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# Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation and Play

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## SOCIAL RIGHTS AND THE RELATIONAL VALUE OF THE RIGHTS TO PARTICIPATE IN SPORT, RECREATION, AND PLAY

Janet E. Lord\* & Michael Ashley Stein\*\*

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## I. INTRODUCTION

People with disabilities, accounting for some ten percent of the world's population, or six hundred fifty million people, are among the most socially marginalized minority groups.<sup>1</sup> An estimated eighty percent of the disabled population lives in developing countries;<sup>2</sup> poverty and social exclusion are phenomena that persist for disabled persons across developing and developed countries alike.<sup>3</sup> Notwithstanding efforts by disability rights advocates to ensure the equality of people with disabilities, social and economic deprivation persists, entrenched and perpetuated by discrimination.<sup>4</sup> It is against this systemic background that in 2006 the United Nations (UN) General Assembly adopted the Convention on the Rights of Persons with Disabilities (CRPD or the Convention),<sup>5</sup> together with its Optional Protocol,<sup>6</sup> that lays out a human rights framework engaging the full spectrum of civil, political, economic, social and cultural rights.<sup>7</sup>

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<sup>1</sup> See UNITED NATIONS POPULATION FUND, *THE PROMISE OF EQUALITY: GENDER EQUITY, REPRODUCTIVE HEALTH AND THE MILLENNIUM DEVELOPMENT GOALS* at 3, U.N. Sales No. E.05.III.H.1 (2005), available at [http://www.unfpa.org/upload/lib\\_pub\\_file/493\\_filename\\_en\\_swp05.pdf](http://www.unfpa.org/upload/lib_pub_file/493_filename_en_swp05.pdf).

<sup>2</sup> Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 76 (2007).

<sup>3</sup> See SECOND ANNUAL REPORT ON THE IMPLEMENTATION OF USAID DISABILITY POLICY 2 (2000), [http://www.usaid.gov/about\\_usaid/disability/](http://www.usaid.gov/about_usaid/disability/) (click on link to pdf of the report in lower right-hand column).

<sup>4</sup> The Secretary General, *Social Development: Questions Relating to the World Social Situation and to Youth, Aging, Disabled Persons and the Family, Implementation of the World Programme of Action Concerning Disabled Persons and the United Nations Decade of Disabled Persons*, ¶ 5, delivered to the General Assembly, U.N. Doc. A/CONF.47/415 (Sep. 11, 1992). The United Nations points to these unfavorable conditions:

[C]urrent economic and social deterioration, marked by low-growth rates, high unemployment, reduced public expenditure, current structural adjustment programmes and privatization, have negatively affected programmes and services . . . . If the present negative trends continue, there is the risk that [persons with disabilities] may increasingly be relegated to the margins of society, dependent on ad hoc support.

*Id.*

<sup>5</sup> Convention on the Rights of Persons with Disabilities, opened for signature Mar. 30, 2007, 46 I.L.M. 433 [hereinafter Convention or CRPD]. The CRPD text, along with its drafting history, resolutions, and updated list of signatories and States Parties is posted on the United Nations Enable website at <http://www.un.org/esa/socdev/enable/rights/convtexte.htm>.

<sup>6</sup> Optional Protocol to the Convention on the Rights of Persons with Disabilities, opened for signature Mar. 30, 2007, 46 I.L.M. 433 [hereinafter Optional Protocol].

<sup>7</sup> See Stein, *supra* note 2, at 84-85. For earlier accounts that were drawn upon for this article, see Michael Ashley Stein & Janet E. Lord, *Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities*, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND*

The CRPD advances social rights in a way that may profoundly affect the development of emergent social rights jurisprudence<sup>8</sup> and advance human rights advocacy. Its comprehensive rights catalog allows direct invocation of social rights claims, eliminating the need to fit such claims within the framework of more established civil or political rights. Witness, for example, the discomfiture of social rights claims brought under the umbrella of civil and political rights before the European Convention on Human Rights,<sup>9</sup> or within the more progressive stance adopted by the Indian Supreme Court in its derivation of social rights under the constitutionally-granted right to life.<sup>10</sup> While asserting social rights under the aegis of well-established civil and political rights has met with some success, this strategy ultimately fails to advance the progressive development of social rights. It may in fact serve to limit their application as envisioned by the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>11</sup> among other social rights standards.<sup>12</sup>

Still, even under an energized progression of social rights cases in international and domestic courts,<sup>13</sup> rights relating to sport, recreation, leisure

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SCANDINAVIAN PERSPECTIVES (Oddný Mjöll Arnardóttir & Gerard Quinn eds., 2009); Michael Ashley Stein & Janet E. Lord, *The Normative Value of a Treaty as Opposed to a Declaration: Reflections from the Convention on the Rights of Persons with Disabilities*, in IMPLEMENTING THE RIGHT TO DEVELOPMENT 27-32 (Stephen P. Marks ed., 2008). See also Janet E. Lord & Michael Ashley Stein, *The Committee on the Rights of Persons with Disabilities*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (Philip Alston & Frédéric Mégret eds., forthcoming 2009) [hereinafter CRITICAL APPRAISAL].

<sup>8</sup> See Malcolm Langford & Jeff A. King, *Committee on Economic, Social and Cultural Rights: Past Present and Future*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 477, 490 (Malcolm Langford ed., 2008).

<sup>9</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, 232. See also International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3, 4-5 [hereinafter ICESCR].

<sup>10</sup> Beginning in 1978, the Indian Supreme Court, as well as some Indian domestic state courts, have derived a relatively robust set of social rights from the well-established, and progressively-interpreted, constitutional right to life. See SOCIAL RIGHTS JURISPRUDENCE, *supra* note 8, at 6. The Court did so by informing the content of the right to life by reference to constitutional principles. *Id.* The rationale for this stance was that the right to life was the “most precious human right” and “must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may . . . enhance the dignity of the individual and the worth of the human person.” *Id.* (quoting *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC).

<sup>11</sup> ICESCR, *supra* note 9.

<sup>12</sup> See, e.g., European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89, revised 1996.

<sup>13</sup> See Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, in SOCIAL RIGHTS JURISPRUDENCE 1, 3 (Malcolm Langford ed., 2008)

and play remain on the sidelines of human rights practice.<sup>14</sup> The inclusion of Article 30(5)<sup>15</sup> on sport, recreation, leisure and play in the CRPD makes participation in sport manifest in a realm of life largely ignored by the global human rights agenda. Long relegated to the margins of international human rights instruments, often in the context of provisions on employment,<sup>16</sup> the right to participate in sport and recreation has been regarded as a second-class right. Indeed, when stated in various human rights instruments, including the Universal Declaration of Human Rights<sup>17</sup> and the ICESCR,<sup>18</sup> these rights either are not as well-developed as other human rights or are absent altogether. Thus, the specific recognition of the right of persons with disabilities to participate in a wide array of recreational, sporting and leisure activities in the Convention

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(asserting that “[i]n the space of two decades, social rights have emerged from the shadows and margins of the human rights discourse and jurisprudence to claim an increasingly central place.”).

<sup>14</sup> See Michael Stein and Janet E. Lord, *Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities*, 13 TEX. J. ON C.L. & C.R. 167, 179 (2007) [hereinafter *Participatory Justice*]. The case law concerning rights to participate in sport or recreation is scant, and those cases addressing such rights in relation to persons with disabilities are even fewer. Those cases that do exist are highly skeptical about the applicability of disability rights protections to this realm. See, e.g., *Kiphart v. Saturn Corp.*, 74 F. Supp. 2d 769, 774-75 (M.D. Tenn. 1999) (rejecting socializing and participating in recreational activities as major life activities that are worthy of protection under the Americans with Disabilities Act), *rev'd on other grounds*, 251 F.3d 573 (6th Cir. 2001). See also *Buskirk v. Apollo Metals*, 116 F. Supp. 2d 591, 598 (E.D. Pa. 2000) (holding that “engaging in various athletics, driving, and performing household chores” are “not major life activities”). In the international human rights realm, the *Botta v. Italy* case exhibited similar skepticism with regard to a social rights claim brought under the European Convention on Human Rights. 26 Eur. Ct. H.R. 241 (1998). See *infra* note 157 and accompanying text. Casey Martin’s case regarding his legally prohibited disqualification from the Professional Golf Association Tour may be regarded as a high-water mark in this area of litigation. It was, however, very narrowly crafted, suggesting that its application to other cases is highly restricted. See generally *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

<sup>15</sup> See CRPD, *supra* note 5, at art. 30, ¶ 5.

<sup>16</sup> See ICESCR, *supra* note 9, at art. 7 (“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular . . . rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”).

<sup>17</sup> See Universal Declaration of Human Rights, G.A. Res. 217A, at art. 24, U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”).

<sup>18</sup> ICESCR, *supra* note 9, at art. 7.

breaks with previous practice and represents an important development in the articulation of social rights.<sup>19</sup>

This article considers the contributions of the CRPD to the development of social rights.<sup>20</sup> More specifically, it tracks the normative content of the social rights to participate in sport, recreation and play and considers the relationship of these rights to the substantive equality vision reflected in the Convention.<sup>21</sup> The article begins by charting the paradigmatic shift from a medical model of disability to a social model: a rights-oriented understanding of disability that makes possible an equality approach to dismantling persistent disability discrimination and social marginalization, isolation, and exclusion. Next, it analyzes the conceptual framework for social rights in the CRPD and the connection between State obligations to eliminate disability discrimination and social rights' guarantees for equal participation in sport, recreation, leisure and play. It further considers the content of CRPD's Article 30(5). Finally, it explores the implications of these rights for the expressive and socializing effects of the Convention.<sup>22</sup>

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<sup>19</sup> See generally INT'L DISABILITY IN SPORT WORKING GROUP, *SPORT IN THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES*, 6-8 (Eli Wolff et al. eds., 2007) [hereinafter UN SPORT], available at [http://assets.sportanddev.org/downloads/34\\_sport\\_in\\_the\\_united\\_nations\\_convention\\_on\\_the\\_rights\\_of\\_persons\\_with\\_disabilities.pdf](http://assets.sportanddev.org/downloads/34_sport_in_the_united_nations_convention_on_the_rights_of_persons_with_disabilities.pdf).

