rights' bias is certainly an egalitarian one, which does not lead easily to the adoption of group-specific measures, even when such measures may be absolutely necessary to protect the rights of members of a certain group.

As it happens, this is clearly the model that has not worked for a number of minorities. Compared to classical rights treaties (the UDHR, the ICCPR), an anti-discrimination convention such as CEDAW was the first to adopt what one might describe as an "appropriate measures" approach to rights implementation. This approach is less interested in the proclamation of rights as such (which are either presupposed or mentioned in passing) than it is with political, economic, and social reform in order to address some of the key obstacles to the realization of these rights. It brings an approach to rights that is much more energetic and less contemplative than the earlier "proclamation model."

If ever there was a group that has suffered from this earlier model, it is arguably persons with disabilities, who have been consistently excluded from partaking in the many human rights advances of the last fifty years, not so much because they were not covered in theory by existing rights, but by the failure of states to focus their attention on their particular difficulties. "Laissez-faire" rights policies when it comes to persons with disabilities, can have particularly catastrophic consequences, in light of the complex needs of these persons to both keep the state and society at bay on the one hand, but enlist their help in securing autonomy and participation on the other.

64. ICESCR, *supra* note 27, arts. 6(2), 10, 11(2), 12(2), 15(2).

To correct this historical failure, the Convention arguably goes further than any international human rights instrument before it in spelling out in substantial detail exactly how states should go about ensuring the rights of persons with disabilities. While CEDAW certainly contained many provisions of this kind, the “appropriate measures” that would be required to effect women’s rights were not always or overly specified. The Disabilities Convention, in contrast, breaks that conceptual barrier by “getting its hands dirty,” as it were, with the details of how persons with disabilities’ rights are to be implemented.

The catalogue and shades of obligations involved is unusually long and diverse. Typically, in order to render effective the rights of persons with disabilities, states are required to “enable” them to do certain things or “facilitate”⁶⁵ their lives. There are many references to “taking appropriate measures”⁶⁶ and “adopt[ing] immediate, effective and appropriate measures.” At times, the Convention goes out of its way to describe what exactly is required of state parties. Generically one can classify the measures to be adopted by states in the following manner:

- To repeal or adopt certain laws⁶⁷
- To mainstream concern for persons with disabilities⁶⁸
- To launch public awareness campaigns⁶⁹
- To build or adapt certain infrastructures⁷⁰
- To train specialized personnel⁷¹
- To employ certain individuals⁷²
- To provide certain forms of services or assistance⁷³
- To consult with the representative organizations of persons with disabilities⁷⁴

All of these obviously appear as duties of the state rather than as human rights *per se*. They indicate how certain rights are to be guaranteed and do not strictly lay the foundations for new rights. However, it is not simply semantics to suggest that they also come close to creating some sort of *sui generis* entitlement.

65. Disabilities Convention, *supra* note 1, arts. 9.1(e), 13.1, 18.1(b), 19, 20(a), 20(b), 21(b), 24.2(d), 24.3, 24.3(a), 24.3(b), 29(a)(ii).

66. *Id.* arts. 4.1(b), 6.2, 9.1, 9.2.

67. *Id.* arts. 4.1(a), 4.1(b), 4.3, 15.2, 16.1, 16.5, 27.1, 30.3.

68. *Id.* art. 4.1(c).

69. *Id.* arts. 8.1(a), 8.1(c).

70. *Id.* arts. 9.1(a), 9.2(d).

71. *Id.* arts. 4.1(h), 8.2(d), 9.2, 13.2, 20(c), 24.4, 25(d), 26(2), 32.1(b).

72. *Id.* art. 24.4.

73. *Id.* pmb. (x), arts. 4.1(f), 4.1(h)–(i), 7.3, 9.1, 9.2(e)–(f), 16.2, 16.4, 19(b), 20(b), 21(c), 23.2, 23.3, 25, 26, 27.1(e), 28.2(a), 28.2(c), 29(a)(iii), 30.1(c), 32.1(d).

74. *Id.* art. 4(3).

