

Disability and Equality Law in Britain

The Role of Reasonable
Adjustment

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Duties to Make Adjustments and Human Rights

1. Introduction

THE EMERGENCE AND development of British non-discrimination law has not taken place within a broad framework of human rights. Indeed, non-discrimination statutes were enacted more than two decades before the Human Rights Act 1998 placed human rights clearly on the domestic agenda. Although these Acts were not confined to employment, it undoubtedly provided their prime focus at least in the early years.¹ The prime focus of human rights law, on the other hand, is the activity of public authorities. The original gap between non-discrimination and human rights in Britain is also demonstrated by the fact that the Commissions set up to support the non-discrimination legislation relating to race, gender and disability were given no clear human rights mandate.

In recent years, however, the originally sharp divide between non-discrimination and human rights has begun to blur. The discharge of public functions has been brought within the ambit of non-discrimination legislation and public authorities have been placed under statutory duties to promote race, gender and disability equality. Part 1 of the Equality Act 2006 provided for the establishment of a single Equality and Human Rights Commission to replace the three pre-existing Commissions. This represents an explicit recognition of the obvious overlap between the concerns of non-discrimination and human rights law.²

In the disability context, British reasonable adjustment duties tend to be associated with non-discrimination law rather than human rights law. This is unsurprising given that such duties were given statutory effect by the Disability

¹ See generally N Bamforth, 'Conceptions of Anti-Discrimination Law' (2004) 24 *Oxford Journal of Legal Studies* 693 at 693–4.

² S Spencer, 'Partner Rediscovered: Human Rights and Equality in the UK' in C Harvey (ed), *Human Rights in the Community* (Oxford, Hart Publishing, 2005); and C Gearty, 'Can Human Rights Provide Real Equality?', Legal Action Group annual lecture, 19 November 2007, available at http://www.conorgearty.co.uk/pdfs/Legal_Action_group_GEARTY2007.pdf (last accessed 29 April 2008).

Discrimination Act 1995 (DDA). Their exact nature and shape will be examined in the next chapter. Their statutory skeleton, as will be seen, is laid out in precise and technical detail and flesh has now been added to it by case law.

Reasonable adjustment obligations have, however, also emerged in the context of human rights law. Although their existence has now been acknowledged (both implicitly and explicitly) in various international and European instruments and case law, they are defined with much less precision and technicality in this context than they are in the DDA. It is the purpose of this chapter to identify and explore the nature and scope of these human rights based reasonable adjustment duties.

In Section 2 of this chapter, the argument that disabled people will only truly be able to enjoy the universal human rights conferred on them if some sort of reasonable adjustment duty is recognised will be outlined. In Section 3, attention will be turned to what is now the foremost international instrument on the human rights of disabled people—the United Nations Convention on the Rights of Persons With Disabilities (CRPD). Section 4 will examine relevant developments under the European Convention on Human Rights (ECHR) and the European Social Charter (ESC). Although the United Kingdom is a signatory to both instruments, the impact of the former on domestic law has been more significant than the latter, largely due to its more powerful enforcement machinery (in the form of the European Court of Human Rights) and to its incorporation into domestic law by the Human Rights Act 1998. This distinction will be reflected in the text which follows—the ECHR being given more emphasis than the ESC. In Section 5 some consideration will also be given to the European Union and the role of relevant human or fundamental rights within it. Relevant provisions of the Employment Equality Directive³ will be outlined at this point because, although that instrument emerged from non-discrimination principles that were not exclusively driven by a human rights agenda, its requirements are inextricably bound up with the European Union's growing concern with human or fundamental rights.

³ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

2. The Role of Reasonable Adjustment in Ensuring the Genuine Universality of Human Rights

2.1 The Traditional Invisibility of Disabled People

Modern human rights regimes date back to the years following the Second World War.⁴ At the international level, the Universal Declaration of Human Rights was issued in 1948 and, at the European level, the European Convention on Human Rights was elaborated in 1950. At both the international and the European levels, a distinction has traditionally been made between civil and political rights on the one hand and social, cultural and economic rights on the other. The former are protected, within the United Nations framework, by the International Covenant on Civil and Political Rights 1966 (ICCPR) and, at the European level, by the ECHR. The latter are protected, within the UN framework, by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and, at the European level, by the European Social Charter. These instruments require States to confer and protect the relevant rights on a universal basis. They are thus obliged to confer them on all citizens, including those who happen to be disabled.

Civil and political rights include the right to life,⁵ to be free from torture and inhuman or degrading treatment,⁶ to liberty and security of person,⁷ to associate freely with others,⁸ and to vote and take part in the political life of one's country.⁹ They also include the right to be free from discrimination.¹⁰ Economic, social and cultural rights include the right to education,¹¹ to work,¹² to health¹³ and to an adequate standard of living.¹⁴

⁴ See generally MA Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, Random House, 2001); and AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (New York, Oxford University Press, 2001).

⁵ ICCPR Art 6.

⁶ ICCPR Art 7.

⁷ ICCPR Art 9. See also Art 8, concerning freedom from slavery, and Art 12, concerning liberty of movement.

⁸ ICCPR Art 22. See also Art 23, concerning family rights; Art 24, concerning the protection of children; and Art 17, concerning privacy.

⁹ ICCPR Art 25.

¹⁰ ICCPR Art 26.

¹¹ ICESCR Art 13.

¹² ICESCR Art 6.

¹³ ICESCR Art 12. See generally K Tomasevski, 'The Right to Health for Persons with Disabilities' in T Degener and Y Koster-Dreese (eds), *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments* (Dordrecht Netherlands, Martinus Nijhoff Publishers, 1995).

¹⁴ ICESCR Art 11.

