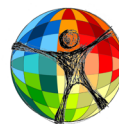


Towards a Level Playing Field: The right to sport for persons with disabilities as a tool to facilitate development

Taylor Gillespie

McGill Centre for
Human Rights
and Legal Pluralism



Centre sur les droits de la
personne et le pluralisme
juridique de McGill



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ABSTRACT

This paper explores the right for persons with disabilities to participate in sport, an area of international disability rights law that has received little academic attention. Although this right is crystallized within The Convention on the Rights of Persons with Disabilities (CRPD), and thus binding on each signatory country, there remains significant gaps in the rates of participation in sports across the world. This paper seeks to bridge this gap. More specifically, it attempts to describe and comparatively assess disability sports law in Canada and Argentina. Sports have the unique feature of uniting people while transcending cultural, political, religious, racial and virtually all other types barriers. Thus, sport seems an ideal platform for raising awareness, addressing stereotypes, and fostering the inclusion of persons with disabilities in society. I begin with a comprehensive review of disability rights in sport followed by a survey of current international instruments that bolster this right. Subsequently, I compare how Argentina and Canada have used domestic laws to breathe life into the right for persons with disabilities to participate in sport. Finally, I propose a series of recommendations to help states meaningfully vindicate this right for their population. These recommendations include gathering adequate data to accurately measure the participation of persons with disabilities in sport, altering social perceptions of what 'disability' really means, enacting sound laws to reinforce the right to participate in sports, and framing this right in a way that highlights the tangible economic benefits derived from increasing opportunities for persons with disability in sport.

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Introduction

“Sport has the power to change the world. It has the power to inspire, it has the power to unite people in a way that little else does...it laughs in the face of all types of discrimination.”¹ This quote by Nelson Mandela—arguably one of the most influential in the history of athletics—has generated significant momentum in academic discussion of how sport and can facilitate social development and cohesion.² Plenty of recent articles, books and case studies have addressed the impact of sport on reconciliation, on racial divides, and on social unity. Despite the recent boom of scholarship in this field, there appears to be relatively little work addressing these issues vis-à-vis sport for persons with disabilities.³ Moreover, there is virtually no scholarship that discusses domestic and international disability sport law. This paper seeks to bridge this disjuncture. More specifically, it attempts to describe and comparatively assess disability sports law and subsequently offer a series of solutions to help states leverage domestic practices that catalyze the achievement of disability-related goals laid out by the Convention on Rights for Persons with Disabilities (CRPD).⁴

Simply stated, with its universal popularity and ability to transcend linguistic and cultural barriers, sport seems an ideal platform for raising awareness, addressing stereotypes, and fostering the inclusion of persons with disabilities in society. Likewise, seeing as there are over a billion people with disabilities worldwide, the impacts of improved rights have enormous

¹ Nelson Mandela, “Speech by Nelson Mandela at the Inaugural Laureus Lifetime Achievement Award” (Speech delivered at the Sporting Club Monte Carlo Monaco, 25 May 2000), (2000) Nelson Mandela Foundation.

² See e.g Kevin Young & Chiaki Okada. *Sport, Social Development and Peace*. (Bringley, UK: Emerald Group Publishing Limited, 2014).

³ See Chiaki Inoue & Tanya Forneris, “The role of Special Olympics in promoting social inclusion: An examination of stakeholder perceptions” (2015) 3:5 J of Sport for Dev 23-34. Where the authors concluded that sport is a promising context for the promotion of social inclusion for persons with disabilities.

⁴ 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 CRPD].

tangible potential.⁵ Through sport, persons with disabilities can acquire vital social skills, develop independence, and become empowered to act as agents of change. Additionally, sport has a knock-on effect which facilitates the realization of other human rights, for instance the physical and mental health benefits associated with being physically active.

Game Plan

The paper is broken down into 5 main sections. In the initial section, I canvass the methodological framework this paper will employ and define key terms. Subsequently, I provide an historical overview of disability rights in sport. In the third section, I sketch out the practical and theoretical underpinnings of current international instruments that bolster the rights to sport for persons with disabilities, namely Article 30.5 of the CRPD. Fourth, with an understanding of the international context, I conduct a comparative analysis of how Canada and Argentina have used domestic laws to supplement and buttress their CRPD Article 30.5 obligations.⁶ In the fifth section, using these comparisons, I propose solutions on how States can better comply with their Article 30.5 obligations as well advance the more general interests of persons with disabilities within their borders. Lastly, I

⁵ UN World Health Organization (WHO), *World Report on Disability*, 2011, WHO/NMH/VIP/11.01, online: WHO Disability and Rehabilitation Programmes <<http://www.who.int>>. People with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others; Also, see UN General Assembly, *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex II, online: United Nations Treaty Collection <treaties.un.org> [Optional Protocol]

⁶ *This comparative study will focus on Argentina as the Latin American comparator. There are several reasons for this. First, for the sake of specificity and academic rigour, it is more practical to offer depth rather than breadth especially when conducting solution-oriented research. Second, given that I have experience doing disability rights related research in the Argentine context, I have both a better understanding of the domestic legal instruments vis-à-vis disability rights law, as well as a larger pool of resources to draw from. In order to capture a true domestic picture of the Argentine and Latin American context, much of the literature I draw upon is written in Spanish or Portuguese by Latin American authors. All citations of these sources and Argentine law are my own translation.

offer my final thoughts and describe how my initial expectations of this paper turned out to be significantly different from the results my research generated. The result of this paper is that the learning process and advancement of the right to sport for persons with disabilities is not a one-way street from 'developed' to 'developing' countries. To the contrary, these processes should be bidirectional.

Housekeeping—Conceptual Framework, Definitions, & Human Rights Relevance

Capabilities

Before beginning down our conceptual journey, it is integral to survey the methodological landscape in which this paper takes root. By and large, I will rely on the capabilities framework, which is well-established in economics, political science, and development studies.

In short, the capabilities approach posits that a society's main obligation is to provide certain capabilities for everyone.⁷ These capabilities are defined as the substantive or real opportunities for individuals to be able pursue whatever they wish. In essence, capability amounts to each person's freedom and agency to pursue activities and achieve states of life that they deeply value.⁸

The capabilities approach fits well with disability rights because it understands that society is diverse, and thus that some people need a little bit more support in order to have the same capabilities as others. To offer a simplistic example, if the information written in this paper was deemed a fundamentally important right to the world—in other words, a capability—then the fact that its words are written in English would prevent a large portion of the global population from accessing the information and ideas presented and therefore this group would never be able

⁷ Caroline Harnacke, "Disability and Capability: Exploring the Usefulness of Martha Nussbaum's Capabilities Approach for the UN Disability Rights Convention" (2013) 41:4 *Journal of Law*, 768-780.

⁸ See Amartya Sen, *Development as Freedom*, (Oxford: Oxford University Press, 1999); Amartya Sen, "Development as Capability Expansion," (1989) 19: *J of Dev Planning* 41–58.

to realize this right. Given that this right should be universal, the obligation on society would be to provide a means of ensuring that everybody has access to the information presented, whether this be through translations or otherwise. The key takeaway is that substantive equality is more important than even-handed equality—the English readers in society do not need any additional measures to realize the capability, but non-English readers require some support to be able to effectuate this same capability.

Surely, the capabilities approach is not immune from viable criticisms and shortcomings.⁹ Nevertheless, the design of this paper is prescriptive and practicable, and is merely underscored by the capabilities approach rather than a defense of it. Thus, these theoretical critiques lie beyond the scope of this paper.