<sup>20</sup> The term "social rights" is used variously in the literature to encompass social rights only, economic and social rights or socio-economic rights, social welfare rights, or economic, social and cultural rights more generally. See Langford, *supra* note 12, at 3 n.1. The term as used herein specifically relates to CRPD Article 30(5) rights of participation in sport, recreation, leisure and play, though the CRPD articulates a full range of social rights provisions (e.g., education or adequate standard of living). CRPD, *supra* note 5.

<sup>21</sup> For further discussion on the substantive equality vision of the CRPD in the economic, social and cultural rights realm, see Janet E. Lord and Michael Ashley Stein, *Accessing Economic, Social and Cultural Rights: The Convention on the Rights of Persons with Disabilities*, in *EQUALITY AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (Malcolm Langford & Eibe Reidel eds., forthcoming 2009).

<sup>22</sup> For a consideration of the CRPD as a vehicle for social transformation, see generally Michael Ashley Stein & Janet E. Lord, *The United Nations Convention on the Rights of Persons with Disabilities as a Vehicle for Social Transformation*, in *NATIONAL MONITORING MECHANISMS OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES* 109 (Comisión Nacional de los Derechos Humanos de México, Network of the Americas & Office of the United Nations High Commissioner for Human Rights ed., 2008), available at [http://www.demotemp360.nic.in/2008/0805\\_libro\\_discapacidad.pdf](http://www.demotemp360.nic.in/2008/0805_libro_discapacidad.pdf).

## II. SOCIAL EXCLUSION AND THE SHIFT FROM MEDICAL PATHOLOGY TO SOCIALLY CONSTRUCTED REALITY

The adoption of the CRPD by the UN General Assembly in 2006 and its rapid entry into force by May 2008<sup>23</sup> shows a dramatic paradigm shift over the past quarter century, culminating in the recognition of persons with disabilities as holding an equal place in global society, while also advancing this underlying principle of equality.<sup>24</sup> During the past quarter century, there has been a shift from understanding disability narrowly, as a medical or charity issue that could only be addressed by certain professionals, to a human rights issue that seeks to dismantle socially constructed barriers.<sup>25</sup>

The social model framework reflected in the CRPD maintains that “it is the socially engineered environment, and the attitudes that are reflected in its construction, that play a central role in creating the condition termed “disability.”<sup>26</sup> This contrasts sharply with the medical model,

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<sup>23</sup> According to the Office of the High Commissioner for Human Rights, the CRPD is second only to the Convention on the Rights of the Child in being the most rapidly ratified human rights convention ever. U.N. Human Rights Council, U.N. High Commissioner for Human Rights, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary General: Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities*, U.N. Doc. A/HRC/10/48, ¶ 5 (Jan. 26, 2009).

<sup>24</sup> The CRPD is the first international human rights instrument that is both applicable to, and legally enforceable by, individuals on the basis of their disability status. Each of the seven core United Nations treaties is applicable to disabled persons to varying degrees in theory, but rarely in practice. At the same time, General Assembly resolutions explicitly referencing disability are not legally enforceable. For an additional treatment of implementing the CRPD at the domestic level, see Janet E. Lord and Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 WASH. L. REV. 449, 452-56 (2008) [hereinafter *Domestic Incorporation*]; for a further discussion of enforcing the CRPD via the Committee on the Rights of Persons with Disabilities, see Lord & Stein, in *CRITICAL APPRAISAL*, *supra* note 7.

<sup>25</sup> *National Council on Disability White Paper on Understanding the Role of an International Convention on the Human Rights of People with Disabilities* (prepared by Janet E. Lord) (June 12, 2002) [hereinafter *National Council on Disability*].

<sup>26</sup> *Participatory Justice*, *supra* note 14, at 170. In the view of one leading scholar, the social model is “nothing more or less fundamental than a switch away from focusing on the physical limitations of particular individuals to the way the physical and social environments impose limitations on certain groups or categories of people.” MICHAEL OLIVER, *SOCIAL WORK WITH DISABLED PEOPLE* 23 (1983). See also Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1397 (1993) (criticizing the Americans with Disabilities Act

which, in the realm of social rights and sport in particular, is premised on the concept of the broken body,<sup>27</sup> where persons with disabilities are benched on the sidelines from physical activity or from spectating. In the same way that ableism strips persons with disabilities of their sexuality,<sup>28</sup> so too does it erode the potential for athletic and social participation, along with the full array of needs associated with recreation, leisure and play. Thus, while classmates participate in gym class, the disabled student is sent to the library, assuming that she is among the minority of children with disabilities who receive adequate schooling.<sup>29</sup> The athlete with a hi-tech prosthesis is considered to be engaging in an "unnatural" act of running which confers an unfair advantage, thereby barring his participation in a race with able-bodied runners.<sup>30</sup> The wheelchair-user spectator at the sporting arena presents a fire hazard for non-disabled viewers.<sup>31</sup>

The shifting perspective of the social model, in contrast to the traditional medical model approach, reveals that the many factors exogenous to a disabled person's own limitations are really what determine the extent to which that individual will be able to function in a given society.<sup>32</sup> Physical or mental limitations have far less to do with the ability to participate in society than do "a variety of considerations related to public attitudes," most of which are "quite erroneous and misconceived."<sup>33</sup>

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[hereinafter ADA] as codifying the medical-social pathology model of disability, granting only limited rights of workplace access to persons with disabilities).

<sup>27</sup> See Ron Amundson, *Disability, Handicap, and the Environment*, 23 J. SOC. PHIL. 105, 105, 109-11 (1992).

<sup>28</sup> See generally MICHAEL OLIVER, *Understanding Disability: From Theory to Practice* (1996).

<sup>29</sup> Office of the United Nations High Commissioner on Human Rights, *Human Rights and Disability* 1, 206 (2002) (prepared by Gerard Quinn et al.) (noting that "only 2 percent of disabled children in developing countries have access to an education system"), available at <http://www.nhri.net/pdf/disability.pdf>.

<sup>30</sup> See Gregor Wolbring, *Oscar Pistorius and the Future Nature of the Olympic, Paralympic and Other Sports*, 5 SCRIPTED- J. LAW, TECH. & SOC'Y 139, 141 (2008), available at <http://www.law.ed.ac.uk/ahrc/script-ed/vol5-1/wolbring.pdf> (discussing the Pistorius case in which the South African double-amputee sprinter, Oscar Pistorius, was deemed ineligible to run in the Olympics because his prosthetic racing legs would give him a competitive advantage, a decision reversed by the Court of Arbitration for Sport).

<sup>31</sup> See Crystal Nix, *From a Wheelchair, Most Doors are Closed*, N.Y. TIMES, May 21, 1986, at C1, available at <http://query.nytimes.com/gst/fullpage.html?sec=health&res=9A0DE3DA1E3AF932A15756C0A960948260>.

<sup>32</sup> See Harlan Hahn, *Feminist Perspectives, Disability, Sexuality, and Law: New Issues and Agendas*, 4 S. CAL. REV. L. & WOMEN'S STUD. 97, 101 (1994); Amundson, *supra* note 27, at 105, 109-111 (1992). See also Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004) (applying the social model to the ADA).

<sup>33</sup> Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 859 (1966) ("Architectural barriers . . . make it very



The Convention responds to traditional models, situates disability within a social model framework and sketches the full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities. Such an understanding of disability rights sharply contrasts with earlier human rights instruments, which were neither disability rights-based nor social model oriented.<sup>34</sup> Beginning with the CRPD's preambulatory provisions, the Convention establishes that its purpose was to address the continuing social exclusion of disabled persons<sup>35</sup> and to recognize the many benefits that participation in sport by disabled persons may contribute to their respective societies.<sup>36</sup> The Convention also categorically affirms the social model of disability by describing it as a condition arising from "interaction with various barriers [that] may hinder their full and effective participation in society on an equal basis with others" instead of inherent limitations.<sup>37</sup> The following section provides an overview of the CRPD framework as a vital tool for

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difficult to project the physically handicapped into normal situations of education, recreation, and employment.") (quoting AMERICAN STANDARDS ASS'N., AMERICAN STANDARD SPECIFICATIONS FOR MAKING BUILDINGS AND FACILITIES ACCESSIBLE TO, AND USABLE BY, THE PHYSICALLY HANDICAPPED 3 (1961). See also Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 814 (1966) ("A disability is a condition of impairment, physical or mental, having an objective aspect that can usually be described by a physician . . . a handicap is the cumulative result of the obstacles which disability interposes between the individual and his maximum functional level.") (quoting HAMILTON, COUNSELING THE HANDICAPPED IN THE REHABILITATION PROCESS 17 (1950)).

<sup>34</sup> Reflecting neither the social model of disability nor indeed a rights-based approach to disability, previous core treaties failed to connect the realization of rights with those barriers experienced by persons with disabilities in their communities. See, e.g., U.N. Charter art. 1, para. 3 (expressing a core purpose of the UN to "achieve international co-operation in solving problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion . . ."); Universal Declaration of Human Rights, G.A. Res. 217A (III), arts. 1-2, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948) (proclaiming that "[a]ll human beings are born free and equal in dignity and rights" and are "entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

<sup>35</sup> See CRPD, *supra* note 5, at pmbl., ¶ k (expressing concern that in spite of soft laws "persons with disabilities continue to face barriers in their participation as equal members of society").

<sup>36</sup> See *id.* at pmbl., ¶ m (acknowledging that "full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty").

<sup>37</sup> See *id.* at art. 1 and pmbl., ¶ e.

the advancement of social rights of persons with disabilities, and more generally, the social rights of all persons.