These rights, if appropriately granted and protected, would undoubtedly go a considerable way towards solving the problems of exclusion, neglect and humiliation which disabled people all over the world continue to experience.¹⁵ Traditionally, however, the potential of these universally conferred human rights to effect improvements in the lives of disabled people has been disturbingly underdeveloped. The invisibility of disabled people as subjects of human rights law has often been identified as the principal explanation.¹⁶

This invisibility has arisen from the separation of disabled people from society's mainstream—a separation caused by their inability to access mainstream facilities due to physical and social barriers. Even if their exclusion and humiliation are noticed, lawyers, policy-makers and others have frequently failed to recognise such marginalisation as involving any form of violation of human rights. Too often, it has been attributed to the disabled person's impairment rather than to an inadequate social response to that impairment.

For at least the past four decades, the Disability Movement has striven to challenge the assumption that unless a person with an impairment can be cured or corrected (eg through a hearing aid or drugs) they must remain outside the mainstream of their society and, unable to participate in education or employment, become dependent on welfare or charity for their survival. It has argued that disabled people should be valued as equals. They should be viewed, not merely as somewhat burdensome objects of pity or charity, but as human beings who, like their non-disabled counterparts, are entitled to enjoy the fundamental human rights granted to all. In the words of Gerard Quinn and Theresia Degener, in a highly influential report on the treatment of disability in the UN human rights system, 'the answer to invisibility is an insistence on the equal application of all human rights to persons with disabilities'.¹⁷ The 'equal application' of human rights to disabled people, however, is not an entirely straightforward matter.

¹⁵ See generally L Despouy, *Human Rights and Disabled Persons*, Human Rights Studies Series No 6, sales no E.92.XIV.4 (Geneva, UN Publications, 1992).

¹⁶ See eg, in the context of the ECHR, L Clements and J Read, *Disabled People and European Human Rights: A Review of the Implications of the 1998 Human Rights Act for Disabled Children and Adults in the UK* (Bristol, Policy Press, 2003); and L Clements and J Read, 'The Dog that Didn't Bark: The Issue of Access to Rights under the ECHR by Disabled People' in A Lawson and C Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Oxford, Hart Publishing, 2005); and, in the context of the UN, G Quinn and T Degener, 'Expanding the System: The Debate about a Disability-Specific Convention' in G Quinn and T Degener (eds), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (Geneva, UN, 2002).

¹⁷ G Quinn and T Degener, 'The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform' in Quinn and Degener (eds), *Human Rights and Disability* (n 16 above) para 1.4(c).

2.2 Equal Application of Human Rights

The concept of equality has attracted debate and analysis for many centuries.¹⁸ A detailed account of that debate is beyond the scope of this work. Nevertheless, for present purposes, an understanding of the distinction that is frequently drawn between notions of formal and substantive equality is important.¹⁹

Formal equality is based on the Aristotelian notion that likes should be treated alike—that similarly situated people should be treated in the same way despite irrelevant differences in their circumstances. Its focus is therefore on requiring identical treatment. It would insist, for instance, that a university treat identically qualified applicants in the same way regardless of the fact that they might have different genders, racial backgrounds or physical impairments. It would insist that employers offer promotion to identically situated people on the same basis regardless of such differences; that hospitals offer them beds on the same basis; that electoral authorities allow them to vote on the same basis; and that public housing services offer them accommodation on the same basis. Clearly, the application of a system of formal equality begs the question of what should be regarded as a relevant difference and who should be treated as similarly situated.²⁰

Substantive equality, however, looks beyond the limits of identical treatment to the measures which may be required in order to counter disadvantage and to facilitate equality of opportunity or even equality of outcome. It therefore requires difference, resulting from factors such as disability, to be acknowledged and to elicit different treatment where identical treatment would cause disadvantage. It would thus require education providers not simply to issue all students with identical printed examination questions but to ensure that those questions were issued to a blind student in an appropriate alternative format. It would require electoral authorities not simply to declare that all citizens were entitled to vote but to ensure that the places in which voting took place were accessible to wheelchair-users.

A distinction which reflects the division between notions of formal and of substantive equality has been developed by Ronald Dworkin.²¹ He distinguishes

¹⁸ See generally I Hampsher-Monk, *A History of Modern Political Thought: Major Political Thinkers from Hobbes to Marx* (Oxford, Blackwell, 1992); S Darwall (ed), *Equal Freedom* (Ann Arbor, Michigan University Press, 1995); L Pojman and R Westmoreland (eds), *Equality: Selected Readings* (Oxford, Oxford University Press, 1997); and M Clayton and A Williams (eds), *The Ideal of Equality* (Basingstoke, Palgrave Macmillan, 2002).

¹⁹ See generally S Fredman, *Discrimination Law* (Oxford, Oxford University Press, 2002) ch 1; S Fredman, 'Equality: A New Generation?' (2001) 30 *Industrial Law Journal* 145; C Barnard and B Hepple, 'Substantive Equality' (2000) 59 *Cambridge Law Journal* 562; and A Hendriks, 'The significance of equality and non-discrimination for the protection of Disabled Persons' in Degener and Koster-Dreese (eds), *Human Rights and Disabled Persons* (n 13 above).

²⁰ R Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537. See also E Holmes, 'Anti-Discrimination Rights Without Equality' (2005) 68 *Modern Law Review* 175.