The reasons for using this paradigmatic lens are twofold. First, the capabilities approach is particularly apt for disability studies insofar as it presumes diversity within society and that individuals have different abilities, needs, preferences, and goals.¹⁰ Second, the capabilities approach is useful given this paper's emphasis on a human rights angle and the CRPD. Indeed, "the CRPD and the capabilities approach both aim at societal measures to empower individuals regardless of their own abilities and therefore seem to fit together well."¹¹

⁹ First, and perhaps most glaring, 'capabilities' is a nebulous and broad term that is hard to define—what exactly are the things that count as contributing to agency? Many academics have attempted to address this criticism, but I have yet to come across a convincing piece that pins down exactly how to define what capabilities are. Second, a capabilities approach does not carry significant normative weight insofar as it does not offer much in the way of advice for decision-makers or policymakers with respect to increasing people's freedom. Third, in reference to disability studies, the capability framework falls short on being able to account for the full range of diversity on the disability spectrum. More specifically, the capabilities framework envisages levels of capabilities required for individuals to be able to truly exercise agency. However, some individuals, particularly those with severe mental impairments, will never be able to exercise agency and thus are unable to reach these levels of capability.

¹⁰ Harnacke, *supra* note 7 at 771.

¹¹ *Ibid* at 769; see Martha Nussbaum, *Creating Capabilities: The Human Development Approach*, (Cambridge, MA: Harvard University Press, 2011).

Sports & Human Rights: Definitions and Connection

For the purposes of this paper, sport entails “all forms of physical activity that contribute to physical fitness, mental well-being and social interaction, such as play, recreation, and or competitive sport, and indigenous sports and games.”¹² In other words, ‘sport’ in this context is not limited to a high-performance level professionalized forms, but instead encapsulates recreation and play broadly.

Human rights, in the context of this paper, refer to rights which are “inherent to all human beings” regardless of their nationality, place of residence, sex, national origin or any other status.¹³ These rights are interrelated, interdependent and indivisible.¹⁴

With these definitions in mind, there are two avenues to discuss the relationship between sport and human rights. The first is to consider sport as a human right. This may be a conceptual jump seeing as ‘human rights’ is generally associated with more ominous language; for instance, the ability to be free from torture. However, sport and physical activity dovetail with human rights for the reason that “beyond its physical and health dimensions, sport contributes to comprehensive and harmonious development and fulfillment of the human being,”¹⁵ akin to how art or music

¹² United Nations Inter-Agency Task Force on Sport for Development and Peace, *Sport for Development and Peace: Towards Achieving the Millennium Goals*, 2003 at 5.

¹³ The United Nations High Commissioner for Human Rights (2011). Online: UNOHCHR Publications <ohchr.org>.

¹⁴ *Ibid* at 1-2. The entire UN definition is: “Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.”

¹⁵ African Union, “Policy Framework For The Sustainable Development Of Sport In Africa (2008-2018)” CAMS/EXP/3(II), online: African Union publications, online: <au.int> at 8.

contributes to the richness of the human experience.¹⁶ Thus, sport can properly be considered a human right.

The second avenue for thinking about the connection between sports and human rights is to consider sport as a *conduit* to promote human rights. This entails the use of sport as a platform to both draw attention to and deal with societal human rights issues. For instance, many professional athletes in the National Football League (NFL) have recently begun to kneel during the pre-game playing of the American National Anthem in order to spotlight and protest systemic racial injustices in the country. Given the importance of the NFL in the United States, and other sports in other countries around the world, professional athletes have an amplified voice to garner media and political attention and use their role in sport to advance and push a human-rights based agenda.¹⁷

On the whole, these two avenues give materiality to the idea of development through sport, which essentially enables sport to have a broader reach and a more powerful impact upon the lives of individuals and communities.¹⁸ Now, with a general backdrop of terms, we proceed to the substantive portion of this paper.

From Disabilities to Capabilities: An historical overview of disability rights in sport

There were virtually no opportunities for persons with disabilities to participate in sport before the end of the Second World War.¹⁹ Evidently, many soldiers were severely mentally and/or physically handicapped during the War and

¹⁶ See e.g. Keith Gilbert & Will Bennett, *Sport, Peace and Development*, (Champaign, IL: Common Ground Publishing, 2012) at 245.

¹⁷ Even if this type of protesting bears no immediate fruit, it at the very least calls attention to deep-seeded issues and opens space for discussions about these issues.

¹⁸ Bruce Kidd, "A new social movement: Sport for development and peace" (2008) 11:4 *Sport in Society* at 370.

¹⁹ Carolina Ferrante "Cuerpo, discapacidad y estigma en el origen del campo del deporte adaptado de la Ciudad de Buenos Aires, 1950-1961: ¿una mera interiorización de una identidad devaluada?" (2014) 21:2 *História, Ciências, Saúde*.

many States wanted to help these veterans—often labeled as national heroes—integrate back into society.²⁰ It was believed that participation in sports was an essential ingredient to productive integration.²¹ Consequently, in 1948, the first Stoke Mandeville Games (which would later be renamed the Paralympic Games) were held for paraplegic athletes, beginning on the same day as the 1948 London Summer Olympic games.²² Over the following 20 years, the domain of disability sport related research expanded beyond simply rehabilitating disabled veterans and began to assess the effects of exercise on other persons with disabilities.²³ This research was innovative and ground-breaking inasmuch as it challenged the prevailing medical model of disability which considered the person's disability itself as the inhibiting factor preventing them from fully participating in sports. Instead, it was established that the contrary was true: the root of issue was not the individual's disability, but rather a lack of opportunity that hindered persons with disabilities to acquire the skills to participate in sport and become physically fit.²⁴ In sum, this research proved that sport could have a transformative effect on the lives of those with a disability, and eventually led to the genesis of the Special Olympics in 1968.²⁵ The Special Olympics have been hosted in conjunction with the Olympics since then, and the events "whether individual or collective, coincide with the

²⁰ Nuria Pérez De Lara, "Identidad, diferencia y diversidad. Mantener viva la pregunta" in: Larrosa, Jorge; Skliar, Carlos. *Habitantes de Babel: política y poética de la diferencia*. Barcelona: Alertes (2001) at 291.

²¹ Productive integration, in this context, refers to employment. See e.g. Julie Anderson, "Turned into taxpayers: Paraplegia, rehabilitation and sport at Stoke Mandeville, 1944–56" (2003) 38:3 *J of Contemporary History* 461.

²² International Paralympic Committee. *History of the Paralympic Movement*. online: <paralympic.org>.

²³ See Joan Scruton, *Stoke Mandeville road to the Paralympics: Fifty years of history*, (Aylesbury, UK: Peterhouse Press, 1998).

²⁴ Special Olympics Canada, About Special Olympics Canada online: <specialolympics.ca>.

²⁵ See James Haskins, *A New Kind of Joy: The story of the Special Olympics*, (Garden City, N.Y: Doubleday, 1976); Linda Mastandrea & Donna Czubernat, *Sports and the Physically Challenged: An encyclopedia of people, events, and organizations*, (Westport, Conn: Greenwood Press, 2006) at 122.

long-standing traditions of Olympic events with the necessary adaptations to promote participation of persons with disabilities.”²⁶

In concert with the shift from the medical to the social model of disability in the realm of athletics, the underlying reasoning for allowing persons with disabilities to participate in sports shifted away from rehabilitation and towards participation, with the intent of “creating opportunities for people with disabilities to use sport as a vehicle for their empowerment.”²⁷ Simultaneously, several international federations²⁸ emerged to advance a sport agenda for impairment-specific groups on a grassroots and international levels.²⁹ However, it was not until 2008 that the rights of persons with disabilities were recognized and affirmed by the United Nations or the greater international community.