### III. THE CRPD AND THE GENERAL FRAMEWORK FOR ADVANCING SOCIAL RIGHTS

#### A. Structure, Purpose and Definitions

The Convention's structure sets forth introductory articles,<sup>38</sup> articles of universal application,<sup>39</sup> articles addressing substantive rights,<sup>40</sup> articles establishing implementation and monitoring schemes,<sup>41</sup> and articles that set forth rules governing the CRPD's operation.<sup>42</sup> Notably, the Optional Protocol to the CRPD, adopted at the same time as the Convention itself, provides mechanisms for individual and group communications and an inquiry procedure, all of which present rich opportunities for developing social rights jurisprudence.<sup>43</sup>

Article 1 announces that the Convention's express 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."<sup>44</sup> It is notable for a human rights convention to state its purpose in a specific provision; the inclusion of this article makes clear that the CRPD is a rights-based instrument, thereby underscoring its goal of protecting human rights as opposed to disability prevention or social welfare.<sup>45</sup> Article 1 also conceives of disability as including, but not limited to, "long-term physical, mental, intellectual or sensory impairments."<sup>46</sup> As noted above, the Convention categorically affirms the social model of disability.<sup>47</sup>

Two disability-specific terms defined in Article 2 of the CRPD are central to the interpretation of non-discrimination under human rights law as

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<sup>38</sup> See *id.* at pmb., arts 1-2.

<sup>39</sup> See *id.* at arts. 3-9.

<sup>40</sup> See *id.* at arts. 10-30.

<sup>41</sup> See *id.* at arts. 31-40.

<sup>42</sup> See *id.* at arts. 41-50.

<sup>43</sup> See Optional Protocol, *supra* note 6.

<sup>44</sup> CRPD, *supra* note 5, at art. 1.

<sup>45</sup> Provisions stating the purpose of the treaty are a common feature of international environmental and other types of international agreements, but not of human rights conventions. See, e.g., United Nations Framework Convention on Climate Change, art. 2, May 9, 1992, 31 I.L.M. 849.

<sup>46</sup> CRPD, *supra* note 5, at art. 1.

<sup>47</sup> See *id.* at art. 1. Because these conceptual norms are set forth in the purpose article, it follows that States cannot enter permissible reservations to the normative contents of this article. See Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331 (prohibiting a State from entering a reservation to a treaty, *inter alia*, where the "reservation is incompatible with the object and purpose of the treaty").

it applies to persons with disabilities, including in the economic, social and cultural rights realm. "Discrimination on the basis of disability" includes "any distinction, exclusion or restriction on the basis of disability" that "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" and extends to "all forms of discrimination, including denial of reasonable accommodation."<sup>48</sup> Disability discrimination therefore applies to disabled persons themselves, but may also be applied relationally to those persons who are associated with a person with a disability such as family members or caregivers. The recognition of associational discrimination represents one of the more significant contributions of the Convention to equality and non-discrimination law. Article 2 similarly defines the notion of reasonable accommodation as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden" that ensure disabled persons "the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."<sup>49</sup>

#### B. *Principles and Articles of General Application*

Article 3 catalogs the Convention's general principles, which include respect for individual dignity, autonomy, and independence; respect for difference and acceptance of disability as human diversity; non-discrimination; equal opportunity; complete and meaningful participation; accessibility; sexual equality; and respect for children's rights and support of their evolving capabilities.<sup>50</sup> The inclusion of a general principles article is an innovation that will serve to guide the interpretation of the entire text of the treaty.<sup>51</sup> Its application to social rights provisions is fundamentally important because principles of participation, autonomy and independence reinforce inclusive approaches to social rights implementation as opposed to segregation. In weighing whether a State has met its obligation to respect, protect and fulfill the rights to participate in sport, recreation, leisure and play, the general principles of the CRPD must be used to inform the interpretation of the Article 30(5) obligation.

General obligations of States Parties are laid out in Article 4.<sup>52</sup> States Parties are obliged to undertake measures that will ensure the promotion and "full realization of all human rights and fundamental freedoms" under the CRPD "for all persons with disabilities," while also prohibiting

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<sup>48</sup> CRPD, *supra* note 5, at art. 2.

<sup>49</sup> *Id.*

<sup>50</sup> *See id.* at art. 3, ¶¶ a-h.

<sup>51</sup> It should be noted that the CRPD is the first human rights convention to include a provision specifically outlining general principles, thereby providing an interpretive tool to guide the application of specific obligations.

<sup>52</sup> *See* CRPD, *supra* note 5, at art. 4.

any form of discrimination in their attainment.<sup>53</sup> In addition, States Parties must progressively take measures to realize economic, social and cultural rights to the maximum extent of their available resources.<sup>54</sup> In keeping with treaty body jurisprudence, this will require States Parties to “move as expeditiously and effectively as possible” towards full realization of rights.<sup>55</sup>

The CRPD combines the insights of the social model of disability together with a robust non-discrimination and equality framework that applies across its rights catalog, inclusive of civil and political, as well as economic, social and cultural rights. The non-discrimination and equality provisions are set forth in Article 5, which requires States Parties to ensure the equality of individuals with disabilities, as well as prohibiting any discrimination because of disability status.<sup>56</sup> In doing so, the CRPD requires States Parties’ recognition “that all persons are equal before and under the law” and therefore entitled “to the equal protection and equal benefit of the law” free of any discrimination.<sup>57</sup> States Parties also must “prohibit all discrimination on the basis of disability,” ensure that persons with disabilities have “equal and effective legal protection” against all manners of discrimination,<sup>58</sup> and “take all appropriate steps to ensure that reasonable accommodation is provided.”<sup>59</sup> The Convention further stipulates that specific measures required to “achieve de facto equality of persons with disabilities” may not be deemed discriminatory.<sup>60</sup>

The CRPD thus renders traditional distinctions between formal and substantive equality largely irrelevant by providing broad mandates and setting forth an equality framework that reflects and expands upon formal equality.<sup>61</sup> These are among the more significant contributions of the

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<sup>53</sup> See *id.* at art. 4, ¶ 1.

<sup>54</sup> The structure of the CRPD clarifies the relationship between non-discrimination and equality and economic, social, and cultural rights insofar as Article 5 (Non-Discrimination and Equality) and Article 3 (General Principles) are not stand-alone articles. Rather, they are articles of general application to be applied horizontally across the CRPD rights spectrum. See CRPD, *supra* note 5, at art. 4, ¶ 2.

<sup>55</sup> U.N. Comm. on Econ., Soc., & Cultural Rights, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 9, General Comments 3, 20, HRI/GEN/1/Rev.5 (Apr. 26, 2001).

<sup>56</sup> CRPD, *supra* note 5, at art. 5.

<sup>57</sup> *Id.* at art. 5, ¶ 1.

<sup>58</sup> *Id.* at art. 5, ¶ 2.

<sup>59</sup> *Id.* at art. 5, ¶ 3.

<sup>60</sup> *Id.* at art. 5, ¶ 4.

<sup>61</sup> The received normative theories of equality (and by implication, non-discrimination) found in international human rights law may be categorized as follows: (i) formal equality wherein similarly situated persons are treated similarly with the aim of equalizing opportunity; and (ii) substantive equality (equality of results) which assesses whether targeted individuals achieve *de facto* equality. See Office of the United Nations High Commissioner on Human Rights, *Human Rights*

CRPD to principles of non-discrimination and equality as applied to economic, social and cultural rights. This scheme makes explicit the recognition that non-discrimination provisions couched in human rights conventions are not “stand alone” rights that exist in a vacuum, disconnected from more specific substantive rights. Trenchantly, this understanding embraces the essential interrelatedness, indivisibility and interconnectedness of human rights.<sup>62</sup> In this sense, these provisions foster the full realization of the rights articulated in the Convention.

Following Article 5 are thematic articles of general application to be horizontally integrated across the CRPD. These include specific articles on the rights of women with disabilities<sup>63</sup> and children with disabilities.<sup>64</sup> Article 8 targets the underlying attitudinal causes of disability-based discrimination by requiring States Parties to raise public awareness and provides a list of illustrative measures.<sup>65</sup> The awareness-raising provision reflects parallel provisions in human rights conventions combating gender and race discrimination.<sup>66</sup> Article 8 reflects a core idea of the social model of disability, namely, that constructions in the socially created (and amendable) environment serve to reinforce persistent discrimination against persons with disabilities and that formal equality measures alone will not suffice in redressing such exclusion. Transforming mindsets and prompting attitudinal shifts are essential components in tackling discrimi-

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*and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* 16-18 (2002) (prepared by Gerard Quinn et. al.). As articulated by Smita Narula in her study of caste-based discrimination and social exclusion, “[i]f formal equality aims at equal opportunity, then substantive equality aims at equal results by considering the social structures in which equal results would not necessarily result from formal equality guarantees. See Smita Narula, *Equal by Law, Unequal by Caste: The “Untouchable” Condition in Critical Race Perspective*, 26 WIS. INT’L L. J. 255, 288 (2008).

<sup>62</sup> The CRPD recognizes, in its Preamble, the conceptualization of rights as “indivisible, interrelated and interconnected.” CRPD, *supra* note 5, at pmb., ¶ c. This concept was drawn from the Vienna Declaration. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc A/CONF.157/24 (July 12, 1993), available at <http://www2.ohchr.org/english/law/pdf/vienna.pdf> [hereinafter Vienna Declaration].

<sup>63</sup> See CRPD, *supra* note 5, at art. 6.

<sup>64</sup> See *id.* at art. 7. Other individuals with disabilities subject to multiple forms of discrimination are acknowledged in the Preamble. *Id.* at pmb., ¶ p (“Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.”) (emphasis in original).

<sup>65</sup> *Id.* at art. 8, ¶ 1.