²¹ R Dworkin, *A Matter of Principle* (Oxford, Oxford University Press, 1986) 190–98 and 205–13.

the equal treatment of people, in terms of the division of resources, from the treatment of people as equals. The latter type of treatment is a manifestation of commitment to the view that people are entitled to equal concern and respect from the State. Such a commitment will require treatment which is not identical in situations where treating everybody in the same way would demonstrate a lesser degree of concern and respect for certain individuals because of their particular circumstances. This distinction is succinctly expressed by Nicholas Bamforth in the following words:

A crucial difference between equal treatment and treatment as equals lies in the comparison which each involves. Equal treatment requires only a crude evaluation of whether two people or actions are sufficiently 'the same' that they merit similar treatment. Treatment as equals, by contrast, involves a fuller and more flexible conception of equality. The question is not 'whether any deviation' from equal treatment is permitted, but instead 'what reasons for deviation are consistent with equal concern and respect'.²²

The use of the term 'equality' to cover notions of treatment as equals has not been free from controversy. It has been argued that it constitutes little more than a rhetorical device by which to express the principle that the well-being of every human being matters.²³ Attention should consequently be directed to the values or the 'moral goods' on which legal regimes which purport to be justified by reference to such principles are in fact based.²⁴

The facilitation of social inclusion and of participation in society may be regarded as important values, which underlie and shape non-discrimination and much of human rights law.²⁵ Concepts of autonomy and freedom also play an important role.²⁶ The value which is perhaps most frequently mentioned in connection with human rights, however, is that of human dignity.²⁷

²² Bamforth, 'Conceptions of Anti-Discrimination Law' (n 1 above) 712—drawing upon Dworin, *ibid.*, 209.

²³ See eg J Raz, *The Morality of Freedom* (Oxford, Oxford University Press, 1986) 217–28.

²⁴ *Ibid.*

²⁵ See generally H Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 *Modern Law Review* 16; C Barnard, 'The Future of Equality Law: Equality and Beyond' in C Barnard, S Deakin and GS Morris (eds), *The Future of Labour Law* (Oxford, Hart Publishing, 2004); and F Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30 *Human Rights Quarterly* 494.

²⁶ See eg Raz, *The Morality of Freedom* (n 23 above). See also the Opinion of the Advocate General in Case C-303/06 *Coleman v Attridge Law* OJ C 237, 30 September 2006, p 6, (31 January 2008) [7]–[14] where 'human dignity' and 'personal autonomy' are identified as the values underlying equality.

²⁷ See generally G Moon and R Allen, 'Dignity Discourse in Discrimination Law: A Better Route to Equality?' [2006] *European Human Rights Law Review* 610; C McCrudden, 'Human Dignity' Working Paper No 10/2006 (April 2006), University of Oxford Faculty of Law, Legal Studies Research Paper Series, available at <http://papers.ssrn.com/Abstract=899687> (last accessed 2 March 2008); DG Reaume, 'Discrimination and Dignity' (2003) *Louisiana Law Review* 645; D Feldman, 'Human Dignity as a Legal Value Part I' [1999] *Public Law* 682 and 'Part II' [2000] *Public Law* 61; and DC Galloway, 'Three models of (in)equality' (1993) 68 *McGill Law Review* 64.

Dignity has particular resonance for disabled people. In the words of Gerard Quinn and Theresia Degener,

[r]ecognition of the value of human dignity serves as a powerful reminder that people with disabilities have a stake in and a claim on society that must be honoured quite apart from any considerations of social or economic utility. They are ends in themselves and not means to the ends of others. This view militates strongly against the contrary social impulse to rank people in terms of their usefulness and to screen out those with significant differences.²⁸

A commitment to respect for human dignity requires a focus not on sameness or identical treatment but on individual flourishing. Connor Gearty adopts this view, arguing that the language of human rights

asserts that we are all equal in view of our humanity and ... our dignity ... demands that we each of us be given the chance to do the best we can, to thrive, to flourish, to do something with ourselves.²⁹

For this reason respect for dignity will sometimes require treatment which is different rather than treatment which is identical.³⁰

Notions of substantive equality or the treatment of people as equals are of fundamental importance in human rights law. They underlie the references which are frequently made to the idea that democratic society is 'founded on the principle that each individual has equal value' and that their rights should be protected accordingly.³¹ The right to equality in this sense has been described as 'one of the oldest and most well-recognised of fundamental human rights'.³² Indeed, it played an important part in shaping such venerable documents as the French Declaration of the Rights of Man and the Constitution of the United States of America.³³

The principle that all human beings must be valued and protected as equals also shapes the rhetoric of the current international human rights framework.

²⁸ Quinn and Degener, 'The Moral Authority for Change' (n 17 above) para 1.1.

²⁹ *Can Human Rights Survive?* (Cambridge, Cambridge University Press, 2006) 50.

³⁰ See generally Moon and Allen, 'Dignity Discourse in Discrimination Law' (n 27 above) 635–9. For arguments that the notion of dignity is highly context and time dependent and that its substantive content is therefore not fixed or unvarying, see E Grabham, 'Law v Canada: New Directions for Equality Under the Canadian Charter' (2002) 22 *Oxford Journal of Legal Studies* 654; and McCrudden, 'Human Dignity' (n 27 above). For similar arguments in relation to human rights generally, see S Sedley, 'Human Rights: A Twenty-First Century Agenda' [1995] *Public Law* 386.

³¹ *Ghaidan v Godin-Mendoza* [2004] UKHL 22 [132] (Baroness Hale). See further B Hale, 'The Quest for Equal Treatment' [2005] *Public Law* 571 and, for critical analysis of the concept of equal human worth and its constitutional role, L Pojman, 'On Equal Human Worth: A Critique of Contemporary Egalitarianism' in Pojman and Westmoreland (eds), *Equality: Selected Readings* (n 18 above); and J Jowell, 'Is Equality a Constitutional Principle?' (1994) 47 *Current Legal Problems* 1.

³² C Barnard, 'The Principle of Equality in the Community Context: P. Grant, Kalanke and Marschall—Four Uneasy Bedfellows?' (1998) 57 *Cambridge Law Journal* 352 at 362.

³³ See generally T Paine, *Rights of Man* (Indianapolis, Hackett Publishing, 1992) and AH Kelly, W Harbison and H Belz, *The American Constitution: Its Origin and Development* (New York, W Norton and Company, 1991).