International Instruments – Nowadays

The United Nations Convention on the Rights of Persons with Disabilities (CRPD)³⁰ “imparts a human rights framework that engages the full spectrum of civil, political, economic, social, and cultural rights.”³¹ In doing so, the CRPD strives to remedy the

²⁶ [translation by author] Alberto Martins Da Costa, “Educação física e esporte adaptado: o progresso, história e retrocessos em relação aos princípios da integração/inclusão e perspectivas para o século XXI” (2004) 25:3 Revista Brasileira de Ciências do Esporte, at 31. As examples of events in the early Special Olympics, Da Costa and Sousa mention: athletics, wheelchair basketball, judo for visually-impaired persons, swimming, seated volleyball, tennis, table tennis, wheelchair soccer, weightlifting, archery, equestrian.

²⁷ David Howe, “Policy on Sport for the Disabled” in Lucy Thibault & Jean Harvey, *Sport Policy in Canada*, (Ottawa: University of Ottawa Press, 2013) 295 at 297.

²⁸ Several examples of these International Organizations of Sports for the Disabled (IOSD) are: Cerebral Palsy International Sport and Recreation Association (CP-ISRA), the International Blind Sport Association (IBSA), the International Sports Federation for Persons with Intellectual Disability and the International Wheelchair and Amputee Sport Association (IWAS).

²⁹ See David Howe, *The Cultural Politics of the Paralympic Movement: Through the anthropological lens*. (London: Routledge, 2008).

³⁰ CRPD, *supra* note 4

³¹ Micheal Stein & Janet Lord, “Participatory Justice, the UN Disability Human Rights Convention, and the Right to Participate in Sport, Recreation, and Play” in Jukka Kumpuvuori & Martin Scheinin, *The United Nations Convention On*

systemic deprivation experienced by persons with disabilities across the world and seeks to make reality the concept of participatory justice.³² In fact, 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."³³ There exists some controversy about whether the Convention merely reaffirms existing rights or whether its "contribution is more than conveniently bringing the human rights of persons with disabilities under the same roof,"³⁴ but there is no denying that it crystallizes a radical shift from the medical to the social approach regarding disability. The CRPD exemplifies this in several ways, most importantly by how it defines disability as a fluid and evolving concept that results from the interaction between an impairment and an environmental barrier that hinders an individual's participation in society on an equal basis with others.³⁵ This definition recognizes societal barriers as the inhibitory focal point which must be "overcome or removed to enable people with disabilities access to the rights and freedoms allowed to others."³⁶

The CRPD is similar to other UN Conventions for the reason that it aims to eliminate discrimination against a specific segment of the population.³⁷ However, the CRPD differentiates itself from other UN Conventions in several ways. Perhaps most remarkably, the CRPD is distinguished from its predecessors by the direct participation of persons with disabilities in its formulation. This

The Rights Of Persons With Disabilities: Multidisciplinary Perspectives, (Helsinki: Centre for Human Rights in Finland, 2009) 226 at 226.

³² *Ibid.*

³³ CRPD, *supra* note 4, Article 1; Article 4.1.

³⁴ Frédéric Mégret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?" 2008 30:2 Human Rights Quarterly 494 at 500.

³⁵ See: CRPD *supra* note 4, Article; Preamble item (e).

³⁶ Amy Farkas, Valerie Karr, Eli A. Wolff & Anna Lachowska, "Inclusive Sport for Development" in Keith Gilbert & Will Bennett, *Sport, Peace and Development*, (Champaign, IL: Common Ground Publishing, 2012) at 257.

³⁷ Many other UN Conventions explicitly aim to eliminate discrimination. For instance, on the grounds of: racial discrimination (CERD), discrimination against women (CEDAW), children (CRC) migrant workers (CRMW), and indigenous people (DIP); see e.g. CRPD, *supra* note 4, preamble; Article 3(b) for mention of "discrimination".

involvement of civil society—sometimes termed “participatory justice”³⁸—is crucial because it allocates significant normative weight to the “irreducibility of the experience of certain categories of persons”³⁹ and more importantly allows persons with disabilities to exercise agency in attempting to erode the barriers they face in the world.

Article 30.5

For current purposes, the CRPD item of interest is Article 30.5, which asserts the right of “persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities.”⁴⁰ By explicitly highlighting these aspects of cultural life, the CRPD embraces the idea that that meaningful engagement in society necessitates ample opportunity to engage in collective activities, and a failure to be able to participate in this type of socialization reinforces internalized oppression and disconnection of disabled persons from the community.⁴¹ Clearly, Article 30.5 is a massive step forward for the reason that it entrenches a social right to sport for a marginalized segment of the population that has historically lacked opportunities thereof.

Substantively, Article 30.5 obliges States to “encourage and promote the participation of people with disabilities in mainstream and disability-specific sporting activities at all levels and to ensure that they have access, on an equal basis with others, to training, resources, and venues.”⁴² Furthermore, the same article mandates States to ensure that children with disabilities “have equal access with other children to participation in play, recreation and leisure and sporting activities, including those

³⁸ Michael Ashley Stein, “Disability Human Rights” (2007) 95 Cal. L. Rev. 75 at 102.; Also, see Janet Lord & Michael Ashley Stein, “Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation and Play” (2009) 27 BU Int’l L. J. 249.; Michael Ashley Stein & Janet Lord, “Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities” (2008) 13 Tex. J. C.L. & C.R. 167.

³⁹ Mégret, *supra* note 34 at 494.

⁴⁰ CRPD, *supra* note 4, Article 30.5.

⁴¹ See Michael Stein. & Janet Lord, *supra* note 31 at 226.

⁴² CRPD, *supra* note 4, Article 30.5(a); 30.5(b); 30.5 (c); See Farkas *et al*, *supra* note 36 at 258.

activities in the school system.”⁴³ By recognizing sport as a human right, the CRPD crystallizes the value of sporting activities as a central element of the human condition. Without this affirmation of sport as a human right within a policy context, sport is perceived as unimportant, which renders it susceptible to becoming both discriminatory and exclusive. In essence, the mere conceptualization of sport as a human right endorses that access, inclusion, dignity, and respect in sport must exist for every human. Indeed, access in this sense is the only means through which human development can be facilitated by sport.⁴⁴ The potency of Article 30.5 is highlighted by its commitment to equality and inclusion of persons with disabilities. Nevertheless, like many international human rights instruments, ratification does not necessarily induce meaningful on-the-ground change within domestic borders.

CRPD Ratification

One hundred and seventy-five states have ratified the CRPD, yet, perhaps unsurprisingly, many have not made significant progress in advancing the rights of persons with disabilities within domestic borders. In Spanish-speaking Latin America, all 18 countries except for Cuba and Colombia have ratified both the CRPD and the Optional Protocol. In theory, ratifying both of these items affords persons with disabilities within that jurisdiction the highest level of rights protection and affirmation. That said, it is interesting to note that States such as Canada,⁴⁵ the United States, and Norway, which have traditionally been considered progressive regarding the advancement of human rights, have not ratified the Optional Protocol.⁴⁶ Furthermore, success in fulfilling the CRPD’s obligations has varied between states and does not seem correlated with the ratification of the Optional Protocol.⁴⁷ Given the discrepancy

⁴³ CRPD, *supra* note 4 at Article 30.5(d).

⁴⁴ Farkas *et al*, *supra* note 36 at 258.