<sup>66</sup> *Id.* For parallel provisions pertaining to awareness-raising in the racial discrimination context, see International Convention on the Elimination of All Forms of Racial Discrimination, G.A. RES. 2106 (XX), ART. 7, U.N. GAOR, SUPP. NO. 14, U.N. Doc. A/6014 (DEC. 21, 1965).

nation that results in inequality. This acknowledgement of social transformation's role in advancing the rights of persons with disabilities under the CRPD could also be applied to other socially marginalized groups to address, for example, racism and caste-based discrimination.<sup>67</sup> It likewise calls to mind the much-neglected but increasingly appreciated role that participatory human rights education can have in facilitating such transformation.<sup>68</sup>

Last among the articles of general application is Article 9, which seeks to dismantle barriers erected on account of discriminatory attitudes by promoting different forms of accessibility<sup>69</sup> in the public and private spheres, including physical, technological, economic and social accessibility, as well as information and communication accessibility.<sup>70</sup> The reference to public and private spheres, together with Article 4's obligation to eliminate disability discrimination "by any person, organization or private enterprise,"<sup>71</sup> is significant considering that sport and recreational programs are both publicly and privately operated. Accessibility in this regard is to be applied across the Convention both by virtue of Article 9, as well as by its inclusion as a general principle in Article 3.<sup>72</sup> The role that barriers play in reinforcing the social exclusion of persons with disabilities underscores the rationale for giving prominence to accessibility in the CRPD. Accessibility as an article of general application thus gives further traction to social rights claims and should help animate rights of participation in sport, recreation and play for persons with disabilities.

### C. Overview of Specific Substantive Articles

Because the Convention is a comprehensive human rights treaty, its substantive articles run the gamut of life activities in clarifying those human rights to which all persons are entitled within a disability-specific context. These elemental protections include fundamental freedoms such as the right to life,<sup>73</sup> freedom from torture,<sup>74</sup> the right to education,<sup>75</sup> employment,<sup>76</sup> political participation,<sup>77</sup> legal capacity,<sup>78</sup> access to jus-

<sup>67</sup> See Narula, *supra* note 61, at 266-67 (offering one of the more thoughtful analyses of the failure of the human rights project to fully address deeply ingrained prejudice that fuels inequality and renders formal equality strategies ineffective).

<sup>68</sup> See Lord & Stein, *supra* note 22, at n.95 (arguing that participatory human rights education "may assume an important role in fostering the expressive value of the CRPD").

<sup>69</sup> See CRPD, *supra* note 5, at art. 9.

<sup>70</sup> See *id.* at art. 9, ¶ 1.

<sup>71</sup> CRPD, *supra* note 5, at art. 4, ¶ e.

<sup>72</sup> See *id.* at art. 3.

<sup>73</sup> See *id.* at art. 10.

<sup>74</sup> See *id.* at art. 15.

<sup>75</sup> See *id.* at art. 24.

<sup>76</sup> See *id.* at art. 27.

<sup>77</sup> See CRPD, *supra* note 5, at art. 29.

tice,<sup>79</sup> freedom of expression and opinion,<sup>80</sup> privacy,<sup>81</sup> participation in cultural life, sports and recreation (discussed in more detail below),<sup>82</sup> respect for home and family,<sup>83</sup> personal integrity,<sup>84</sup> liberty of movement and nationality,<sup>85</sup> liberty and security of the person,<sup>86</sup> and adequate standard of living.<sup>87</sup> Although several articles might seem to embody newly created rights, they were in fact included in order to direct the means by which other Convention rights are realized.<sup>88</sup> For example, the articles on living independently,<sup>89</sup> personal mobility,<sup>90</sup> and habilitation and rehabilitation<sup>91</sup> are central if other more historically recognized human rights (like employment) are to be achieved.<sup>92</sup>

#### D. *Monitoring and Implementation Measures*

Ten subsequent articles set forth implementation and monitoring measures.<sup>93</sup> The Optional Protocol also sets forth such measures and mandates that the Committee on Persons with Disabilities accept and deliberate on individual and group complaints regarding alleged violations of the CRPD.<sup>94</sup> Included among the monitoring and implementation measures are provisions addressing the collection of disability-related data to counter the lack of comparative information that impedes rights realization.<sup>95</sup> A separate CRPD provision on international cooper-

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<sup>78</sup> See *id.* at art. 12.

<sup>79</sup> See *id.* at art. 13.

<sup>80</sup> See *id.* at art. 21.

<sup>81</sup> See *id.* at art. 22.

<sup>82</sup> See *id.* at art. 30.

<sup>83</sup> See *id.* at art. 23.

<sup>84</sup> See *id.* at art. 17.

<sup>85</sup> See *id.* at art. 18.

<sup>86</sup> See *id.* at art. 14.

<sup>87</sup> See *id.* at art. 28.

<sup>88</sup> See United Nations Department of Economic and Social Affairs, *Convention on the Rights of Persons with Disabilities: Why a Convention?*, <http://www.un.org/disabilities/convention/pdfs/qna.pdf> (last visited Mar. 16, 2009).

<sup>89</sup> See CRPD, *supra* note 5, at art. 19.

<sup>90</sup> See *id.* at art. 20.

<sup>91</sup> See *id.* at art. 26.

<sup>92</sup> See generally Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203 (2007).

<sup>93</sup> See CRPD, *supra* note 5, at arts. 31-40.

<sup>94</sup> See Optional Protocol, *supra* note 6, at art. 6. The Optional Protocol also includes a procedure of inquiry that allows human rights monitoring systems to initiate investigations, particularly those regarding egregious or systematic human rights violations. *Id.* A procedure of inquiry is triggered in cases where the Committee receives "reliable" information relating to "grave or systematic violations" of convention obligations by a State Party. *Id.*

<sup>95</sup> See CRPD, *supra* note 5, at art. 31.

ation recognizes that partnerships with other States, relevant international and regional organizations, and civil society supports national level implementation of State Party obligations.<sup>96</sup> Notably, Article 32 makes it clear that all of these collaborative efforts, including international development programmes (which have historically excluded a disability dimension), should be accessible and fully inclusive of persons with disabilities.<sup>97</sup>

Ten subsequent articles set forth implementation and monitoring measures,<sup>98</sup> as does the Optional Protocol, which mandates the Committee on the Convention on Persons with Disabilities to accept and deliberate upon individual and group complaints regarding alleged violations of the CRPD.<sup>99</sup> Among the monitoring and implementation measures are provisions on the collection of disability-related data to counter the traditional dearth of comparative information that impedes rights realization.<sup>100</sup> A separate CRPD provision on international cooperation recognizes that partnerships with other States, relevant international and regional organizations, and civil society support national-level implementation of State Party obligations.<sup>101</sup> Notably, Article 32 makes it clear that all of these collaborative efforts, including international development programmes (which have historically excluded a disability dimension), should be accessible and fully inclusive of persons with disabilities.<sup>102</sup>

Effective implementation of the CRPD at the national level requires States Parties to “designate one or more focal points” within their gov-

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<sup>96</sup> See *id.* at art. 32.

<sup>97</sup> See *id.* at art. 32(1)(a). For a comprehensive treatment, see Janet E. Lord & Katherine N. Guernsey, *Convention Document Working Group Draft Text Commentary: A Legal Commentary on the Draft Convention Text Produced by the Working Group for the UN Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* (March 2004).

<sup>98</sup> See CRPD, *supra* note 5, at arts. 31-40.

<sup>99</sup> See Optional Protocol, *supra* note 6, at art. 6. The Optional Protocol also includes a procedure of inquiry, employed within some human rights monitoring systems to allow the initiation of investigations, particularly regarding egregious or systematic human rights violations. See *id.* A procedure of inquiry is triggered in cases where the Committee receives “reliable” information relating to “grave or systematic violations” of convention obligations by a State Party. *Id.*

<sup>100</sup> See CRPD, *supra* note 5, at art. 31.

<sup>101</sup> See *id.* at art. 32.

<sup>102</sup> See *id.* at art. 32, ¶ 1. For a comprehensive treatment, see Janet E. Lord & Katherine N. Guernsey, *Convention Document Working Group Draft Text Commentary: A Legal Commentary on the Draft Convention Text Produced by the Working Group for the UN Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* (March 2004).



ernments for the Convention's application.<sup>103</sup> Further, States are urged to consider creating or designating a coordination mechanism within their governments to ensure greater application across government sectors.<sup>104</sup> The CRPD also requires States Parties to establish and/or support one or more independent mechanisms separate from the government to "promote, protect and monitor" the Convention's implementation.<sup>105</sup> Finally, Article 33 mandates that persons with disabilities and their representative organizations must "be involved and participate fully in the monitoring process."<sup>106</sup>

#### IV. THE SOCIALIZING RIGHT TO PARTICIPATE IN SPORT, RECREATION, AND PLAY

Article 30 of the CRPD expresses the right to participate in cultural life as well as sport, recreation and leisure.<sup>107</sup> Though under-theorized in the human rights literature and largely ignored in human rights practice, Professor Jacobus tenBroek, a noted constitutional and disability rights scholar, was among the first to recognize the connection between inclusion on the one hand and the participation of persons with disabilities in sport and recreation on the other, noting the power of participation as a vehicle for inclusion and a social change conveyor.<sup>108</sup> Increasingly, the role of sport and recreation in the lives of persons with disabilities is emerging from the shadows to occupy a place on the policy agenda. The European Union, for example, makes reference to the role of sport "as a factor for improving the quality of life, self-esteem, independence and social integration of people with disabilities" in its 2006-2007 European Action Plan.<sup>109</sup>

##### A. *Social Rights Exclusion*

Isolation from socialization opportunities such as sport, recreation and play serves to reinforce internalized oppression and disconnection from others for persons with disabilities.<sup>110</sup> The tendency of traditional disabil-

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<sup>103</sup> CRPD, *supra* note 5, at art. 33, ¶ 1.

<sup>104</sup> *See id.*

<sup>105</sup> *Id.* at art. 33, ¶ 2.

<sup>106</sup> *Id.* at art. 33, ¶ 3.

<sup>107</sup> *See id.* at art. 30, ¶ 1, art. 30, ¶ 5, § (b).

<sup>108</sup> *See Participatory Justice, supra* note 14, at 172-73.