For example, if a state party is bound by a treaty to “take measure *y*” to “ensure right A” of person D with “measure *y*” being identified clearly as the only measure susceptible of guaranteeing “right A,” then any failure to adopt “measure *y*” will be a violation of “right A” of D. One could argue that the adoption of “measure *y*” merely spells out the content of “right A,” but one could also reasonably argue that “measure *y*” also creates a *right* for D to have “measure *y*” adopted. To some extent “measure *y*” is merely a means to an end (“right A”). In another sense, it is also a sort of “secondary right” (in its own right, as it were), say, right “a” (“right A” being the primary right). It may be that D will not be able to complain of a failure to adopt “measure *y*,” short of showing that this has resulted in a violation of “right A,” but she will now have very precise grounds to establish the violation of “right A” (non-adoption of “measure *y*”).

This tendency to delve deep in issues of implementation and to essentially absorb them in a shroud of rights is taken to new heights by the Disabilities Convention. At the very least, the Convention fundamentally renews our understanding of what these rights mean and imply, and, therefore, substantially enriches their content.

IV. EXTENSION: DISABILITY RIGHTS AS HUMAN RIGHTS “PLUS”

A number of provisions in the Convention go further than simple reformulation by emphasizing rights that have typically not been highlighted as such in the main international human rights instruments, even though they may draw on existing rights. These rights are not entirely new, and indeed, are probably rights of all human beings, but the particular circumstances of disability have made it necessary to incorporate them in the Convention almost as novel and separate categories, rather than simply variations on existing themes (as above).

What these rights have in common, I would argue, is that they focus on the societal dimension of the rights experience, thereby departing from human rights’ traditional emphasis on the relationship of the individual to the state. They thus display more sensitivity to issues of structural power and oppression than the mainstream human rights framework has typically done. This fully takes into account the fact that persons with disabilities have often been as much at risk of having their freedoms curtailed in the private sphere or by society than by acts of the state as such.

Two examples come to mind of this phenomenon. The first is Article 16’s right to “freedom from exploitation, violence and abuse.” Although this sounds intuitively like it could fit in any classical list of liberties, there is, of course, no such expressly mentioned right in either the Universal Declaration, the ICCPR, or any other international human rights instrument. In fact,

despite what one would surmise has been its centrality in the emergence of the international human rights movement against these forms of human oppression, the terms do not even appear in these key instruments.⁷⁵

Has a new right thereby been created? The question is an intriguing one. I would argue that the proper way to analyze “freedom from exploitation, violence and abuse” is probably somewhere between a compendium of existing rights and an almost entirely new right. In a sense, freedom from such treatment is another way of describing the “right to life, liberty and security of person,”⁷⁶ and can probably be seen as including freedom from torture, cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, etc. However, all these rights are also protected independently in the Disabilities Convention, so that clearly “freedom from exploitation, violence and abuse” must have been seen as adding something to the existing register of rights.

Indeed, if one interprets those words according to their ordinary meaning, they obviously have an extremely broad ambit. There is a sense, moreover, in which, in this specific context, the Convention switches the focus from rights as such to certain phenomena which are perceived as the root cause of rights violations, at least for persons with disability. One explanation is that “exploitation, violence and abuse,” as phenomena rather than particular manifestations of rights abuse (torture, attacks on the integrity, or on liberty), manage to capture structures of oppression that lie behind rights violations. “Exploitation, violence and abuse” also appear as phenomena that are unusually amorphous, even all-pervasive, and which naturally locate themselves beyond the limited realm of the state’s relationship to individuals within its jurisdiction. Article 16’s specific reference to protection “both within and outside the home” points very directly in this direction, by suggesting “the home” as one of the key variables in assessing “exploitation, violence and abuse”—a very unusual step in international human rights law.

A second example of how the Disabilities Convention creates, through some of its reordering, rights which are quite specific to persons with disabilities, is the at least implicitly promoted “right to participation,” as embodied in the Convention’s reference to “full and effective participation and inclusion in society.” This idea is promoted as one of the Convention’s “General Principles”⁷⁷ rather than a right as such. Overall, however, it comes very close to emerging as a right as such.

75. Violence is mentioned in the ICCPR but only in article 20(2) on the prohibition of advocacy of “national, racial or religious hatred.” Violence is not highlighted more generally as a key phenomenon with which human rights attempt to deal.