⁴⁵ Canada has recently confirmed that it will ratifying the Optional Protocol, but it had not as of May 2017.

⁴⁶ CRPD Information chart (2017). UN CRPD Information online: <un.org/development>

⁴⁷ There is no legitimate ranking by state with respect to disability rights. This assumption is based off of my own superficial analysis of various Human Rights Index rankings (e.g. UN Human Rights Office of the High Commissioner report;

between what should happen and what actually happens, a comparative study of how different States actualize their CRPD Article 30.5 obligations is important to further our understanding of why policy obligations remain unmet and help us determine which strategies are most useful. What follows is a comparative analysis of Canadian and Argentine sport disability law.

Comparative Analysis of Domestic Instruments—Legislative & Advocacy

Before diving into a comparative analysis of the domestic instruments which influence the participation of persons with disabilities in sport, it is important to contextualize Canada as a “high-income” country and Argentina, as an “upper-middle-income” country per the World Bank in 2018.⁴⁸ This is significant insofar as the economic stability of a country and its population might be an influencing factor vis-à-vis the domestic rights of persons with disabilities to participate in sport, their actual rates of participation, and so on. Nevertheless, as will be demonstrated, economic indicators and levels of wealth do not necessarily correspond with rights of persons with disabilities in sport.

Canada

The *Canadian Sport Policy*, written in 2012 is “designed as a roadmap that establishes direction and desired outcomes” with respect to Canadian participation in sports.⁴⁹ One of the stated outcomes of this policy is to increase “both the number and diversity of Canadians participating in sport”⁵⁰ and ensure that “sport delivery is accessible and equitable and reflects the full breadth of [...] abilities and the diversity of Canadian society.”⁵¹ One means it adopts in order to achieve this end, particularly

<freedomhouse.org>, etc.) relative to which UN Conventions each state has ratified.

⁴⁸ World Bank Country and Lending Group Data (2018) calculated based on GNI per capita using the Atlas Method. online: <worldbank.org>.

⁴⁹ Sport Canada. *Canadian Sport Policy 2012*, (Ottawa, ON: Department of Canadian Heritage, 2012), online: <sirc.ca> .

⁵⁰ *Ibid* at 3.

⁵¹ *Ibid* at 6.

relevant for the inclusion of persons with disabilities, is the implementation of “intentionally designed, barrier-free and relevant sport programming.”⁵²

Moreover, *The Policy on Sport for People with Disabilities* (Policy on Sport for PWD), enacted in 2006, governs the relationship specifically between persons with disabilities and their rights in sport.⁵³ This piece of legislation, *inter alia*, crystalizes equality for persons with disabilities in terms of access and opportunities to sport, with the objective of encouraging “all Canadians to become more involved in sport, including persons with a disability.”⁵⁴

Notwithstanding the overarching theme of inclusion in both of these policies, the fact that there exists separate legislation uniquely for persons with disabilities brings several concerns to the fore. Namely, if an overarching principle is inclusion, there should be no need for a separate policy for persons with disabilities. With this in mind, although the development of the 2006 *Policy on Sport for PWD* was designed to foster inclusion, perhaps its effect is more marginalizing than beneficial, and its *raison d’être* is a symptom of a disease rooted deep within Canada’s Constitutional ecology. To unpack this, the fact that there was a need for the government to legislate the *Policy on Sport for PWD* demonstrates that the *Canadian Charter of Rights and Freedoms* has been ineffective in guaranteeing that “every individual is equal before and under the law [...] and, in particular, [...] without discrimination based on [...] mental or physical disability.”⁵⁵ Put simply, if there was true equality ‘before and under’ the law, long-standing Canadian sport policy such as the *National Physical Fitness Act, 1943-1944*⁵⁶, which posits that the government has a duty “to promote the physical fitness of the people of Canada,”⁵⁷ then there would be no need for

⁵² *Supra* note 49 at 10.

⁵³ Canadian Heritage, *Policy on Sport for Persons with a Disability*. (Ottawa, ON: Her Majesty the Queen in Right of Canada, 2006).

⁵⁴ *Ibid* at Ministers Foreword.

⁵⁵ *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.*

⁵⁶ *National Physical Fitness Act, 1943-44, c. 29, s.1.*

⁵⁷ *Ibid.* at section 4(1).

supplemental disability-specific legislation.⁵⁸ This is an important illustration of a reoccurring theme throughout this paper: good law alone does not equate to positive remedial effects.

De facto pessimism and constitutional criticisms aside, let us proceed to *de jure* analysis (this is, after all, a section entailing legal analysis). *Prima facie*, the legal foundation of the Canadian *Policy on Sport for PWD* posits four clear goals: to increase the number of persons with a disability involved in sport activities at all levels,⁵⁹ to support the achievement of podium results at Paralympic Games and related World championships,⁶⁰ to strengthen the capacity of the Canadian sport system to address the needs of persons with disabilities,⁶¹ and to improve communication, coordination and collaboration to support the sport participation of persons with a disability.⁶² However, there is a disconnect between this policy's objective, and how it purports to reach these objectives. To explain, while the policy offers means to achieve its goals, these means are far from ideal because they are devoid of substance and meaning.⁶³ This lack of concreteness translates to an inability for persons with disabilities in Canada to make a viable legal claim that the government is not meeting its obligations under the policy. With this in mind, irony is rife in the fact that the *Policy on Sport for PWD* repeatedly

⁵⁸ This argument is the counterpart of the argument of David Howe, *supra* note 27. He who posits that s. 15(2) of the Charter is the main cause of the Charter's ineffectiveness insofar as it permits the isolation and marginalization of "individuals and communities of difference as a 'problem that needs special measure'" at 296.

⁵⁹ Canadian heritage, *supra* note 53 at s 5.1.

⁶⁰ *Ibid* at s. 5.2

⁶¹ *Ibid* at s. 5.3

⁶² *Ibid* at 5.4

⁶³ For instance, the 3 means to achieve the second goal of capacity building, are to "support the sport community in developing and applying fair and clear systems/procedures of eligibility, classification and divisioning" (5.3.1), "support the work of partner organizations responsible for developing sport leaders...who have the skills, resources, and ability to respond to the needs of sport for people with a disability"(5.3.2), and "acquire and generate research to inform policy development and practices related to sport for persons with a disability." (5.3.3) Clearly, these are nearly impossible to enforce from a legal standpoint. See *ibid*.

mentions how it will be implemented through an “action plan.”⁶⁴ Although this language hints that the policy carries with it a palpable course of action, the blueprint is insubstantial: instead of asserting what the government *will do* to meet the legislation’s intended outcomes, it merely puts forward a non-committal list of what, in the abstract, *could be done* to reach these goals.

In sum, this section has attempted to elucidate that while there are Canadian laws which provide a platform for affording persons with disability equal opportunity to participate in sport, this legal foundation is poorly laid and susceptible to criticism. For example, given that one of the stated goals of the *Policy on Sport for PWD* is to increase Canadian presence on the podium at the Paralympics, poor Canadian results in recent Paralympic competitions evidence that there remains significant work to be done for Canadian policies to achieve the objectives they aspire to.⁶⁵

Nevertheless, these Canadian policies are a partial step in the right direction because they imply a recognition of the reality that persons with disabilities do not have equal opportunity to participate in sport. In this light, the existence of Canadian policies demonstrate that the Government has, at minimum, thought about its Article 30.5 obligations and has attempted to conform to them. Nonetheless, despite being at the “forefront of human rights legislation regarding discrimination on the grounds of disability,”⁶⁶ Canadian domestic legal instruments remain half-baked attempts to facilitate inclusion in sport.