The Universal Declaration of Human Rights 1948, for instance, asserts that 'all human beings are born free and equal in dignity and rights'³⁴ and describes the recognition of the 'inherent dignity' and the 'equal and inalienable rights of all members of the human family' as the 'foundation of freedom, justice and peace in the world'.³⁵ These 'equal and inalienable' rights are thus inextricably linked to and 'derived from the inherent dignity of the human person'.³⁶

The idea that different treatment may sometimes be required in order to ensure that the human rights of certain individuals enjoy the same degree of respect, concern and protection as that accorded to the rights of others is by no means a new one in the international arena. As early as 1935, the Permanent Court of International Justice observed that

equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.³⁷

It is an idea which has been expressly articulated by both the UN's Human Rights Committee and its Committee on Economic Social and Cultural Rights. In its General Comment No 18 the Human Rights Committee stressed that Article 26 of the ICCPR—which requires civil and political rights to be enjoyed on a non-discriminatory basis—may sometimes go beyond requiring mere formal equality and demand different treatment.³⁸ These views are reflected in the Committee on Economic Social and Cultural Rights' General Comment No 5.³⁹ It is therefore no surprise that the Conventions on race and gender expressly authorise affirmative action measures which aim to counter the particular forms of disadvantage and discrimination experienced by relevant groups.⁴⁰ Article 5(4) of the recently adopted CRPD makes similar provision, although, unlike the equivalent provisions relating to race and gender, it is not subject to the limitation that 'these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved'.

In the context of human rights, then, recognition of the need to accord equal respect and concern to all human beings carries with it an obligation on States to ensure that, where appropriate, certain individuals are treated differently from others. Treating them in the same way as others would be to fail to recognise

³⁴ Universal Declaration of Human Rights 1948 Art 1.

³⁵ *Ibid*, Preamble.

³⁶ Preamble to both the ICCPR and the ICESCR.

³⁷ PCIJ, Advisory Opinion of 6 April 1935 on the *Minority Schools in Albania* case (Series A/B no 64) 19.

³⁸ UN Official Records, Supp No 40, 1989 (A/45/40) pp 173–5, para 8.

³⁹ General Comment No 5 'Persons with Disabilities' adopted by the Committee on Economic, Social and Cultural Rights at its 11th session in 1994 (UN Doc E/1995/22). For discussion of the background to this General Comment, see P Alston, 'Disability and the International Covenant on Economic, Social and Cultural Rights' in Degener and Koster-Dreese (eds), *Human Rights and Disabled Persons* (n 13 above).

⁴⁰ International Convention on the Elimination of Discrimination Against Women 1979, Art 4(1); and International Convention on the Elimination of Racial Discrimination 1965, Art 1(4).

significant differences in their circumstances and would result in a lesser degree of respect for, or protection of, their basic human rights. Adherence to the concept of formal equality alone would thus represent an inadequate response. Some notion of substantive equality is therefore inherent in the effective recognition of universal human rights. The nature of the different treatment required in any particular case will depend on the needs and circumstances of the individuals concerned.

2.3 Reasonable Adjustment and the Human Rights of Disabled People

In the context of disability, the importance of responding to the differing needs and circumstances of each individual, as a pre-condition of effective human rights protection, was recognised in the World Programme of Action concerning Disabled Persons. This was adopted by the UN General Assembly in 1982. According to it,

[t]he principle of equal rights for the disabled and non-disabled implies that the needs of each and every individual are of equal importance, that these needs must be made the basis for the planning of societies, and that resources must be employed in such a way as to ensure, for every individual, equal opportunity for participation.⁴¹

These words were echoed a decade later in both the non-binding Standard Rules on the Equalization of Opportunities for Persons with Disabilities,⁴² and the Committee on Economic Social and Cultural Rights' General Comment No 5.⁴³ Given the stress they placed on responding appropriately to the needs and circumstances of a particular disabled individual, the emergence of some form of reasonable adjustment or accommodation duty was perhaps inevitable.

The concept of reasonable adjustment, or reasonable accommodation, was explicitly acknowledged to be an integral element of equality in General Comment No 5. The Committee on Economic, Social and Cultural Rights there stressed that Article 2(2) of the ICESCR required States to ensure that the rights conferred by that Convention should be enjoyed by all citizens without any discrimination on the ground of disability.⁴⁴ For this purpose, it specified that disability-based discrimination included

⁴¹ General Assembly Resolution 37/52 (3 December 1982) para 25.

⁴² Standard Rules on the Equalization of Opportunities for Persons with Disabilities adopted by General Assembly Resolution 48/96 of 20 December 1993, paras 25 and 26.

⁴³ General Comment No 5 'Persons with Disabilities' (n 39 above) para 17.

⁴⁴ According to the Committee, disability is included in Art 2(2)'s reference to 'other status': General Comment No 5 'Persons with Disabilities' (n 39 above) para 5.

any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.⁴⁵

It is not difficult to imagine scenarios in which the denial of a reasonable adjustment would nullify the recognition or enjoyment of such rights. The right to education, for instance, would be meaningless for children with sensory impairments, such as blindness or deafness, without some provision for information and communication to be made accessible to them. The right to health would be illusory for people with mobility impairments if medical advice and treatment were made available only in physically inaccessible buildings. The right to work would be effectively nullified for many disabled people if employers were entitled to treat them in exactly the same way as their non-disabled colleagues without any obligation to consider adapting timetables, physical features or equipment to accommodate their needs.

Some notion of reasonable accommodation or adjustment also seems to have been recognised in the context of civil and political rights prior to the CRPD. This is well illustrated by the decision of the Human Rights Committee in *Hamilton v Jamaica*.⁴⁶ *Hamilton* concerned a prisoner whose legs were paralysed and who was detained in the standard accommodation of death row. Because of his physical impairment, he was unable to slop out his cell and to climb onto the bed. The failure of the State to ensure that he was held in conditions that were adapted to meet his needs was found to constitute a failure to treat a detained person with humanity and respect, contrary to Article 10 of the ICCPR.