76. UDHR, *supra* note 25, art. 3. See also ICCPR, *supra* note 26, art. 9 (not mentioning the right to life as such).

77. Disabilities Convention, *supra* note 1, art. 3.

Like “freedom from exploitation, violence and abuse,” “participation” is not a right that is protected as such in the main international human rights instruments. Nonetheless, like “freedom from exploitation,” it appears as both a combination of existing rights, and an extrapolation on those. In terms of existing rights, “participation” incorporates the right to participate “in political and public life”⁷⁸ (which is not mentioned as such in existing human rights instruments, but is another way of describing political rights) and the right to participate in cultural life, recreation, leisure and sport⁷⁹ (which is protected as such in the UDHR). These rights are amplified in the context of disability so that, for example, “participation in political and public life” includes such an obligation for states as that of promoting actively “an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs.”⁸⁰ “Participation in cultural life, recreation, leisure and sport” is similarly supplemented by a number of provisions regarding its scope when it comes to persons with disabilities.

The vision of a “right to participation,” however, goes further than these two rights taken together. Lack of participation in society and in the community are seen both as an inherent part of the very definition of disability,⁸¹ a cause of persons with disabilities’ dismal rights experience,⁸² and what the Convention seeks to combat primarily.⁸³ The whole Convention is infused by this notion of “participation” being something akin to a right more generally. That right goes beyond participation as the ability to stand and vote for public office, for example, or participate specifically in “cultural life, recreation, leisure and sport.”⁸⁴ Rather, it is a broader demand, made not only to the state but also to society, to allow persons with disabilities to fully become members of society and the various communities of which they are part.

For example, state parties are required to “take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of . . . their full inclusion and participation in the community.”⁸⁵ The right to education is geared towards enabling “persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community.”⁸⁶ The goal of “habilitation and rehabilitation” efforts is to ensure “full inclusion and participation in all aspects of life”⁸⁷ and state parties are to implement programs that “support participation and inclusion in the community.”⁸⁸

78. *Id.* art. 29.

79. UDHR, *supra* note 25, art. 27; ICESCR, *supra* note 27, art. 15.

80. Disabilities Convention, *supra* note 1, art. 29(b).

81. *Id.* pmb. (e).

82. *Id.* pmb. (k).

83. *Id.* pmb. (m), (y).

84. *Id.* art. 30

85. *Id.* art. 19.

86. *Id.* art. 24.3.

87. *Id.* art. 26.1.

88. *Id.* art. 26.1(b).

Very closely related to this notion of participation (and in itself an undeniably new right) is the right to “live in the community.”⁸⁹ Again, this is a right that is not protected in any existing international human rights instruments, largely because it is assumed to be unproblematic in the case of persons without disabilities and to be subsumable under larger rights (e.g. freedom from the state interfering with it). In the case of persons with disabilities, the right needs to be not so much protected from its potential denial by the state, as rescued from its potential virtuality.

Persons with disabilities are arguably unique in their vulnerability to both exploitation and denial of participation. This may make it necessary to strengthen the normally available protections by going beyond the normal register of rights. Through the protection from “exploitation, violence and abuse,” and through its insistence on the notion of “participation,” the Convention arguably provides very useful pointers on how to mediate the tensions among individuals with disabilities, the state, society, and communities. It thus may go deeper in addressing violations by extending known and existing rights with an upper-layer of rights whose goal can be seen as protecting persons with disabilities from some of the “root causes” of violations of their rights.

It is less clear whether these are rights that are specific to persons with disabilities, rights that are specific to them in their particular formulation, or simply rights which exist in some form or other for all human beings, but whose existence needs to be highlighted in this context because of the particular vulnerabilities of those with disabilities. At any rate, however, a normative space is opened that seeks to bridge the gap, sometimes uneasily, but with a definite sense of resolve, between general formulations of rights and the need to craft categories of rights that better take into account the irreducible experience of those with disabilities.

V. INNOVATION: DISABILITY RIGHTS AS (HUMAN) RIGHTS INHERENT TO PERSONS WITH DISABILITIES

A further manifestation of the Disabilities Convention’s willingness to endorse the idea that certain rights are specific to members of certain groups is that, in a limited way, the Convention is actually going further than merely extending existing rights, and that it comes very close to either creating new rights or formulating rights in the context of disability that have never been framed as such.