<sup>109</sup> EUROPEAN PARLIAMENT, SITUATION OF DISABLED PEOPLE IN THE ENLARGED EUROPEAN UNION: THE EUROPEAN ACTION PLAN (2006-2007), available at <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=INI/2006/2105>

<sup>110</sup> *See National Council on Disability, supra* note 25, at 5. *See also* HARVEY JACKINS, THE RECLAIMING OF POWER (1st ed. 1983); DAVID HUTCHINSON & CAROL TENNYSON, TRANSITION TO ADULTHOOD: A CURRICULUM FRAMEWORK FOR STUDENTS WITH SEVERE PHYSICAL DISABILITY (1986) (discussing disability oppression in the context of childhood). Relatedly, internalized oppression serves to

ity programming to segregate and thus perpetuate the exclusion of disabled persons from mainstream life has prompted the drafters of the CRPD to graft onto the text a broad array of interpretive principles and core concepts to be applied across its provisions.<sup>111</sup> These substantive rights, combined with fundamental disability principles, are intended to work in combination to break down intransigent barriers in all realms of life and to make participation in society possible.<sup>112</sup> It remains the case that the extent of isolation and exclusion of persons with disabilities from their communities is under-reported or not at all acknowledged in human rights practice.<sup>113</sup>

The exclusion of children with disabilities from play and more structured forms of recreation can stifle both mental and physical well-being.<sup>114</sup> Children with disabilities, when they are included in educational systems, often are not appropriately accommodated, thus undermining the goal of socialization that can be achieved in both the classroom as well as during physical education and non-structured

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isolate other marginalized groups in society. See G. Pheterson, *Alliances Between Women: Overcoming Internalized Oppression and Internalized Domination*, in BRIDGES OF POWER: WOMEN'S MULTICULTURAL ALLIANCES 34, 45 (Lisa Albrecht & Rose M. Brewer eds., 1990); INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, THE PERSISTENCE AND MUTATION OF RACISM 20-21 (2000) (discussing the ways in which those oppressed by racism respond to their marginalization in society), available at [http://www.ichrp.or/files/reports/26/112\\_report\\_en.pdf#search='THE PERSISTENCE AND MUTATION OF RACISM.'](http://www.ichrp.or/files/reports/26/112_report_en.pdf#search='THE PERSISTENCE AND MUTATION OF RACISM.')

<sup>111</sup> See CRPD, *supra* note 5, at art. 3.

<sup>112</sup> Gerard Quinn makes a similar point in relation to the important revisions to the European Social Charter, which substantially revised the disability-related provision (Article 15) and added a non-discrimination provision (Article E). See Gerard Quinn, *The European Social Charter and EU Anti-discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose*, in SOCIAL RIGHTS IN EUROPE 279, 285-86 (Gráinne de Búrca & Bruno de Witte eds., 2005).

<sup>113</sup> See *National Council on Disability*, *supra* note 25, at 23.

"Organizations devoted to the protection of human rights have generally failed to focus on abuses against people with disabilities or to develop the capacity to investigate and report on disability-based human rights violations. In some instances, well-meaning humanitarian assistance organizations have unwittingly perpetuated human rights abuses against people with disabilities through "charity" programs that serve to perpetuate discriminatory programs that ultimately disempower people with disabilities."

*Id.*

<sup>114</sup> See, e.g., HUTCHINSON, *supra* note 110 (discussing disability oppression in the context of childhood). There is a well-developed literature on the role of play in ensuring the well-being of children with disabilities. See, e.g., Ellen M. Hamm, *Playfulness and the Environmental Support of Play in Children With and Without Developmental Disabilities*, 26 OCCUPATION, PARTICIPATION AND HEALTH 88, 95 (2006); Leasha M. Barry & Suzanne B. Burlew, *Using Social Stories to Teach Choice and Play Skills to Children with Autism*, 19 FOCUS ON AUTISM AND OTHER DEVELOPMENTAL DISABILITIES 45 (2004).

play.<sup>115</sup> One of the fundamental human rights infringements documented by disabled people's organizations (DPOs) that report on abuses in various orphanages or mental health institutions for children with disabilities is a lack of stimulation, which could be countered through sport, recreational and cultural activities.<sup>116</sup>

Organizations responsible for reporting disability rights have documented persistent abuses in which both adults and children with disabilities who are housed in institutional settings are denied their right to access or participate in sport, recreation or play.<sup>117</sup> In its most extreme and abusive form, children with disabilities are tied to furniture, caged, and/or rendered immobile all day, often on the basis of an alleged strategy of protection by institution staff.<sup>118</sup> Failures in this context clearly contribute to other human rights violations, such as the right to the highest attainable standard of health, thereby underscoring the interrelatedness of rights.<sup>119</sup> The CRPD's commitment to inclusion and substantive equality in all aspects of life represents a potentially powerful response to social exclusion and its deleterious effects.

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<sup>115</sup> See MARK C. WEBER, *DISABILITY HARASSMENT* 6 (2007) (cataloging school-based failures to accommodate children with disabilities, including harassment in schools, and noting that the "[l]ack of daily contact at a level of true equality with persons with disabilities promotes and constantly reinforces stereotypes").

<sup>116</sup> This is well-documented in each of the following reports by the international non-governmental organization, Mental Disability Rights International (hereinafter MDRI), see MDRI, *Ruined Lives: Segregation from Society in Argentina's Psychiatric Asylums* (2007); MDRI, *Hidden Suffering: Romania's Segregation and Abuse of Infants and Children with Disabilities* (2006); MDRI, *Behind Closed Doors: Human Rights Abuses in the Psychiatric Facilities, Orphanages and Rehabilitation Centers of Turkey* (2005); MDRI, *Human Rights and Mental Health in Peru* (2004); MDRI, *Not on the Agenda: Human Rights of People with Mental Disabilities in Kosovo* (2002); MDRI, *Human Rights & Mental Health: Mexico* (2000) (unavailable on website noted below); MDRI, *Children in Russia's Institutions: Human Rights and Opportunities for Reform* (1999) (Russian only); MDRI, *Human Rights & Mental Health: Hungary* (1997); [hereinafter MDRI Reports]. Many of these reports are available at <http://www.mdri.org> (hover cursor over "our work"; then follow "MDRI reports and publications" hyperlink).

<sup>117</sup> See generally *id.*

<sup>118</sup> See MENTAL DISABILITY ADVOCACY CENTER, *CAGE BEDS: INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT IN FOUR EU ACCESSION COUNTRIES* 9, 30 (2003) available at [http://www.mdac.info/documents/118\\_MDAC\\_Cage\\_Bed\\_Report.pdf](http://www.mdac.info/documents/118_MDAC_Cage_Bed_Report.pdf) (documenting cage bedding abuses).

<sup>119</sup> See World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/24 (July 12, 1993), available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En).

### B. *Defining CRPD Rights of Participation in Sport*

Article 30 of the CRPD recognizes a number of specific measures designed to enhance participation in various realms of social as well as cultural life.<sup>120</sup> In so doing, the Convention recognizes that people with disabilities are full participants in the social and cultural life of their communities as professional and amateur athletes, engaged spectators, tourists, artists, musicians, scholars and actors and audience. For Professor Ann Hubbard, who has written thoughtfully on conceptualizing the full range of activity that encompasses the “major life activity of belonging,” the sport, recreation and play domain, far from being trivial, is essential for fully realizing the human rights promise.<sup>121</sup>

The CRPD articulates the scope of the right of persons with disabilities to participate in sport, recreation and leisure, as well as the right of disabled children to play, in the fullest expression seen to date in a human rights convention.<sup>122</sup> Under the CRPD, States must encourage and promote the inclusion of persons with disabilities in mainstream sporting activities.<sup>123</sup> Applying the general principles of the CRPD to this provision, people with disabilities have the right to enjoy equal access to sport (at all levels) and recreational facilities (such as swimming pools and playgrounds) and must be reasonably accommodated in exercising their

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<sup>120</sup> CRPD, *supra* note 5, at art. 30. These include the duty of States to take measures to support access to places where cultural performances or services are held, “such as theatres, museums, cinemas, libraries and tourism services.” *Id.* at art. 30, ¶ 1. It also includes, as far as possible, “access to monuments and sites of national cultural importance.” *Id.* The CRPD affirms the right of people with disabilities to develop “their creative, artistic, and intellectual potential” for both individual and societal benefit. *Id.* at 30, ¶ 2. Article 30 also expresses the duty of States “to ensure that laws protecting intellectual property rights do not” present “unreasonable or discriminatory barrier[s]” in access to cultural materials by persons with disabilities. *Id.* at 30, ¶ 3. This includes translating books and other material into Braille, providing audio cassettes or providing sign language or forms of accessible technology for artistic performances. *Id.* at 30, ¶ 4. The right of persons with disabilities to equal recognition and support of their “cultural and linguistic identity” is likewise a fundamental cultural right expressed in article 30, *id.*, and serves to further facilitate participation in society on one’s own terms, including, for example, the right to use sign language, as well as the recognition and support of deaf culture. *Id.*

<sup>121</sup> Anne Hubbard, *The Major Life Activity of Belonging*, 39 WAKE FOREST L. REV. 217, 218, 267 (2004).

<sup>122</sup> See CRPD, *supra* note 5, at art. 30, ¶ 5.

<sup>123</sup> “Inclusion” in this context has been 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 the competition or organization.” Howard L. Nixon II, *Constructing Diverse Sports Opportunities for People with Disabilities*, 31 J. SPORT & SOCIAL ISSUES 417, 419 (2007); see also *Participatory Justice*, *supra* note 14, at 180 n.139.

rights.<sup>124</sup> Article 30(5) requires States to provide opportunities for participation in both disability-specific sport and recreation (e.g., wheelchair basketball) and mainstream sport programming.<sup>125</sup> It further affirms the rights of persons with disabilities to organize, develop, and participate in sport and recreation with other persons with disabilities, which includes activities organized specifically for persons with disabilities in both mainstream programs as well as disability-specific sport.<sup>126</sup>

In addition to ensuring their right to access and to use sporting, recreational and tourism facilities such as sport arenas, community pools, and recreational facilities, States also must take specific measures to ensure that persons with disabilities are included as recipients of services and programming by organizers.<sup>127</sup> Finally, Article 30 recognizes the right of children with disabilities to play and to participate in recreation, leisure and sporting activities in the school system.<sup>128</sup> This includes access to playgrounds and other child-specific sport, recreation and play venues in the community and adaptive physical education in schools.<sup>129</sup>

Regarding the modalities of the right to participate in sport, recreation and play, States Parties, through the reporting obligation, should be exhorted to provide specific information that fully supports the Convention's underlying focus on equality. In this respect, Article 3 and other

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<sup>124</sup> The ADA, for example, covers twelve categories of private establishments open to the public, most of which are directly relevant for sport, recreation, leisure and play: restaurants and bars; theaters and sports arenas; retail stores (such as sport shops); professional offices; service providers (such as bike repair shops); zoos and amusement parks; museums, libraries and galleries; schools, day care centers, senior centers and homeless shelters; and gyms, spas and recreation facilities. 42 U.S.C. § 12181(7) (2000).