In summary, even before the CRPD, there was an understanding that the human rights of disabled people would be effectively enjoyed and protected only if their different circumstances and needs were recognised and, where reasonable, accommodated. The CRPD, as will be seen in the next Section, builds on this understanding. Indeed, one of its central aims is to clarify this understanding and to give it context. It is also neatly encapsulated in the following words of the British Disability Rights Commission:

Starting from a human rights perspective means recognising that human beings do not all start from the same place. The approach recognises that as we tackle the differing dimensions to exclusion, address multiple exclusion and the cumulative effect of different forces on the individual ... we do not lose sight of that individual. This focus on the individual means that barriers need to be actively dismantled and reasonable adjustments made to ensure equitable outcomes for all people ... The DRC hopes that

⁴⁵ General Comment No 5 'Persons with Disabilities' (n 39 above) para 15.

⁴⁶ Communication No 616/1995, Views adopted by the Committee on 28 July 1999 (CCPR/C/66/D/616/1995). For a similar case decided by the European Court of Human Rights, see *Price v UK* App No 33394/96 (2001) 34 EHRR 1285; and, for a similar decision of the Inter-American Commission on Human Rights, see *The Case of Victor Rosario Congo*, Annual Report of the Inter-American Commission on Human Rights, Report 63/99, Case 11.427, Ecuador, OEA/Ser.L/V/II.102, Doc 6 Rev (1999) (discussed in A Kanter, 'The Globalization of Disability Rights Law' in P Blanck (ed), *Disability Rights* (Hants, Ashgate Publishing, 2005) 508–11).

one day we will get to the situation where human rights and disability rights are regarded as one in the same and where there is a thriving human rights culture in this country.⁴⁷

3. Reasonable Adjustments Under the United Nations Convention on the Rights of Persons with Disabilities

3.1 Purposes and Obligations

3.1.1 The Clarification of Existing Rights

The CRPD, together with its accompanying optional protocol, was adopted by the General Assembly on 13 December 2006 and opened for signature on 30 March 2007.⁴⁸ It received more signatures from States Parties on its opening day than have been received by any other UN human rights Convention. The CRPD entered into force on 3 May 2008 and its Optional Protocol entered into force thirty days after that. It is the first binding UN disability-specific instrument and its implementation is to be monitored and supported by a new Committee on the Rights of Persons with Disabilities.⁴⁹

The CRPD was described by Kofi Annan, the outgoing Secretary-General, as a 'remarkable and forward-looking document' which marks

the dawn of a new era—an era in which disabled people will no longer have to endure the discriminatory practices and attitudes that have been permitted to prevail for all too long.⁵⁰

Similar enthusiasm was displayed by leading figures in the disability movement. According to Venus Ilagan, the chair of Disabled Peoples International, speaking on the day the substantive terms of the Convention were finalised,

[t]oday, August 25, 2006, is a day to celebrate! We have achieved something that has long been the dream of our membership: A UN Convention on our human rights....

⁴⁷ Parliamentary Briefing released prior to a House of Lords balloted debate on human rights on 22 March 2007.

⁴⁸ See generally A Kanter (ed), *Special Issue of Syracuse Journal of International Law and Commerce*, vol 34, Spring 2007; O Arnardottir and G Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden, Martinus Nijhoff, 2008); R Kayess and P French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1; Mégret, 'The Disabilities Convention' (n 25 above); and C Parker and L Clements, 'The UN Convention on the Rights of Persons with Disabilities: A New Right to Independent Living?' [2008] *European Human Rights Law Review* 508.

⁴⁹ CRPD Art 34.

⁵⁰ Secretary-General's Message on the Adoption of the CRPD, available at <http://www.un.org/apps/sgstats.asp?nid=2362> (last accessed 29 April 2008).

The draft instrument accepted here today recognizes and entrenches our rights in the UN Human Rights framework, and in this way is a huge victory for us all.⁵¹

These words allude to the important role played by disabled people and their organisations in the elaboration and adoption of the CRPD. Insisting on the motto 'nothing about us without us', they played an unprecedented role in the history of UN treaty-making. According to Ambassador Don MacKay, who chaired the meetings in which the terms of the CRPD were finalised,

[t]his is an extraordinarily far-reaching convention ... When I first became involved in the process I would not have seen States being able to reach out as far as they have on the issues in the Convention. The credit for that undoubtedly goes to colleagues from civil society who have been so actively engaged in the process in such large numbers. They have constantly cajoled, urged, entreated, pressured, argued and very very effectively persuaded governments to keep shifting the boundaries of the envelope in so far as the Convention is concerned. I am very pleased that that has happened.⁵²

In view of such enthusiasm, it may be tempting to believe that the CRPD confers new rights on disabled people.⁵³ This, however, was not its purpose. It was elaborated in order to ensure that the rights already conferred on all human beings in signatory states by instruments such as the ICESCR and the ICCPR might genuinely be enjoyed by disabled people on an equal basis with others. The realisation of this aim would nevertheless represent a giant leap forward towards a world in which disabled people were meaningfully included and valued. It is this possibility which has justifiably generated so much enthusiasm.

The task confronting the drafters of the CRPD was thus the challenging one of articulating pre-existing rights so as to give them particular relevance to the lives of disabled people. Disability activists insisted that, regardless of political pressure to reach agreement, no compromise could be made on the standard of the rights to be set out in the new instrument. A new disability-specific convention would be worth having only if its elaboration of the human rights to be enjoyed by disabled people was set at a standard no lower than that set for non-disabled people.⁵⁴ With this in mind, the International Disability Caucus (set up to co-ordinate the work of disabled people's organisations during the drafting process) issued a statement in which it set out a number of examples of issues and principles that it considered essential to include in the Convention and

⁵¹ Disabled Peoples International, 'Message from the Chairperson', available at <http://v1.dpi.org/lang-en/resources/details.php?page=685> (last accessed 29 April 2008).

⁵² Press conference on the adoption of the Convention on the Rights of Persons with Disabilities, UN Headquarters, New York, 6 December 2006.