The most significant and perhaps only example of this type of right in the Convention is what I would describe as a significant push towards promoting

89. *Id.* art. 19.

a concept of persons with disabilities' "autonomy."⁹⁰ Although not defined in the Convention, autonomy refers to the ability of persons with disabilities to do things on their own without the assistance of others and is linked to the right to be "free to make one's own choices," which is highlighted in the Preamble as being of "importance" to persons with disabilities.⁹¹ The Convention may fall short of proclaiming a right to autonomy, but respect for the autonomy of persons with disabilities is certainly presented as one of the Convention's "General Principles."⁹² This "general principle," furthermore, receives substantial echo in the rest of the Convention, with state parties being pressured to take a broad range of measures to facilitate the exercise of that autonomy. Indeed, the idea of autonomy seems to be part of an entire normative constellation which gives it an added glow. It can be linked, for example, to the ideas of "personal mobility"⁹³ and "accessibility."⁹⁴ Moreover, there is certainly a "right to live independently" proclaimed as such,⁹⁵ and the Convention's push in favor of autonomy should be read in this light. The goal of measures of "habilitation and rehabilitation" is described as enabling "persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability."⁹⁶ In the same vein, it is the obligation of state parties to ". . . render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities"⁹⁷ (meaning that state parties should make it possible for persons with disabilities to be autonomous parents).

Article 12 is, perhaps, the high point of this drive to "proclaim" persons with disabilities' autonomy, which recognizes the principle of persons with disabilities' legal capacity, in what must surely be one of the Convention's greatest advances. This comes close to the right to be recognized as a "legal person" as expressed in the ICCPR, but the insistence on capacity (rather than merely personality), in a context where it has often been denied to persons with disability, is particularly enlightening. It comes as a sort of legal culmination of the recognition of autonomy: it is because of their

90. On the centrality of autonomy to the idea of human rights, and its rediscovery in the context of persons with disabilities, see Gerard Quinn, *The International Covenant on Civil and Political Rights and Disability: A conceptual framework*, in HUMAN RIGHTS AND DISABLED PERSONS—ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS 69–70 (Theresia Degener & Yolán Koster-Dreese eds., 1995).

91. Disabilities Convention, *supra* note 1, pmb. (n).

92. *Id.* art. 3(a).

93. *Id.* art. 20.

94. *Id.* art. 9.

95. This in itself goes further than some of the claims advanced in the 1970s, for example, by the 'independent living' movement, which promoted 'independent living' from a general political perspective rather than strictly a rights framework.

96. Disabilities Convention, *supra* note 1, art. 26.1.

97. *Id.* art. 23.2.

fundamental autonomy that persons with disability should be granted the legal capacity that is its natural extension. Provisions regarding access to justice, which do not feature as a separate right in the ICCPR, are of similar inspiration and point to persons with disabilities' "effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."⁹⁸ It is also interesting to note that the strong, almost ontological link, among autonomy, legal capacity and rights, was highlighted by a footnote that was for a time introduced in the Arabic, Chinese, and Russian language translations of one of the final drafts of the Convention, which presented capacity as being the "legal capacity *for rights*."⁹⁹

It is not clear why, for all this insistence on autonomy, there is no "right to autonomy" mentioned as such. This may be merely out of prudence or conservatism. More interesting is the idea that one might hesitate to describe autonomy as a right because it is in the nature of autonomy that it can be recognized or not impeded, but not granted as such to individuals who are not, in essence, autonomous. That may be true in some cases and the situation of the profoundly mentally ill, for example, does create dilemmas for human rights.¹⁰⁰ However, autonomy should be seen as less of an "either/or" notion, and more something that can be located on a spectrum. Even in the case of persons without disabilities it is by and large a fiction, and the granting of autonomy by human rights law is also part and parcel of what makes individuals actually (to the extent there is such a thing) autonomous. Moreover, to a large extent the absence of autonomy is not so much a given, but a result of persons with disabilities' treatment by the state and society, so that a "right to autonomy" would, at any rate, involve less the granting of what cannot be granted than the organization of society in such a way as to maximize each individual's degree of autonomy.

All in all, in fact, whether the Convention actually proclaims a right to autonomy or not is probably a secondary point: the Convention makes the achievement of autonomy for persons with disabilities one of its primary goals. It holds up autonomy, therefore, as something akin to an entitlement. Now, this mention of "autonomy" is clearly a specificity of the Convention. Autonomy, however familiar it may be to the conceptual apparatus of human rights,¹⁰¹ is not included as a right in any of the existing international

98. *Id.* art. 13.1.

99. *Ad Hoc Committee Reaches Agreement on Treaty Protecting, Promoting Rights, Dignity of Persons with Disabilities*, *Ad Hoc Committee on Convention on Persons with Disabilities*, Department of Public Information, 21st mtg., U.N. GA/SOC/4720, 5 Dec. 2006 (emphasis added).