Argentina

According to Art. 75(22) of the *Constitución Argentina*, Congress is empowered to “approve or reject treaties concluded with other nations and international organizations [...] these treaties and concordats have a higher hierarchy than laws” passed by congress.⁶⁷ Thus, the CRPD, as an international treaty,

⁶⁴ See Canadian heritage, *supra* note 53. Sections 1,4,6,7 all mention “action plan.”

⁶⁵ See Community Active. *Para-Athletics Program Review—Summary report*. (May, 2008).

⁶⁶ Howe, *supra* note 27, at 312.

⁶⁷ Author translation: *Constitución de la Nación Argentina* Art. 75(22) (Arg.).

occupies the second highest rung on the Argentine Constitutional ladder, and is subject to only the Constitution itself.⁶⁸ Given its upmost importance in the legal hierarchy, it would be logical to assume that the obligations imparted by the CRPD would carry significant weight in Argentine law, and that there should be an extensive set of domestic laws designed to supplement these obligations. However, an extensive analysis of Argentine national law reveals that this is not the case—sport and disability related laws are sparse, and there are few national laws that correspond to Article 30.5 of the CRPD. In this section, I will canvass disability sport law in the Argentine legal system and highlight its inadequacies. Additionally, in light of the relatively high level of participation of persons with disability in sport in Argentina, I will offer brief insight into how laws are not the sole determinant for realizing rights.

Disability and Sport Law in Argentina

The key national law vis-à-vis the right to participate in sport is Law 20655, which was enacted in 1974. This law recognizes sport, in its diverse manifestations, as fundamental to Argentine society.⁶⁹ Moreover, Law 20655 posits that the State will “implement conditions that will permit access to sport for all inhabitants in the country, and especially for children and young people, considering recreation as an authentic means to social stability and balance.”⁷⁰ Similarly, the State must “assure the adequate physical training and learning of sport for the entire Argentine population, with special attention to parents, educators, children and young people to encourage adequate development

⁶⁸ Ley No. 27044. Otórgase jerarquía constitucional a la Convención sobre los Derechos de las Personas con Discapacidad. Promulgada: Diciembre 11 de 2014. This Law cristallizes the CRPD as one of the treaties that has constitutional hierarchy; Ley 26.378. Apruébase la Convención sobre los Derechos de las Personas con Discapacidad y su protocolo facultativo, aprobados mediante resolución de la Asamblea General de las Naciones Unidas del 13 de diciembre de 2006. Promulgada: Junio 6 de 2008; For discussion about whether these laws are discriminatory, see: Pablo Rosales, *Discapacidad, justicia y Estado: discriminación, estereotipos y toma de conciencia*. 1ed. (Buenos Aires: Infojus, 2013) at 150.

⁶⁹ Ley No. 20655. Promoción de las actividades deportivas en todo el país. Promulgada: Abril 2 de 1974, at Article 1.

⁷⁰ [Author’s translation] *ibid* at Article 1(e).

of sport practices and abilities.”⁷¹ Interestingly, while this law highlights that special attention must be paid to select segments of the population, the scope of this special attention is exceptionally narrow and does not make any reference to persons with disabilities, or other communities such as racial or religious minorities. It was not until October 2015 that law 20655 was amended to align with the obligations of Article 30.5. Clearly, the fact that it took nearly 8 years for Argentina to enact laws that fulfill CRPD requirements says something about how important the Argentine government perceives the right to equal participation in sport for persons with disabilities to be, and perhaps how seriously it takes the CRPD as a whole.

In terms of substance, the amending Law 27202 adds very little to its predecessor, Law 20655. First, it introduces a sub-article which codifies that the State must provide equal opportunities in sport with respect to gender.⁷² Second, and more important for the scope of this paper, Law 27202 adds that the government will offer “special opportunities to [...] persons with disabilities [...] considering that sociocultural [sporting] activities are a means of [...] social inclusion.”⁷³ Notably, given that congressional debates leading up to legal reform are not published in Argentina, it is unclear whether the motivation for this legal reform was rooted in a desire to harmonize domestic laws with the CRPD, if there were social pressures to change the law, or other influences.

Argentine law further establishes that the Minister of Social Wellbeing is in charge of accomplishing the goals set out by Law 27202 and allocating resources from a National Sport Fund.⁷⁴ However, provisions with respect to equality in the allocation of said resources are absent, which might impact how the substantive opportunities for persons with disabilities play out relative to opportunities for able-bodied athletes. For example, high performance national athletics in Argentina (including Olympic and National Team sports), are regulated and funded by the *Ente Nacional De Alto Rendimiento Deportivo* (ENARD—a National Sports Agency for High Level Performance), a branch of the

⁷¹ [Author’s translation] *ibid* at article 3(a),

⁷² Ley No. 27202. Modificación. Ley No. 20.655 Promulgada: Noviembre 03 de 2015 at Article 1(f).

⁷³ [Author’s translation] *ibid* at article 1(e).

⁷⁴ *Ibid* at Article 5; Article 12.

federal government.⁷⁵ Per Article 2 of Law 26573, ENARD has the discretionary ability to provide funding to “high performance” athletes, including in support of Paralympic athletes.⁷⁶ In addition, although Special Olympic athletes are not explicitly mentioned within this framework, and there has been no jurisprudence elucidating this, my view is that law 26573, read in conjunction with aforementioned law 22702 positing equal opportunity in sport (“especially for persons with disabilities”), would qualify these athletes to receive ENARD funding should this issue be litigated.

However, notwithstanding the theoretical equality imparted by the law, in practice this dynamic unfolds very differently. For example, ENARD manages the Centre for High Performance Athletes (CeNARD) in Buenos Aires, an 11.5 hectare training facility equipped with state-of-the-art equipment where roughly 2,500 internationally-competing athletes train and live.⁷⁷ Out of these athletes, not a single one competes in either the Paralympics or the Special Olympics.⁷⁸ Thus, although Argentinian law explicitly posits equality in the realm of access and opportunity to sport, there is a disconnect between what the law purports to do and its actual effect.

Nevertheless, Argentinian athletes have maintained high levels of success at the Paralympics, and Argentina has been represented at each Special Olympics since 1979.⁷⁹ Likewise, although data in this regard is extremely limited, it has been shown that persons with disabilities in Argentina have high levels of participation in sport.⁸⁰ These snippets of evidence call into

⁷⁵ Ley No. 26573. Creación de Ente Nacional De Alto Rendimiento Deportivo Promulgada: Diciembre 21 de 2009 Ley 26.573 (2009).

⁷⁶ See *Ibid.* Article 2; Article 2(h).

⁷⁷ Ministerio De Educación Y Deportes Secretaría De Deporte, Educación Física Y Recreación Resolución 694-E/2017. Ciudad de Buenos Aires, 06/07/2017 at preamble.

⁷⁸ Disclosed to me during a telephone interview with Ricardo Grin, Director of (CeNARD) conducted on November 15, 2017. Mr. Grin’s contact information is on file with the Author.

⁷⁹ Olimpiadas Especiales Argentina, *Anuario*, 2016, (Buenos Aires: Olimpiadas Especiales Argentina, 2016) at 48.

⁸⁰ Coreen Harada, Robin Parker, & Gary Siperstein, “A Comprehensive Study of Special Olympics Programs in Latin America: Findings from Argentina,

question the importance of law in advancing the sport related rights of persons with disabilities: although Argentine law seems impotent, persons with disability still enjoy rich participation in sport. With this in mind, the discussion shifts now to explaining this inconsistency.