<sup>125</sup> CRPD, *supra* note 5, at art. 30, ¶ 5 (calling on States "[t]o encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels").

<sup>126</sup> *See id.* at art. 30, ¶ 5, § (b) (requiring States to take measures "[t]o ensure that persons with disabilities have an opportunity to organize, develop, and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources").

<sup>127</sup> *See id.* at art. 30, ¶ 5, § (e) (requiring States "[t]o ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities"); art. 30, ¶ 5, § (c) (requiring States to take measures "[t]o ensure that persons with disabilities have access to sporting, recreational and tourism venues").

<sup>128</sup> *See id.* at art. 30, ¶ 5, § (d) (calling on States "[t]o ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system").

<sup>129</sup> *Id.* For a helpful overview of the meaning of play and recreation within the context of child rights, see UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD (3d ed. 2002) (hereinafter UNICEF HANDBOOK).

articles of general application must animate the reporting process. States therefore should provide information on a range of issues which could include, by way of illustration, the following: (1) whether and how persons with disabilities and their representative organizations are engaged in meaningful consultation on law, policy and programming in the areas of sport, recreation and play; (2) what the legislative base is for guaranteeing Article 30(5) rights; (3) what specific measures have been put in place to ensure access to sporting and recreational facilities, such as accessibility guidelines to direct implementation; (4) whether and how school physical education curriculum and play periods are adjusted or adapted to accommodate children with disabilities; and (5) whether and how individualized educational plans are crafted in a way so as to include sport and play for students with disabilities.

In addition to ensuring that general principles and other articles expressing the equality framework of the CRPD are applied in relation to Article 30(5), the general obligations set forth in Article 4 make clear the need to ground Convention obligations in national law, policy and programming, in consultation with persons with disabilities. Relatedly, the European Committee for Social Rights, in its dialogue with States, has affirmed the idea that undertaking specific measures in the pursuit of economic, social and cultural rights is not enough to satisfy its obligations. Rather, measures must be coherent and coordinated as part of a complementary system of achieving equality. Of special relevance for implementing social rights, the Committee has stated that “[w]hen the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress, and to an extent consistent with the maximum use of available resources.”<sup>130</sup> This is perhaps one of the strongest expressions of the importance of making social rights a reality and, if applied in relation to the social rights of disabled persons, can advance visibility for a largely invisible minority. Article 4 obligations require that Article 30(5) obligations must be reinforced in the domestic legislative framework.

### C. *The Expressive Law Potential of Social Rights and Participation in Sport, Recreation and Play*

For members of the disability community, participation in sporting activities serves as a vital channel of engagement with society when such participation is embraced by the community.<sup>131</sup> Much has been written

<sup>130</sup> Quinn, *supra* note 112, at 292 (quoting European Committee of Social Rights, Decision on the Merits of Collective Complaint No. 13, at ¶ 53).

<sup>131</sup> Expressions of the dignitarian value in participating in the life of one's community are ubiquitous and are often tied to inclusion in sport and recreational activities. Senator Robert Dole, a disabled war veteran and supporter of the ADA

about the role that participation in sport and recreation can have on increasing the self-reliance and empowerment of persons with disabilities and in providing tools to facilitate fuller community engagement in all realms, including education and employment.<sup>132</sup> Conversely, the consequences of being denied meaningful opportunities in sport, recreation and other social activities can be devastating for one's socialization, community inclusion, and physical and mental well-being.<sup>133</sup> In this respect, the CRPD's narrative regarding the unnecessary and amenable nature of the historical exclusion of persons with disabilities across societies can serve a vital function beyond the particular implementation of its substantive obligations in law and policy.<sup>134</sup>

The Convention both signals the global community's recognition of persons with disabilities' equality, dignity, autonomy, and worth, and it possesses expressive value.<sup>135</sup> Expressive law explores the process whereby legal instruments affect preferences and behavior by altering social perceptions and conventions.<sup>136</sup> Using expressive law criteria to analyze the CRPD, especially in the context of its social rights provisions, suggests that the Convention can precipitate belief changes by providing information to societies about the rights of persons with disabilities.<sup>137</sup> As such, its potential for altering social mores may be fully realized

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stated: "Living independently and with dignity means [having the] opportunity to participate fully in every activity of daily life, be it going to the movies, dining in a restaurant, cheering at a baseball game, communicating by phone or going to the doctor. The ADA offers such opportunity to persons with disabilities." 136 CONG. REC. S9695 (daily ed. July 13, 1990) (statement of Sen. Dole).

<sup>132</sup> See, e.g., Penny Parnes & Goli Hashemi, *Sport as a Means to Foster Inclusion, Health and Well-Being of People with Disabilities*, in SPORT FOR DEVELOPMENT & PEACE INT'L WORKING GROUP 124, 133 (2008), available at <http://iwg.sportanddev.org/data/htmleditor/file/Lit.%20Reviews/literature%20review%20SDP.pdf>; see also Reuben McCarthy, *Sport and Children with Disabilities*, in UN SPORT, *supra* note 19, at 14-15 (noting the socializing impact of sport in promoting inclusion and acceptance of children with disabilities).

<sup>133</sup> See *supra* Part II.A.

<sup>134</sup> See CRPD, *supra* note 5, at pmbl., ¶ k (expressing concern that "persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world").

<sup>135</sup> For a literary review of expressive law, see Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 VA. L. REV. 1151 (2004). For an account of the expressive law value of human rights treaties, see generally Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 Vand. L. Rev. 77 (2007) (hereinafter *Expressive Theory*); Alex Geisinger & Michael Ashley Stein, *Rational Choice, Reputation, and Human Rights Treaties*, 106 MICH. L. REV. 1129 (2008).

<sup>136</sup> Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 40 (2002-2003).

<sup>137</sup> For an account of the expressive law value of human rights treaties, see *id.* at 48-49; *Expressive Theory*, *supra* note 135.

through the Convention's provisions supporting its use as an educational tool.<sup>138</sup>

The systematic removal of discriminatory and isolating barriers in social life and the equalization of opportunities supporting full participation in society is a principle goal of the disability rights movement.<sup>139</sup> An important dimension of this work therefore has included a push for the realization of participatory justice in social life.<sup>140</sup> The potential for sport, recreation and play to serve as relational vehicles supporting a broad array of human rights ideas and rights-based interventions is increasingly understood.<sup>141</sup> It is likewise expressed in an expansion of programming at community, national and international levels in which sport and recreational activities serve as cohesion tools and conveyors of social issue messaging.<sup>142</sup> The role of sport in fostering peace-building and social mobilization is also increasingly recognized.<sup>143</sup> Disability sport, for example, has been effectively utilized as a tool for continued national reconciliation in Cambodia.<sup>144</sup> Likewise, celebrations in recognition of the International Day of Disabled Persons have often been marked by disability rights awareness events in which sporting events are key.<sup>145</sup>

A rights-based approach to the idea of participation as applied to sporting and recreational life seeks to understand how persons with disa-

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<sup>138</sup> See, e.g., CRPD, *supra* note 5, at art. 8 (requiring States Parties "to adopt immediate, effective and appropriate measures . . . [t]o raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities."). In this regard, the tools of human rights education may assume an important role in fostering the expressive value of the CRPD. See, e.g., Janet E. Lord et al, *Human Rights. YES! Action and Advocacy on the Rights of Persons with Disabilities* (2007), available at <http://www1.umn.edu/humanrts/edumat/hreduseries/TB6/desc.html>.

<sup>139</sup> See, e.g., RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY* 178 (2d ed. 2001).

<sup>140</sup> Eli Wolff et al., *Raising the Bar: Inclusion of People with Disabilities in Sport*, 2004 Disability in Sport Symposium (2004).

<sup>141</sup> See, e.g., UNICEF HANDBOOK.

<sup>142</sup> See Charlotte McCain-Nhlapo, *Sport a Force for Inclusive Development!*, in UN SPORT, *supra* note 19, at 18.

<sup>143</sup> See UNITED NATIONS INTER-AGENCY TASK FORCE ON SPORT FOR DEVELOPMENT AND PEACE, *SPORT FOR DEVELOPMENT AND PEACE: TOWARDS ACHIEVING THE MILLENNIUM DEVELOPMENT GOALS 1-2* (2003), available at <http://www.un.org/themes/sport/reportE.pdf>.

<sup>144</sup> See SPORT FOR DEVELOPMENT AND PEACE WORKING GROUP, *SPORT LEAGUE DRIVES REINTEGRATION OF DISABILITY COMMUNITY IN CAMBODIA*, (detailing the success story of the National Standing Cambodian Volleyball League), available at <http://www.globalgiving.com/pfil/2520/projdoc.pdf>. For more on the team, see the League website, <http://www.standupcambodia.org>.