100. See Anthony P. Butcher, *The Relative Irrelevance of Human Rights for the Care and Protection of the Mentally Ill*, 35(1) *AUS. J. POL. SCI.* 85–97 (2000); Nathaniel Laor, *The Paradox of Autonomy: The Case of the Mentally Ill*, 18 *J. VALUE INQUIRY* 159 (1984).

101. Quinn, *supra* note 90; Luis Kutner, *Commentary: Aristotle, Aquinas and Kant on Human Rights*, 55 *MARQ. L. REV.* 264 (1972).

human rights instruments. No mention is made of it in either the Universal Declaration, the ICCPR, or any of the leading international human rights instruments.

The reason for this omission is not hard to fathom: in accordance with an old liberal, particularly Kantian idea of rights, autonomy is presumed in these instruments as what gives rise to rights, so that it need not be specified. Autonomy is, in a sense, antecedent to the logic of rights. Indeed, autonomy is probably one of the things that renders the individual *capable* of enjoying these rights (as opposed to merely being their more—or less—passive recipient) and, therefore, of fully participating in the realm of rights. The point is that it would not make sense to proclaim a right to autonomy in the case of persons without disabilities because such individuals have historically captured the human rights middle-ground by imposing the norm of the autonomous, self-determining agent. Autonomy is therefore not something granted or encouraged in any particular way. Rather, it is effectively what human rights seek to protect.

Conversely, it is because autonomy is often precisely what persons with disabilities lack, at least in part, that the Convention must bring to light that which is otherwise implicit, as it attempts to ground the “human rights” of persons with disabilities into, if not a right to be autonomous, at least an attempt to augment their effective autonomy to a point where their rights can be made effective. The Convention’s efforts, in that respect, might be seen as helping to “constitute” people with disabilities more fundamentally as full rights-holders. The Disabilities Convention, therefore, almost has a pre-rights logic in that it strives to equalize the ability of disabled persons to make the most of their rights with that of the rest of the population. In that, arguably, the Convention creates a new layer of deeper rights or brings to the fore a layer of rights that is normally sedimented in rights discourse.

The status of such a “new” entitlement as autonomy is unclear normatively, and I do not believe such a perplexing issue can be settled once and for all. The type of debate involved here is not so different from similar questions that have arisen in the past regarding women’s rights “as human rights,” particularly reproductive rights,¹⁰² and raises profound questions about whether some of the rights of members of certain groups are human rights properly so-called, a variation on the theme of human rights, or something altogether different.

There is a case, on the one hand, that what we are dealing with here is a sort of right that is specific to persons with disabilities, in that it is grounded in the irreducibility of their experience (that of being at a substantial disad-

102. MAJA ERIKSSON KIRILOVA, *REPRODUCTIVE FREEDOM: IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* (2000); CORRINNE A. PACKER, *THE RIGHT TO REPRODUCTIVE CHOICE: A STUDY IN INTERNATIONAL LAW* (1996).

vantage in terms of autonomy). The right to autonomy in that context would be the analytical equivalent of those few women's rights that are not simply universal human rights, such as the right to pregnancy-related health care or to maternity leave. Within the Convention's architecture, it addresses the irreducible core of the life-experience of persons with disabilities.

To characterize such a right as a "disability right," somehow isolated from "human rights" conceptually, on the other hand, would not convey fully the extent to which it is intertwined with the normative structure of human rights. Autonomy is not a "disability right" in a sense wholly detached from human rights. As I have shown, the goal of reinforcing autonomy is precisely to reinforce the sense of entitlement to and capacity to benefit from rights. Autonomy is hardly alien to the lexicon of human rights, and it is not as if human beings in general lack entitlement to respect for their autonomy. Indeed, almost all existing rights can be seen, in some way or other, concurring to protect that autonomy.

However, it is not simply that the history and conceptual genesis of rights have made the proclamation and reinforcement of autonomy as less than urgent a matter as it is in the case of persons with disabilities. There is a sense in which autonomy means something very different for persons with disabilities, a sense in which it has a very different consonance in terms of rights. Autonomy is effectively a form of human rights that takes its meaning in relation to the specific vulnerabilities of a particular group.