Perhaps good law is not a necessary ingredient to fulfilling CRPD obligations

Reports have highlighted the key issues associated with Argentina's compliance with the CRPD. Among these are the lack of integration of the CRPD in the national legal frameworks, situations of multiple discrimination, the lack of adequate anti-discrimination legislation, the insufficient promotion of awareness-raising about rights, deficient accessibility, the lack of attention to people in situations of risk and humanitarian emergencies, the barriers to access to justice, the lack of protection of personal freedom, and so on.⁸¹ In the context of opportunities to participate in sport, the above listed issues, coupled with the fact that virtually all sport programmes in Argentina are regulated by government and mandated by weak law, a dismal picture is painted regarding participation opportunities.

Nevertheless, the crucial missing link explaining why Argentina does well in this regard is that Argentina has a remarkable level of civil engagement. In other words, the richness of the right is not solely a function of the law, but rather is influenced significantly by civil society.⁸² In this context, civil engagement means that persons with disabilities in Argentina forge their own opportunities and find ways to leverage their rights beyond government blueprints. This entails techniques such as "networking among others with disabilities and organizing

Brazil, and Peru." (Boston: University of Massachusetts, 2008) at 8. Compare Gary Siperstein, Coreen Harada, Robin Parker, Michael Hardman, & Jayne McGuire, "A Comprehensive National Study of Special Olympics Programs in the United States." (Boston: University of Massachusetts, 2005).

⁸¹ Naciones Unidas. "Lista de cuestiones que deben abordarse al examinar el informe inicial de Argentina (CRPD/C/ARG/1) en relación con los artículos 1 a 33 de la Convención." Marzo 6 de 2012 at 8.

⁸² This is partly speculative. Indeed, there exists little data to corroborate this claim. Given that the government collects data solely based on its programs rather than on the level of engagement of civil society outside of government initiatives.

their own sporting events and participation strategies within the mainstream.”⁸³ Civil engagement in Argentina appears to exist on a much greater scale than in Canada. As such, Canada and other countries ought to attempt to engage civil society in a more meaningful way. With this notion of civil society engagement, and the aforementioned legal analysis in mind, the discussion now shifts to exploring both legal and extra-legal solutions for improving the rights of persons with disabilities to participate in sport.

Solutions

Large potential reach

First, it must be highlighted that although the above comparative analysis involves specifically the Canadian and Argentine contexts, the solutions and recommendations I put forward are intended to apply more broadly to States in all regions of the world. Evidently, like any pointed policy analysis, these recommendations are not a one-size-fits and must be tailored to each individual context, but the broad principles, advantages, and shortcomings of the Argentine and Canadian approaches to CRPD implementation may be analogous to the issues facing other States. Moreover, my intent with the solutions that follow is to offer a set of speculative yet realistic recommendations which are both narrow enough to be meaningfully followed, but at the same time offer overarching, broad principles which are effective in guiding the behaviours of decision-makers internationally on how to tackle (pun intended) their own domestic issues facing persons with disability vis-à-vis CRPD Article 30.5. Ultimately, the goal is to give persons with disabilities the capability to participate in these endeavours on an equal basis as others. As such, the following solutions aim to deconstruct barriers that hinder this objective. Interestingly, while this paper has devoted a considerable amount of space to critically analyzing laws, only one of the four proposed solutions is directly related to domestic law. In simplified terms, the proposed solutions are: getting the information, altering social

⁸³ Disclosed to me during a telephone interview with Diego Pando Soldati, President of Special Olympics Argentina, conducted November 29th, 2017. Mr. Pando Soldati’s contact information is on file with the author.

perceptions, adopting good laws, and framing the issue through economic incentives.

Solution 1: Data as the key first step

Perhaps the most evident yet underrated solution to solve any policy related issue is to collect all relevant information about the situation in order to then understand where the gaps are. In the field of development economics, evidence-based solutions have recently gained significant traction. For example, leading economists Abhijit Banerjee and Esther Duflo have written extensively on the importance of using data to assess policies.⁸⁴ Formulating policy based on insufficient data is to make a cost-benefit analysis without a full-bodied understanding of either side of this equation, which provides the perfect medium for yielding ineffective policies. In Argentina, for instance, statistics on participation rates in sport for persons with disability and other associated data⁸⁵ are not even collected.⁸⁶ In the absence of relevant data, the needs of persons with disabilities in terms of improving access to participation in sports are unknown. Consequently, attempting to improve government programmes is like throwing darts in a dark room.

The reasons for the lack of data collection by a government might be associated with the funding required to actually conduct research, with administrative difficulties, or because data of this nature is undervalued. While the first two criticisms may be viable, the importance of the data must not be understated. Indeed, the importance of the rights established by

⁸⁴ See e.g. Abhijit Banerjee & Esther Duflo, *Poor Economics: A radical rethinking of the way to fight global poverty*, 1ed. (New York: Public Affairs, 2011).

⁸⁵ For instance, what sports are more popularly participated in, what kinds of disabilities participating individuals might have, what kind of funding might have been received etc.

⁸⁶ According to telephone conversation with the Office of the Minister of Social Wellbeing, conducted on November 3, 2017. ; This lack of data has been observed elsewhere, with respect to wheelchair sport marketing in Latin America. See Micheal Cottingham, Doug Blais, Brian Gearity, Kim Bogle, Ryan Zapalac, "A Qualitative Examination of Latin American Wheelchair Sport Practitioners' Marketing Practices" 3:5 *J of Sport for Dev* (London: Open-Access, 2015) 11 at 11-22.

Article 30.5 of the CRPD has been fleshed out throughout this paper.⁸⁷ Nevertheless, in the Argentine context, there is a potential avenue through the law to mandate the government to collect this type of data. For example, Law 22431 codifies a “system of ‘comprehensive protection’ for disabled persons”⁸⁸ and posits that the Minister of Social Development and Environment must execute statistical studies to promote the protection of rights of persons with disabilities.⁸⁹ Among this ‘comprehensive protection’, as explicitly stated by both Article 30.5 of the CRPD and Argentine Law 27202 is the right to equal access to participate in sporting activities. Although there exists no case law to this effect, a prospective legal challenge seems fertile ground for a solution to the lack of relevant data in the Argentinian context.

Solution 2: Alter social perceptions

In my view, adjusting the social perception of disability is the critical factor to ensuring the rights of persons with disabilities are respected. There exists a deep pool of sociological research that highlights the importance of an inclusive society for persons with disabilities.⁹⁰ More specifically, inclusion “occurs through a process of interaction between a person with a disability and others in society.”⁹¹ This process of “interaction between an individual with a disability who possesses his/her own attitude toward integration, strategies, and social roles and others in society who adopt certain attitudes and perceptions of people with disabilities”⁹² seems to coincide with the capabilities framework—an inclusive society enhances opportunities for

⁸⁷ On this note, data of this nature has been suggested to be benefit promotional efforts and ultimately enhance the success of the Paralympic Games. See *ibid*.

⁸⁸ [Author’s translation] Ley No. 22431. Sistema de protección integral de los discapacitados. Buenos Aires, 16 marzo de 1981.

⁸⁹ *Ibid* Article 5(e).

⁹⁰ Leontine van de Ven, Marcel Post, Luc de Witte & Wim van den Heuvel, “It takes two to tango: The integration of people with disabilities into society.” (2005) 20:3 *Disability and Society* at 311.

⁹¹ *Ibid* at 319.

⁹² Howe, *supra* note 27 at 302.

persons with disabilities to participate in and contribute to social life.