⁵³ For thought-provoking discussion of the extent to which this Convention does in fact create new rights, see Mégret, 'The Disabilities Convention' (n 25 above).

⁵⁴ See eg E Rosenthal and CJ Sundram, 'Recognizing Existing Rights and Crafting New Ones: Tools for Drafting Human Rights Instruments for People with Mental Disabilities' in S Herr, L Gostin and H Koh (eds), *The Human Rights of Persons with Intellectual Disabilities* (Oxford, Oxford University Press, 2003) 470-71 and 474-7.

without which it would 'fall short'.⁵⁵ Among these were the prohibition of 'any deprivation of liberty on the basis of disability' and 'any medical and other intervention which is made against the informed consent of persons with disabilities'; equal access to health care and rehabilitation; the right to live in the community and to fully inclusive mainstream education; the provision of accessible information and infrastructure; and the establishment of a rigorous monitoring system operating with the involvement of disabled people's organisations.

The concern that the standard of rights articulated for disabled people must be equivalent to that applying to non-disabled people animated the debates over every substantive Article in the Convention. It is thus to be hoped that it will not be possible to interpret any of the provisions to emerge from such debates so as to legitimise a lower standard of protection for the rights of disabled people. Article 4(4) offers an additional safety net by providing that the Convention should not in any way derogate from stronger obligations imposed on a particular State either by national or by international laws. It would thus make it impossible for a State to argue that the CRPD sets a lower standard than that set by the ICCPR or the ICESCR and thereby exempts it from satisfying the higher standard.

3.1.2 General Principles and Obligations

The CRPD itself contains a number of Articles, in addition to the 26 paragraphs of its preamble, the function of which is to make clear its purpose and its underlying principles. According to Article 1, its purpose is

to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

The principle of equality is thus given a central place. The preamble refers to 'the profound social disadvantage' currently experienced by disabled people, to the fact that most of them live in conditions of poverty and to the fact that they continue to encounter 'barriers in their participation as equal members of society'.⁵⁶ It is acknowledged that, although the UN Charter recognises that 'all members of the human family' have 'equal and inalienable rights', there is a need for disabled people to be guaranteed the full enjoyment of these rights 'without discrimination'.⁵⁷ Further, paragraph (h) declares that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.

⁵⁵ 'IDC Final Statement to States Delegates at Ad Hoc Committee 6th Session'. See further P Wright, 'When to Hold 'Em and When to Fold 'Em: Lessons Learned from Enacting the Americans with Disabilities Act' in M Breslin and S Yee (eds), *Disability Rights Law and Policy: International and National Perspectives* (Ardsley NY, Transnational Publishers inc, 2002).

⁵⁶ CRPD preamble, paras (y), (t) and (k) respectively. See also para (e).

⁵⁷ *Ibid.*, paras (a) and (c).

Article 3 contains eight paragraphs, which set out the underlying principles of the CRPD and are intended to inform its interpretation. Paragraph (a) refers to respect for the 'inherent dignity', 'autonomy' and 'independence' of the individual, and paragraph (d) to respect for 'difference' and 'human diversity'. Other paragraphs refer to 'non-discrimination', 'equality of opportunity', 'accessibility' and 'full and effective participation and inclusion in society'.⁵⁸ Reference is also made to the principle of gender equality⁵⁹ and to that of respect for the identity and the evolving capacities of disabled children.⁶⁰ Given the explicit reference to gender and to childhood, it is perhaps surprising that there is no mention of race or of older people in Article 3.⁶¹

Article 4 sets out the 'general obligations' of States under the Convention. Article 4(1) lists a range of strategies which must be adopted in pursuance of the general obligation to ensure the full realisation of all human rights by disabled people. These include refraining from practices inconsistent with the Convention⁶²; mainstreaming disability perspectives into all policies and programmes⁶³; introducing legislative, administrative and other measures to secure relevant rights for disabled people⁶⁴; and taking positive steps to promote the development and availability of universal design, of assistive technology and of professionals appropriately trained in the provision of relevant skills, essential to the realisation of human rights (for example, the use of assistive technology or mobility aids such as long canes, assistance dogs and wheelchairs).⁶⁵ These obligations are supplemented by the duty, imposed on States by Article 8, both to raise awareness of the contribution and potential of disabled people and also to counter stereotypes and to promote positive images of disability. Article 4(3) requires States to 'closely consult with and actively involve' disabled people's organisations in their implementation of the CRPD and other policies affecting disabled people.

Finally, it should be noted that the CRPD covers both civil and political rights and economic, social and cultural rights. The traditional tendency to draw fairly sharp distinctions between these two types of right (as illustrated by the different regimes set up by the ICCPR and the ECHR on the one hand and the ICESCR and the ESC on the other) has long been challenged. It has frequently been argued that it will be possible to confer meaningful human rights on disabled

⁵⁸ CRPD Art 3(b), (e), (f) and (c) respectively.

⁵⁹ *Ibid*, Art 3(g). See further Art 6.

⁶⁰ *Ibid*, Art 3(h). See further Art 7.

⁶¹ Although some reference is made to such issues in para (p) of the preamble. See, on the issue of older people, H Meenan, 'Disability and Age: Achieving Freedom for All' (paper delivered at The Human Rights of People With Disabilities: Extending Freedom to All seminar, London School of Economics Centre for the Study of Human Rights, London, March 2006).

⁶² CRPD Art 4(1)(d).

⁶³ *Ibid*, Art 4(1)(c).

⁶⁴ *Ibid*, Art 4(1)(a) and (b).

⁶⁵ *Ibid*, Art 4(1)(f) and (g) respectively.

people, and indeed on everybody else, only if the interdependence and indivisibility of both types of right is acknowledged.⁶⁶ This point is undoubtedly recognised in the CRPD, the structure of which reflects issues of relevance to the lives of disabled people rather than technical distinctions between different categories of right.⁶⁷ There is nevertheless one respect in which the two types of right are treated differently.