<sup>145</sup> For more on International Day of Persons with Disabilities, see UNITED NATIONS ENABLE, *INTERNATIONAL DAY OF PERSONS WITH DISABILITIES 3* (2008), <http://www.un.org/disabilities/default.asp?navid=22&pid=109>.



bilities can be included in ways that promote individual as well as community empowerment and development. Inclusion under the model envisioned by the Convention requires participation in the selection of appropriate sporting and recreational activities and roles within sport, such as spectator or as competitor. This selection should be in line with the particular individualized motivations, interests and talents and, clearly, in consultation with people with disabilities themselves and their representative organizations.<sup>146</sup>

The Special Olympics represents one approach to providing modified sport and recreational activities in individualized and structured frameworks to facilitate successful achievement.<sup>147</sup> The organization's premise is that people with intellectual disabilities can, with instruction and encouragement, derive numerous benefits from participation in individual and team sports designed according to the age and ability level of each athlete and that the community at large benefits from participation and observation in events.<sup>148</sup> As one commentator persuasively has argued, through developing inclusive models that open up sport options for disabled athletes, options open for all, including "able-bodied people who find the existing sports opportunity structure inaccessible or unappealing."<sup>149</sup>

The role that media plays in and around sporting, recreational and play opportunities is also an important factor in combating – or all too frequently, reinforcing – disability discrimination and stereotyping.<sup>150</sup> Pub-

<sup>146</sup> It should be underscored that designating both participation as a general principle in Article 3 and consultation with persons with disabilities and their representative organizations a general obligation in article 4(3) requires application to Article 30. See CRPD, *supra* note 5, at art. 3, ¶ (c), art. 4, ¶ (3).

<sup>147</sup> Special Olympics includes 30 Olympic-type individual and team sports that provide meaningful training and competition opportunities for persons with intellectual disabilities, including age-appropriate activities and activities for lower ability athletes. For persons who may not yet possess the physical and/or behavioral skills necessary to participate in these sports, Special Olympics offers the Motor Activities Training Program, which provides the means for people to participate in appropriate recreation activities geared to their ability levels. See generally Special Olympics, <http://www.specialolympics.org> (last visited Apr. 2, 2009).

<sup>148</sup> See *id.*

<sup>149</sup> Nixon, *supra* note 123, at 430.

<sup>150</sup> For critical assessments of the media coverage of disability sport, see generally Marie Hardin & Brent Hardin, *Performance or Participation . . . Pluralism or Hegemony? Images of Disability & Gender in Sports 'n Spokes Magazine*, 25 DISABILITY STUD. QTR. 11, at 12-13 (2005), available at [http://www.dsqsds-archives.org/\\_articles\\_html/2005/fall/hardin.asp](http://www.dsqsds-archives.org/_articles_html/2005/fall/hardin.asp); Kay W. Maas & Cynthia A. Hasbrook, *Media Promotion of the Paradigm Citizen/Golfer: An Analysis of Golf Magazines' Representations of Disability, Gender, and Age*, 18 SOC. SPORT J. 21, 32 (2001); Brent Hardin, et al., *Missing in Action? Images of Disability in Sports Illustrated for Kids*, 21 DISABILITY STUD. QTR. 21, (2001), available at [http://www.dsqsds-archives.org/\\_issues\\_pdf/dsq\\_2001\\_Spring.pdf](http://www.dsqsds-archives.org/_issues_pdf/dsq_2001_Spring.pdf). See also Marie Hardin et al., *Challenge and*

lic media serves to shape popular conceptions about disability and ideas about the capacity of people with disabilities to be competent in various types of sporting and cultural activities.<sup>151</sup> Scholars working in the area of disability sport have argued that the visibility of an increasing number of successful athletes with disabilities in the mainstream could help to transform negative stereotypes about disability, persons with disabilities, and the sporting body.<sup>152</sup> This idea is certainly expressed in the disability advocacy strategy of holding community sporting events hosted by DPOs and disabled participants to raise the image and voice of people with disabilities in their societies.<sup>153</sup>

In sum, Article 30 of the CRPD is a core component of realizing the substantive equality vision of the disability rights project. The explicit coupling of non-discrimination and the reasonable accommodation mandate, together with the requirement that they be applied across the CRPD, inclusive of social rights, represents the clearest and strongest legal expression of the right to sport, recreation and play in international

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*Conformity on 'Contested Terrain': Images of Women in Four Women's Sport/Fitness Magazines*, 53 SEX ROLES 105 (2005) (discussing hegemony and sport as expressed through images).

<sup>151</sup> Disability studies literature has explored the social construction of sport and athleticism within the context of disability. See, e.g., Karen P. DePauw, *The (In)Visibility of Disability: Cultural Contexts and "Sporting Bodies"*, 49 QUEST 416-430 (1997); see also KAREN P. DEPAUW & SUSAN J. GAVRON, *DISABILITY SPORT* (2005); Karen P. DePauw, *Girls and Women with Disabilities in Sport*, 70 J. PHYS. ED. REC. & DANCE 50 (1999); see also *Participatory Justice*, *supra* note 14, at 180 n.139.

<sup>152</sup> See, e.g., David Promis et al, *Reconceptualizing Inclusion: The Politics of University Sports and Recreation Programs for Students with Mobility Impairments*, 18 SOC. SPORT J. 37, 47 (2001) (arguing that people with disabilities need to be seen as athletes regardless of their impairment, which requires a reconceptualization of the sporting body).

<sup>153</sup> In 1997, the theme for the International Day of Persons, December 3, was Arts, Sports and Disabilities, United Nations Disabled Persons Bulletin No. 3 of 1997, <http://www.un.org/esa/socdev/enable/disb973b.htm> (last visited Apr. 2, 2009). The UN focused its celebration efforts that year on the achievements and contributions of artists and athletes with disabilities. *Id.* The UN stated in connection with the events: "Arts and sports play a vital role in preparing people with disabilities for learning and career success. Participation nurtures the independence and self-worth of persons with disabilities and contributes to the cultural and economic life of their communities. This, in turn, can help bring about positive changes in public attitudes." *Id.* The visibility of people with disabilities in the performing arts can likewise have a positive impact on cultural norms about disability. This is one of the premises of *Art and Soul*, an international celebration of arts, disability and culture, the purpose of which is to hold visual and performing arts workshops, exhibits, and artist development sessions to provide emerging artists with disabilities opportunities to explore abilities, expand careers and heighten artistic exposure. See *Ability Arts, Programs, Art & Soul*, (accessible online by typing "Ability Arts Festival" into search engine) (last visited Apr. 2, 2009).

human rights law. Given that the social rights of sport, recreation and play occupy a remote position on the human rights playing field,<sup>154</sup> and considering the marginalization of disability rights within the human rights system generally,<sup>155</sup> the challenge of applying CRPD rights, is considerable.

#### V. ADVANCING THE APPLICATION OF SOCIAL RIGHTS THROUGH THE CRPD

The process of applying the social rights framework of the CRPD both presents unique opportunities for positive change and reveals major challenges in realizing the Convention's promise.<sup>156</sup> The social rights vision of the Convention is a transformative one, calling for a human rights practice that combines social acculturation with more traditional legal advocacy approaches reflected in national disability law adoption<sup>157</sup> and reform and strategic litigation.<sup>158</sup> Social rights advocates must employ the range of approaches and techniques contemplated by a full and integrated reading of the CRPD beyond the specific provisions of Article 30(5). This might include, for example, ensuring that sport and recreation-based foreign assistance programming is inclusive of adults and children with disabilities.<sup>159</sup> This might likewise include work to ensure that humanitarian assistance groups working in natural disaster and refugee

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<sup>154</sup> See *Participatory Justice*, *supra* note 14, at 178.

<sup>155</sup> See *National Counsel on Disability*, *supra* note 25, at 23.

<sup>156</sup> For a review of the challenges associated with pressing social rights claims, see generally Langford & King, *supra* note 8.

<sup>157</sup> See CRPD, *supra* note 5, at art. 4. For more on national level law reform in support of CRPD implementation, see generally *Domestic Incorporation*, *supra* note 24. It should be noted that participation in sport and recreation is rarely featured explicitly in disability rights legislation, though there are some exceptions, including the provision in the Jordanian disability legislation according to which the Ministry of Youth is directed to "provide for young disabled persons the opportunities for sports and recreation in playgrounds and halls, as well as the equipment, to satisfy their needs and develop their capabilities." See Jordanian Laws for the Welfare of Disabled Persons, art. 4, ¶ (G), available at <http://www.dredf.org/international/jordan.html>. More often, participation in sport and recreation is subsumed under the category of access to public accommodations. See, e.g., Americans with Disabilities Act, 42 U.S.C. § 12181, ¶ 7 (2000) (subsuming gyms, health spas and other recreational spaces under the category of "public accommodations").

<sup>158</sup> The Optional Protocol provides a concrete opportunity for making claims at the international level for those States opting to ratify and the CRPD, insofar as it adds content to existing international human rights law. See Optional Protocol, *supra* note 6, at art. 6. The CRPD should clearly open the door for invocations of disability rights claims in other claims procedures, including the mainstream treaty bodies, regional human rights tribunals and national courts through direct or indirect invocations of CRPD obligations.

<sup>159</sup> See CRPD, *supra* note 5, at art. 32, ¶ (a).

assistance contexts integrate their sport and recreational programming, now regarded as an increasingly important tool for such groups.<sup>160</sup>

The following section explores several contexts in which social rights advocacy may usefully be pursued, not only to the advantage of advancing disability rights but, more broadly, for the purpose of rendering social rights claims meaningful beyond the disability rights realm.

#### A. *Social Rights Claims before International Human Rights Bodies*

The equality framework set forth in the CRPD has the potential to transform social rights claims in the realm of sport and recreational life that have been viewed with skepticism by international adjudicatory bodies, particularly the European Court of Human Rights. The approach of the ECHR in *Botta v. Italy* reflects an unwillingness to read social rights into provisions of the European Convention on Human Rights and belies a failure to draw connections between rights of privacy and family life, non-discrimination, and other principles that may inform disability rights analysis.<sup>161</sup> In *Botta*, an applicant with a disability was unable to access the beach and sea at a private beach resort, notwithstanding the clear requirement to provide facilities for persons with disabilities under Italian law.<sup>162</sup> The applicant relied on Article 8 (addressing the right to privacy and family life) and Article 14 (addressing non-discrimination) under the European Convention on Human Rights in order to press his claim.<sup>163</sup> The Court held that the right to access the beach and sea at a location some distance from the applicant's normal place of residence did not fall within the scope of Article 8 or the general parameters of Article 14.<sup>164</sup> Instead, the ECHR reasoned that there was an insufficient "direct and immediate link" between the entitlement claimed and the right asserted.<sup>165</sup> In other words, access to general amenities was not a direct enough link to the enjoyment of the core right. In offering a standalone right to participate in sport, recreation and leisure, the CRPD offers promise for advancing social rights claims premised on the failure in a given case to make positive provisions to render rights meaningful.