As per the above historical analysis, the trend through history has been towards inclusion of persons with disability, but in regard to disability sports specifically, there remains much work to be done. For instance, there may be a social (mis)understanding that winning a Paralympic medal is easier or less important than winning an Olympic medal. An example of this in Canada is provided by the 2004 award for 'Athlete of the Year' given by Athletics Canada. The award was given jointly to Chantel Petitclerc, who won 5 gold medals in wheelchair racing with world-record times at the 2004 Paralympics, and able-bodied hurdler Perdita Felicien, who, in the 2004 Olympics, finished the final heat in last place after falling on the first hurdle.⁹³ Given the discrepancy of achievement between the two athletes, it is perhaps unsurprising that Petitclerc refused to accept the award, citing that the joint-award is a symptom of Athletics Canada's perception that a Paralympic medal is easier to win than an Olympic medal.⁹⁴

The refusal garnered significant media attention and shining the spotlight on these types of issues is indeed essential to changing social perceptions about them—many people are uncomfortable with disability, and the best ways to change the stigma are through exposure and opening up space for meaningful discussion. Put simply, social perceptions are the limiting reagent in the integration and inclusion processes because attitudes take time to change. Optimism exists insofar as attitudes towards persons with disabilities seem to have changed considerably in the past half century.

At the heart of the participation of persons with disabilities in sport is dignity—an opportunity to take part in the same activities as everyone else in society and with the same level of respect. Indeed, research has demonstrated that for Special Olympics athletes and their families, the most important goals of the Special Olympics are improved self-esteem, improved self-confidence, and an improved relationship with others.⁹⁵ Considering that the

⁹³ Howe, *supra* note 27 at 302.

⁹⁴ *Ibid.*

⁹⁵ See Coreen Harada *et al*, *supra* note 80 at 11.

Special Olympics is a sports program, it is remarkable that the top goals emphasize social and personal aspects of participating in sport rather than athletic skill development.

With this in mind, why are rates of participation in sports for persons with disability not higher across the board? Before discussing solutions to remedy this issue, we must understand the barriers that contribute to it. Perhaps the perceived fear of failure or a low sense of self-worth act as deterrents for many people with disabilities from becoming involved in sport. This is especially true in the sporting context because sports are very likely to exacerbate the visibility of the physical differences that lead to these feelings and perceptions in the first place.⁹⁶ If these psychological barriers can be overcome, the benefits gained by participation in sport include improved physical conditioning along with a heightened sense of self-esteem and personal empowerment that spills over into other social pursuits.⁹⁷

Changing social perceptions is a gradual process and can be facilitated by opening space where people can be exposed to disability and become more comfortable with it—this amounts to a proactive approach to human development and well-being. Social inclusion entails “facilitating and empowering individuals to participate in society by minimizing both physical and social distances that exist between people,”⁹⁸ which catalyzes positive changes of social perception towards persons with disabilities. When persons with disabilities do not have either a voice or a means to participate in society, the social barriers they face are exacerbated in a vicious cycle—they remain out of sight and thus out of mind. Changing social perceptions around disability, specifically through the social inclusion of persons with disabilities, is the best solution to reverse the direction of this cycle. That being said, true inclusion is a “multifaceted and difficult process, which although it could be defined at a policy level rhetoric, [is] much

⁹⁶ Ian Brittain, “Sport for the Disabled as Social (Re)education and a (Re)builder of Lives” in Keith Gilbert & Will Bennett, *Sport, Peace and Development*, (Champaign, IL: Common Ground Publishing, 2012) 283 at 286.

⁹⁷ Ronald Berger, “Disability and the Dedicated Wheelchair Athlete: Beyond the ‘Supercrip’ Critique” (2008) 37:6 *J of Contemporary Ethnography* 647 at 650.

⁹⁸ Chiaki Inoue & Tanya Forneris, *supra* note 3 at 23.

less easy to define in reality.”⁹⁹ For this reason, we proceed to the third solution, which focuses on how the law can work to advance the rights of persons with disabilities to participate in sport.

Solution 3: Good law

Good law alone is not a panacea to guarantee rights. Indeed, the difficulty when exploring the success of integration policies is that the balance between the philosophical position of the law and the social reality is not always clear or equal. Along the same lines, laws that work in one country or context can easily be transplanted into another, but they will not invariably bring the same result. Nonetheless, if properly constructed, the law is certainly an advantageous tool for facilitating the realization of rights. Drawing from various contexts, this solution offers a description of what I term ‘best practice’ sport disability laws, and explains how these laws meet their objectives.

Renowned legal scholars such as Martha Minow have offered excellent descriptions of the law vis-à-vis effecting social change.¹⁰⁰ However, my view is that renditions of this ilk, which colour the law with ambiguous language and orotundity, are inadequate for enforcing the right to sport captured in this concrete and solution-based paper. To explain, while purposeful vagueness in a law is essential to its longevity and applicability over time, the right to participation in sports for persons with disability is finite in both scope and time. Thus, laws which postulate this right should derive from a different formula. As an alternative, I propose a novel tripartite formula for what a law needs to best accomplish its objective.

In order to advance the rights of persons with disabilities in sport, a law should contain a pointed objective, a concrete action plan, and clear resource commitments to achieve its objectives. Assuming proper enforcement, these three elements are what give proverbial teeth to the law. Although unrelated to

⁹⁹ Barbara Cole, “Good faith and effort? Perspectives on educational inclusion” (2005) 20 *Disability and Society*. 331 at 341.

¹⁰⁰ See Martha Minow, “Brown v. Board in the World: How the Global Turn Matters for School Reform, Human Rights, and Legal Knowledge” (2013) 50 *San Diego L. Rev.* 1; Martha Minow, “Law and social change” (1993) 62:1 *UMKC Law Rev* 62 171.

sports, a great example of a law that helps advance the rights of persons with disabilities is Argentine Law 19279, which was promulgated in 1971. This law is about helping persons with disabilities purchase cars by offering them various price concessions, with the intention of giving them a better chance at integrating fully into society.¹⁰¹ This law clearly canvasses a goal (art. 2) and specific measures to reach this goal, including concrete resource commitments (art. 3) such as offering persons with disabilities a subsidy worth 50% of the sale price of a new car.¹⁰² The specific measures that facilitate this objective give normative weight to the law, insofar as a person with a disability can point directly to black-letter law to show that their legal right has been violated. Evidently, the less ambiguity there is in the law, the less opportunity there is for adjudicators to gloss over violations of the legal right it carries. Put simply, without sufficiently precise measures in a law, the rights it purports to uphold are hollow.

It is important to acknowledge that these types of specific and pointed laws are susceptible to the valid criticism that laws of this nature undermine the natural growth and adaptability of the law. Indeed, one of the most significant challenges facing law-makers is to alleviate the tension between—on one hand—making laws specific enough that they actually enforce a legal right, and, on the other hand, making the laws general and vague enough so that they may be interpreted and applied to a variety of contexts. However, this criticism is rebuttable inasmuch as the right in question is specific and narrowly aimed at only a small portion of the population. In other words, a pointed law advancing a specific right to sport for persons with disabilities by its very nature need not apply to an overly broad audience. The purpose of a circumscribed law like this is to help level the metaphorical playing field for persons with disabilities regarding participation in or access to funding for sporting activities. Ideally, a law positing equality would translate to the expected social norm, and could subsequently be repealed with no adverse effects. In sum, my view is that laws which are specific are not designed to be everlasting legal tools—instead, they are tailored to be a short-term and quick-

¹⁰¹ Ley No. 19279. Automotores para lisiados. Buenos Aires. Promulgada: Abril 10 de 1971 at Article 2; Article 3.