In conformity with long-standing tradition, the CRPD makes provision for economic, social and cultural rights but not civil and political rights to be implemented on a progressive basis.⁶⁸ This reflects the conventional view that the effective implementation of the former type of right is likely to require the investment of resources to a much greater extent than is implementation of the latter. This view, however, is itself challenged by the interpretation given to various civil and political rights in the CRPD.⁶⁹ The right to liberty, for instance, is interpreted in such a way as to ground a right to reject institutional living arrangements and to choose to live in the community (with appropriate support from the State)⁷⁰; and also to maximise one's personal mobility (through, for example, training in mobility skills and the use of assistive aids).⁷¹ Similarly, the right to freedom of expression and opinion is interpreted in such a way as to impose an obligation on States to accept and facilitate, in connection with official communications, the use of 'sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication' by disabled people.⁷²

It is fitting to close this Section with the following words of Sheikha Hissa Al-Thani, the UN Special Rapporteur on Disability:

⁶⁶ See eg Alston, 'Disability and the International Covenant on Economic, Social and Cultural Rights' (n 39 above); G Quinn, 'The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework' in Degener and Koster-Dreese (eds), *Human Rights and Disabled Persons* (n 13 above); Quinn and Degener, 'The Moral Authority for Change' (n 17 above) para 1.2; T Degener, 'Disability as a Subject of International Human Rights Law and Comparative Discrimination Law' in Herr, Gostin and Koh (eds), *The Human Rights of Persons with Intellectual Disabilities* (n 54 above) 151 at 155; A Dander, 'The Right to Treatment of Persons with Psychosocial Disabilities and the Role of the Courts' (2005) 28 *International Journal of Law and Psychiatry* 155; R Gavison, 'On the Relationship Between Civil and Political Rights and Economic and Social Rights' in JM Coicaud, MW Doyle and AM Gardner (eds), *The Globalization of Human Rights* (Tokyo, UN University Press, 2003); H Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton, Princeton University Press, 1996); and S Fredman, *Human Rights Transformed* (Oxford, Oxford University Press, 2008).

⁶⁷ See generally Kayess and French, 'Out of Darkness into Light?' (n 48 above).

⁶⁸ CRPD Art 4(2). See also Art 2(1) of the ICESCR and General Comment No 3 'The nature of States parties' obligations', adopted by the Committee on Economic, Social and Cultural Rights at its fifth session in 1990 (UN Doc E/1991/23). See also Art 4 of the Convention on the Rights of the Child 1989.

⁶⁹ See generally Kayess and French, 'Out of Darkness into Light?' (n 48 above).

⁷⁰ CRPD Art 19.

⁷¹ *Ibid*, Art 20.

⁷² *Ibid*, Art 21.

This Convention has risen from the very core of the human rights principles of the United Nations. It is founded on the principles of dignity and justice; and rooted in the concepts of inalienability, universality and indivisibility of human rights. It highlights the right to full participation, and rests upon the notion of equality without distinctions; underlines the right to enjoyment without discrimination; stresses the belief in the dignity and worth of all human beings, and their right to equality and protection by the law.⁷³

3.2 Reasonable Adjustment Under the CRPD

The concept of reasonable adjustment, though referred to in terms of reasonable accommodation, is firmly embedded in the Convention. It is explicitly mentioned in the substantive Articles dealing with education,⁷⁴ employment,⁷⁵ liberty and security of person⁷⁶ and, though in slightly different terms, in the Article dealing with access to justice.⁷⁷ Further, largely as a result of Articles 2 and 5, it is an implicit element of almost every one of the substantive Articles. As Kayess and French observe,

[t]he incorporation of a State obligation to ensure that reasonable accommodations are made to facilitate the exercise by persons with disability of CRPD [*sic*] rights is perhaps the most fundamental instrumental element of the Convention.⁷⁸

Article 5(2) requires signatory States to 'prohibit all discrimination on the basis of disability'. Such discrimination is defined in Article 2 as follows:

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

As will be apparent, this is an extremely broad definition. It is broader and more far-reaching in its application than any of the definitions of discrimination to be found in current British law.

Reasonable accommodation is itself defined in Article 2 as:

⁷³ 'Convention on the Rights of Persons with Disabilities: A Progressive Human Rights Instrument' statement by the Special Rapporteur on Disability to the UN Human Rights Council, Geneva, September 2006, available at www.un.org/esa/socdev/enable/rapporteur.htm (last accessed 29 April 2008).

⁷⁴ CRPD Art 24(2)(c) and Art 24(5).

⁷⁵ CRPD Art 27(1)(i).

⁷⁶ CRPD Art 14(2).

⁷⁷ CRPD Art 13(1). This refers to the 'provision of procedural and age appropriate accommodations'.

⁷⁸ Kayess and French, 'Out of Darkness into Light?' (n 48 above) section 5D.

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

This makes it clear that a duty to provide reasonable accommodation requires States to impose positive obligations on employers, educators, public authorities and others to identify barriers in the way of a disabled person's enjoyment of their human rights and to take appropriate steps to remove them. The emphasis is on the barriers which operate in a particular case and thus on the need to respond to the specific circumstances of the individual disabled person in question. The solutions required must be appropriate to that person. They may simply require cost-free changes to be made to standard practices but they may also require cost-intensive measures, such as the purchase of additional equipment or support, or the installation of improved physical access.

Article 2, like section 21 of the DDA, refers to 'disabled persons' in the plural. It is therefore possible that an expansive interpretation of its definition of reasonable accommodation would give birth to anticipatory duties of the type which now flourish under the DDA.⁷⁹ Such a possibility, however, was clearly not contemplated in any of the pre-CRPD discussions. Further, the Convention imposes specific obligations relating to accessibility and to universal design.⁸⁰ These obligations would clearly cover much of the same ground as would anticipatory reasonable adjustment duties. Both would require steps to be taken, regardless of the appearance on the scene of a particular disabled person, to remove disabling barriers and to ensure that access to products, information and the built environment was maximised. Thus, although it will remain open to States to choose to adopt anticipatory duties in their own domestic systems, it is highly unlikely that this specific form of legal obligation will be required by the Disability Committee. What is beyond doubt is that States will be required to introduce individualised reasonable accommodation duties which are responsive to the circumstances of the particular case.