VI. CONCLUSION

In this article, I have identified the "pluralization of human rights" as one of the most interesting and least studied puzzles of the contemporary development of international human rights. I have suggested that the extent, degree, and rationale for this pluralization is not always obvious and offered the Disabilities Convention as a particularly enlightening instance of that process. The Convention appears as one further step in the direction of recognizing that there are, within humanity, a number of groups of human beings whose distinct claims to human rights are based on irreducible experiences that require a tailoring of the general rights regime. The Convention also goes a long way, properly studied, to reveal why it is that such specific instruments are needed.

I have sought to assess the extent to which the Convention is merely restating existing human rights in the context of persons with disabilities or, more interestingly, actually participating in the creation of rights that are, in some way, specific to persons with disabilities. I have found that the Convention does many things at once. In addition to a dimension that merely restates the obvious, the Convention, for example, is part and parcel

of a profound process of reformulating rights. In some cases, it goes further and the reformulation is such, its effect on existing and accepted categories so profound, that one could argue the Convention is effectively extending rights by adding an extra layer to them that takes into account the specific experience of persons with disabilities. Finally, I have argued that when it comes to the Convention's insistence on the need to reinforce persons with disabilities' autonomy, one enters a realm fraught with difficulties but within which one may discern the emergence of a new brand of almost "hybrid" rights: rights that clearly partake in the grammar of human rights, yet whose proclamation only really makes sense to crystallize the experience of a particular group or condition.

On the whole, therefore, I conclude that the superficial assessment that the Convention "does not create new rights" is at least unhelpful and probably misleading. The Convention is testimony to the significant need for specific human rights instruments when it comes to certain categories of humanity whose condition has made them uniquely vulnerable to human rights violations and who are insufficiently protected by the existing, mainstream vocabulary of rights.

In this light, the phenomenon of human rights "pluralization" can be assessed more generally. If specific treaties are needed for particular groups of human beings, or types of individuals within humanity, it is not simply because they have more or less accidentally been left on the wayside of human rights. It seems, on the contrary, that there has been something insufficiently sensitive to humanity's pluralism about the principal human rights instruments. The Disabilities Convention is one of the most significant attempts to correct that excessive "unitary-ness" of human rights, in one particular context.

What these international human rights treaties have "missed" when it comes to persons with disabilities is a variety of things. First, they have been insufficiently alert to the fact that persons with disabilities might be flatly denied their rights, and missed the obvious fact that it would help, for example, to specify that disability can be a ground for discrimination. Second, they have been inattentive to the extent to which different rights may mean different things for different persons, so that certain rights can only be fully realized if their content and the road to their implementation are quite narrowly defined in the treaties themselves, bearing in mind the particular circumstances of those they seek to protect. Third, the existing international human rights regime has poorly understood the fact that the state is not always the main threat to the realization of human rights of some, and the risk that social structures, prejudices, the community, or the family pose in processes of exclusion, oppression, discrimination, or violence. Fourth, and at a deeper level, a concept of human rights that presupposes that all individuals are equal because they are all fundamentally alike can

become oblivious to the fact that persons with disabilities, for example, are not autonomous in the same way as persons without disabilities.

On the whole, I would argue that the Convention is more of a rights Convention than a disability treaty, except that it tinkers very substantially with the scope of existing rights and is constantly testing their limitations. It is true, to state the obvious, that the Convention only applies to persons with disabilities. In that respect, it is a normative instrument firmly anchored in the need to protect the experience of a particular category of population. One would not—indeed one has not—ever formulated rights in quite the same way for any other category or group, let alone for the whole of humanity.

By the same token, the Convention does not create a “ghetto” of “disability rights.” It constantly draws on, reformulates, expands, and innovates on the basis of canonical human rights concepts. “Human rights as they apply to persons with disabilities” (rather than “disability rights”) borrow the basic grammar of human rights in almost every respect apart from their *ratione personae* scope: they accrue in their holders because of their very nature and inherent dignity, they are not dependent on discharging any particular duty, their violation engages the state’s responsibility internationally, they have an *erga omnes* character, etc.

They are rights of persons with a disability *by virtue of being human* and, therefore, being entitled to whatever it takes for these human rights to be realized. I would describe them as “disability human rights:” rights that are specific to persons with disabilities, yet rooted in the universality of rights.

The Disabilities Convention confirms an idea for the international human rights movement that is capital and increasingly accepted, yet complex and rich with implications: that there are rights that can and should be guaranteed universally, yet whose formulation and scope needs to be tailored to the specific experience of a particular category of humanity.