¹⁰² 19279 art 3(a)

fix remedy to a social inequality. Therefore, in my opinion, laws with a pointed objective, an action plan, and resource commitments are the most appropriate to help advance the right to sport for persons with disabilities.

The aim of sport disability law, in line with Article 30.5, is to allow persons with disabilities to take a full and active role within sport. In my view, laws which postulate 'separate but equal' type policies for persons with disabilities and able-bodied persons, such as the Canadian *Policy on Sport for PWD* are the most averse because they allow disparate treatment among citizens under the guise of equality or affirmative action.¹⁰³

Instead, laws addressing sport participation should be *horizontally* universally inclusive, in the sense that all persons across society have an equal right to participate in sport. This could occur through a law similar to Title IX in the United States, which mandates equal opportunity for both genders in college athletics.¹⁰⁴ Although Title IX deals with gender, its underpinnings are analogous to disability in the sense that it purports to reconcile an historic lack of sporting opportunities for a segment of the population based on a personal characteristic. *Inter alia*, Title IX mandates that all universities must offer equal funding and an equal number of sports for males and females, and it has been extremely successful in doing exactly that.¹⁰⁵ It is not difficult to envision the enactment of a similar policy for persons with disabilities, which could increase the number of persons with disabilities in sport and help improve social perception of disabilities.

In addition to horizontal inclusivity, laws addressing sport participation for persons with disabilities should be *vertically* inclusive. In the context of CRPD Article 30.5, vertical inclusiveness can be defined as "the final stage of integration of people with disabilities in sport competition or organization, in which they are involved, accepted and respected at all levels of

¹⁰³See generally Mark Deal, "Aversive Disablism: Subtle prejudice toward disabled people" (2007) 22:1 *Disability and Society* 93 at 94; Carolina Ferrante, *supra* note 19 at 421-437.

¹⁰⁴ Title IX of the Education Amendments of 1972. 20 U.S.C. §1681 – 1688. Title 20 – Education. Chapter 38.

¹⁰⁵ *Ibid.*

the competition or organization.”¹⁰⁶ Envisaging how a law could achieve this, one way could be to stipulate equal access to concrete resources for persons with disabilities and able-bodied persons, especially at the elite level. The impact of vertically inclusive laws is twofold and similar to the overall goals of horizontal inclusiveness: first, it provides persons with disabilities equal access to tangible resources such as funding, and second, it promotes heterogeneity of athletes and thus erodes negative social stigmas.¹⁰⁷

Ultimately, good law can be effective in giving teeth to the enforcement of stipulated rights. However, in order for these rights to be realized, the essential elements of an objective, a plan of action, and specific measures to reach this objective must be present. Additionally, laws which entrench a right to sport for persons with disabilities should be both horizontally and vertically inclusive.

Solution 4: Frame the issue through economic incentives

The final proposed solution is to frame the lack of the fulfillment of the rights stipulated by Article 30.5 of the CRPD through an economic lens that emphasises the potential economic gains associated with these rights. Simply stated, this solution involves perturbing the cost-benefit analysis structures of decision-makers by incentivizing decisions that are conducive to giving persons with disabilities equal access to sporting opportunities. Framing the issue in a way that draws attention to the economic benefits left untapped in order to advance a human rights agenda is rooted in the historic ineffectiveness of traditional human rights language and discourse to effectuate real change.

Funding is most often the limiting factor for increasing opportunities and programmes—no matter what the context, each State has a finite limit of financial resources which results in a zero-sum-game regarding what it chooses to pursue. Offering programmes for persons with disabilities to participate in sport is

¹⁰⁶ Howard Nixon II, “Constructing Diverse Sports Opportunities for People with Disabilities” (2007) 31 J. Sport & Social Issues 417 at 419.

¹⁰⁷ Colin Higgs, Istvan Balyi & Richard Way, *No accidental champions: Long-Term Athlete Development for athletes with a disability [resource paper]*. (Vancouver: Canadian Sport Centres. 2006) at 1-17.

likely not very high on the priority list—especially for states on a tighter budget—because the benefits associated with providing these rights are normally conceptualized as being ‘morally good’ for society rather than as financially intelligent. In fact, however, the dollar-value of improving disability rights is not insignificant. According to several reports, the monetary loss due to marginalization of persons with disabilities amounts to roughly \$2 trillion USD each year.¹⁰⁸ More specifically, regarding the participation in sport for persons with disability, one study revealed that disability and wheelchair sports are an “international industry.”¹⁰⁹ For instance, 164 countries competed in the 2012 Paralympic Games,¹¹⁰ over 2.7 million tickets were sold to its events, and television coverage was accessible in over 100 countries.¹¹¹ Additionally, electronic coverage surged as over 5.1 million downloads took place on paralympic.org, while Facebook and Twitter followings swelled.¹¹² These figures are to illustrate that disability sports are much more than a mere ‘feel-good’ initiative for States. Instead, they are an untapped, potentially lucrative investment. To summarize, underlining the potential economic benefits associated with disability sports is an excellent means of fostering the rights for persons with disability in sport.

Final Thoughts

In the formative stages of this paper, I expected to find a significant gap in the opportunities to participate in sport for persons with disabilities available in Argentina and Canada. Likewise, the solutions I anticipated were to be informed by Canadian law and aimed at Argentina. However, after completing rigorous research and writing this piece, I discovered that there was no substantial gap. Indeed, even though the

¹⁰⁸ See UN World Health Organization, *supra* note 5; Robert Metts, “Background Paper Prepared for the Disability and Development Research Agenda Meeting in the World Bank” (World Bank Headquarters, Washington DC: World Bank, 2004); Rich Donovan, *“Translate Different Into Value, 2016 Annual Report: The Global Economics of Disability”* (New York: The Return on Disability group, 2016)

¹⁰⁹ Micheal Cottingham *et al*, *supra* note 86 at 11.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

Canadian legal system might be more advanced in terms of the rights to sport it claims to provide relative to the Argentine legal system, Argentine society has found non-legal means to reach the same ends. Namely, through civil society and community-based activism. This speaks volumes about what the law in practice can and cannot do.

The result of this paper is that the learning and process is not a one-way street from 'developed' to 'developing' countries; it is not simply a matter of transplanting policies across borders. To the contrary, the learning process and advancement of the right to sport for persons with disabilities should be bidirectional. While Argentina and other countries might have something to gain by adopting sound laws from Canada, the inverse also holds true: Canada and other countries might be better off if they espoused the civil society engagement lessons taught by countries like Argentina.

Ultimately, what matters is increasing opportunities for persons with disabilities in sport and in all aspects of life. With this, the theme of this paper comes full circle: society's task is to provide equal opportunities and capabilities for all so that individuals can pursue what makes them happy and live a good life. Viewing sport as a human right—as a capability—in this regard, both harmonizes and reconciles the fundamental importance of equal opportunity for persons with disability to participate in sport.

To conclude, the CRPD reminds us that, as human beings, persons with disabilities remain equal in their inherent dignity and self-worth with all other members of society and therefore are entitled to the full enjoyment of all of their human rights. Included among these is the right to sport and recreation. The benefits of a wholesale investment into buttressing the right for persons with disabilities in sport extend far beyond the intended domain. Indeed, the universal popularity of sport and the physical, social and economic developmental benefits derived from it, coupled with sport's unique ability to transcend linguistic, cultural and social barriers, make sport an excellent relational vehicle through which wider developmental goals can be catalyzed.

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