As Article 2 makes clear, the reasonable accommodation duty contemplated in the Convention is subject to a defence of 'disproportionate or undue burden'.⁸¹ The term 'disproportionate' here means that it is the impact of making the relevant modification on the particular business or entity that will matter—simple absolute figures are therefore not the central issue. Thus, a particular adjustment is much less likely to amount to a disproportionate hardship for a large, wealthy firm than it would be for a small business. A business in a wealthy

⁷⁹ See further ch 3, section 3 below.

⁸⁰ CRPD Arts 9 and 4(1)(f) respectively. 'Universal design' is defined in Art 2 as 'the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design'.

⁸¹ For criticism of this wording, see Kayess and French, 'Out of Darkness into Light?' (n 48 above) section 5D.

country, with access to State subsidies, is also less likely to be able to prove that a particular adjustment would be a disproportionate hardship than is an equivalent business in a poorer country with no State support. Thus, while the CRPD requires all signatory States to introduce reasonable accommodation duties, their practical manifestations are likely to differ markedly from country to country.

Article 5(3) provides:

In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

This would appear to require States not only to impose reasonable accommodation obligations on employers, service providers and others but also to take steps to raise awareness of their existence and nature and to facilitate their enforcement.⁸²

As already mentioned, a failure to make reasonable accommodation is included in the definition of discrimination in Article 2. States are therefore required to prohibit such failures by Article 5(2) and to do so immediately, as the right to be free from discrimination is a civil and political right to which the principle of progressive realisation does not apply.⁸³ Reasonable accommodation obligations, however, depart from the traditional conception of the obligations flowing from civil and political rights in that they are highly proactive in nature and likely to require the spending of money.

Because of the expenditure associated with reasonable accommodation, its positioning within the domain of civil and political rights was not free from controversy in the CRPD negotiations. It should be stressed, however, that the concepts of 'reasonableness' and 'undue burden' will themselves inject some degree of progressive realisation into the implementation of reasonable accommodation duties. These concepts are inherently sensitive to the particular circumstances not only of the disabled individual in need of an accommodation but also to the circumstances of those on whom the duties fall. These circumstances are likely to change over time with the result that an accommodation that may at one time be considered to impose an undue burden would, at a later point, not be so regarded.

Finally, it is worth noting the peculiar bridging role played by the concept of reasonable accommodation in the context of human rights law. As has been seen, it may legitimately be regarded as an integral element of non-discrimination. This situates it within the realms of civil and political rights. Its function, however, is to ensure that rights of all kinds—whether they are classified as economic, social and cultural rights or as civil and political ones—become available, in a meaningful sense, to disabled people. It thus directly challenges the traditional clear-cut division between civil and political rights, on the one hand, and economic, social and cultural ones, on the other.

⁸² See also the awareness-raising obligations imposed on States by CRPD Art 8.

⁸³ See n 68 above and accompanying text.

The concept of reasonable accommodation (together with other related concepts such as accessibility and universal design) operate to move the CRPD away from many of the dichotomies for which human rights law has often been criticised. It is not structured according to whether rights are civil or political on the one hand or economic, social or cultural on the other. Neither does it allow some rights to be regarded as imposing negative cost-free obligations and others as imposing positive resource-demanding obligations. Instead, the CRPD acknowledges and demands that, in relation to every one of its substantive rights, inaction and non-interference by States will not suffice. Positive steps are also required. For these reasons, together with its history of involvement and participation from disabled people themselves,⁸⁴ the CRPD appears entirely consistent with the conception of human rights recently advanced by Sandra Fredman.⁸⁵

Fredman draws upon the capability theory developed by Amartya Sen and applied in the human rights context by Martha Nussbaum.⁸⁶ Like them, she argues that freedom should not be understood as simply the absence of interference or repression. Freedom should instead be regarded as a more positive and dynamic concept, carrying obligations to remove sources of 'unfreedom' that may hinder particular citizens from achieving or becoming what they regard as of value or that prevent them being treated with dignity and respect.⁸⁷ This positive notion of freedom, Fredman argues, underlies human rights law and demands positive action from the State in order to ensure that rights are genuinely conferred on all. She concludes:

Positive duties arising from human rights can no longer be ignored, or hidden behind artificial distinctions between different categories of rights. The fundamental values of freedom, equality, democracy, and solidarity which underpin all human rights entail the recognition of both positive duties and duties of restraint. The challenge is to fashion those duties in a way which is not only coherent and sustainable, but which advances those values.⁸⁸

⁸⁴ See nn 51–2 above and accompanying text.

⁸⁵ Fredman, *Human Rights Transformed* (n 66 above).

⁸⁶ See generally A Sen, *Development as Freedom* (Oxford, Oxford University Press, 1999); and M Nussbaum, *Women and Human Development* (Cambridge, Cambridge University Press, 2000). For an application of this approach in the context of human rights and disability, see M Stein, 'Disability Human Rights' (2007) 95 *California Law Review* 75; and, for discussion of its relationship with the social model of disability, see T Burchardt, 'Capabilities and Disability: The Capabilities Framework and the Social Model of Disability' (2004) 19 *Disability and Society* 735.

⁸⁷ See in particular Fredman, *Human Rights Transformed* (n 66 above) ch 1.

⁸⁸ Fredman, *Human Rights Transformed* (n 66 above) 240. It should be added that the value of 'democracy' is supported by a number of provisions in the CRPD which stress the importance of involving disabled people and their organisations in its implementation.