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<sup>160</sup> See *id.* at art. 11.

<sup>161</sup> See *Botta v. Italy*, 26 Eur. Ct. H.R. 241, 422-23 (1998). See also *Zehnalova and Zehnal v. Czech Republic*, Eur. Ct. H.R. 339, 352-53 Application No. 38621/97 (2002) (holding that the entitlement claimed by the applicants premised on Article 8 and Article 14 in relation to lack of access to many public buildings in violation of Czech law did not fall within the general ambit of Article 8 so that neither Article 8 or Article 14 were applicable).

<sup>162</sup> See *Botta*, 26 Eur. Ct. H.R. 241, 420-21.

<sup>163</sup> *Id.* at 420-21.

<sup>164</sup> See *id.* at 423-24.

<sup>165</sup> *Id.* at 423.

In this regard, the recent practice of the European Committee for Social Rights<sup>166</sup> discloses an apposite approach that may well be further advanced by a proactive UN Disability Committee working to give meaning to the rights set forth in Article 30(5). Professor Gerard Quinn<sup>167</sup> argues that the Committee, tasked with monitoring the European Social Charter,<sup>168</sup> has helped to inform a more progressive rights-based understanding of disability, particularly in view of its interpretive stance on the (Revised) Charter Article 15.<sup>169</sup> In noting that the Committee has worked to explicitly draw connections between the norms of non-discrimination and equality and the social rights reflected in the Charter, Quinn suggests that the earlier concerns about the disconnect between non-discrimination and social rights—that is, the question as to whether and how the principle of non-discrimination would be applied to social rights—have been largely settled.<sup>170</sup> Moreover, Quinn contends that the European Social Committee has been proactive in asserting the requirement that social rights be implemented by way of positive action,<sup>171</sup> an

<sup>166</sup> Counsel of Europe, European Social Charter, [http://www.coe.int/t/dghl/monitoring/socialcharter/ecsr/ecsrdefault\\_EN.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/ecsr/ecsrdefault_EN.asp) (last visited Apr. 2, 2009).

<sup>167</sup> Quinn, *supra* note 112, at 279-304.

<sup>168</sup> European Social Charter, Feb. 26, 1965, 529 U.N.T.S. 89. For more information on the European Social Charter, *see generally* DAVID J. HARRIS & JOHN DARCY, *THE EUROPEAN SOCIAL CHARTER* (2001); LENIA SAMUEL, *FUNDAMENTAL SOCIAL RIGHTS: CASE LAW OF THE EUROPEAN SOCIAL CHARTER* (2d ed. 2002).

<sup>169</sup> Council of Europe - ETS no. 163 - European Social Charter (revised), <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm> (last visited Apr. 2, 2009).

Article 15 of the Revised Charter reads:

With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:

1. to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private;
2. to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services;
3. to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.

*Id.*

<sup>170</sup> *See* Quinn, *supra* note 112, at 286.

<sup>171</sup> *Id.*

approach that bodes well for rights to participate in sport, recreation and leisure. By way of illustration, in its Conclusions prepared for France, the Committee stated that positive action measures needed to achieve the Charter goals of social integration and that participation of persons with disabilities “must not be pursued in isolation and should be programmed to complement each other, on a clear legislative basis.”<sup>172</sup>

Thus, the CRPD offers possibilities for advancing social rights claims through the communications procedure set forth in its Optional Protocol. Furthermore, the Convention, in showing how human rights obligations are to be applied to fulfill the rights of persons with disabilities, offers indirect but significant opportunities for existing human rights tribunals and treaty body communications procedures. Accordingly, the Committee on the Convention on the Rights of Persons with Disabilities has an opportunity, through both substantive adjudication and procedural innovation, to bolster the development of social rights generally through the lens of sports and recreation participation by persons with disabilities.

#### B. Domestic Court Invocations of Social Rights

Case law from domestic courts suggests a way forward for advancing social rights claims, particularly in light of a growing social rights jurisprudence regarding international human rights standards.<sup>173</sup> The adoption of the CRPD provides ample scope for broadening jurisprudence in the area of sport, recreation and play, particularly in ratifying countries that apply, either directly or indirectly, human rights treaties. Even in non-ratifying countries, human rights standards may be utilized to help guide domestic law. International human rights norms are increasingly informing the case law of domestic courts, with those bodies taking human rights standards into account to (1) bolster reasoning based principally on domestic law sources;<sup>174</sup> (2) interpret domestic law statutes consistently with human rights standards;<sup>175</sup> (3) update common law;<sup>176</sup> (4) contextually interpret a nation’s bill of rights; and (5) apply as a canon of constitu-

<sup>172</sup> European Social Charter (Revised) Conclusions 2003, Vol. 1, at 168, available at [http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/Year/2003Vol1\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/Year/2003Vol1_en.pdf).

<sup>173</sup> See Langford, *supra* note 8, at 3.

<sup>174</sup> See Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretative Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 658 (2007) (referencing the United States Supreme Court’s tendency to use international law to confirm the reasonableness of decisions based in domestic law) [hereinafter *Creeping Monism*].

<sup>175</sup> See Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Geo. L.J. 487, 509 (2005) (arguing that domestic courts and international tribunals have utilized international human rights standards as a guide to statutory interpretation which thus constitutes a major mode of transmission for the domestic incorporation of human rights law).

tional interpretation whereby domestic constitutions are construed in alignment with international human rights law.<sup>177</sup> These mechanisms suggest strategic advocacy approaches according to which disability advocates can serve as transnational moral entrepreneurs helping to transpose CRPD social rights in domestic legal systems.<sup>178</sup>

Beyond the further development of a nascent jurisprudence on the area of disability sport, recreation and play that the CRPD may inspire, domestic disability practice suggests other avenues for social rights advocacy. The implementation of the Americans with Disabilities Act (ADA) in the United States<sup>179</sup> has served to advance the social rights of participation in sport and recreation, especially in the context of opening up public accommodations to meaningful participation.<sup>180</sup> This is possible not only through strategic litigation, but also through the more technical process of crafting workable regulations and guidelines to facilitate implementation.

The newly established Committee on the Rights of Persons with Disabilities, tasked with monitoring the implementation of the CRPD, could work to establish a technical advisory committee or informal working group in specific thematic areas. By way of illustration, States Parties will need specific, concrete guidance on how to implement Article 30(5) obligations, and although universal standards or a template approach may prove unworkable, there are ways to utilize country experience in these contexts to advance implementation. There are ample lessons to be learned, for example, from the experience of countries that have sought to develop workable accessibility guidelines to facilitate meaningful

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<sup>176</sup> *Id.* at 502 (asserting the existence of a domestic law transmission of international human rights law thru a process of updating, or filling in the gaps, of the common law); see also Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 838-42 (1997).

<sup>177</sup> See *Creeping Monism*, *supra* note 169, at 660. In this way, human rights are building blocks in the construction of domestic human rights regimes. The implications of domestic incorporation through interpretive judicial process in the case of the CRPD is especially poignant in those States with a demonstrated practice of taking human rights standards into account.

<sup>178</sup> See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2612 (1997) (quoting Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 479, 482 (1990)).

<sup>179</sup> ADA, 42 U.S.C. §§ 12101-12102 (2000).

<sup>180</sup> Title III of the ADA states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." *Id.* at § 12182(a) (1984). In addition, the ADA mandates that facilities built after January 26, 1993 are required to be "readily accessible to and usable by individuals with disabilities." *Id.* at § 12182(a)(1).

access to sport arenas or recreational facilities, or to provide teacher training for adapted physical educational programming.<sup>181</sup>

C. *Advancing Social Rights through the Inclusive Development Mandate*

Social rights, including the right to participate in sport, recreation, leisure and play, may have both domestic and indeed extra-territorial effect in guiding the design and implementation of foreign-assistance development programming.<sup>182</sup> Significantly, the CRPD recognizes the potential of development programming to advance disability rights through its inclusive development mandate and to facilitate the objectives and purpose of the Convention.<sup>183</sup> The CRPD is the first core human rights convention to explicitly call upon States Parties to reform their development assistance programs to compel them to include people with disabilities in such programming.<sup>184</sup>

The CRPD should prompt donor governments to ensure that their development assistance programs impacting the social rights of sport, recreation, leisure and play include persons with disabilities, thereby supporting social integration through inclusive development programming.<sup>185</sup> Current development practices by and large exclude people with

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<sup>181</sup> In the United States, for example, an Architectural and Transportation Barriers Compliance Board, otherwise known as the "Access Board," promulgated accessibility regulations to provide standards guiding the implementation of the public accommodations accessibility provisions of the ADA. See 29 U.S.C. § 792(a)(1) (1994). The Access Board consists of 25 members, including 13 persons appointed by the President, a majority of whom are persons with disabilities, and representatives of 12 governmental departments or agencies, including the Department of Justice. *Id.* The Access Board is mandated to "develop advisory information for" and to "establish and maintain . . . minimum [accessibility] guidelines." *Id.* at § 792(b)(2-3).

<sup>182</sup> There is substantial literature on human rights and foreign policy. *Accord* THOMAS BUERGENTHAL, ET AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 347-401 (2d ed. 2002); JULIE A. MERTUS, BAIT AND SWITCH: HUMAN RIGHTS AND U.S. FOREIGN POLICY (2d ed. 2008); Mark L. Schneider, *A New Administration's New Policy: The Rise to Power of Human Rights*, in HUMAN RIGHTS AND U.S. FOREIGN POLICY, PRINCIPLES AND APPLICATIONS 3 (Peter G. Brown & Douglas MacLean eds., 1979); David Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 GA. J. INT'L & COMP. L. 231 (1977).

<sup>183</sup> See CRPD, *supra* note 5, at art. 32.

<sup>184</sup> See *id.* at art. 32, ¶ (1), § (a).

<sup>185</sup> See *id.* (requiring States Parties to "undertake appropriate and effective measures" in making sure that "international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities"). For a discussion of the Millennium Development Goals (MDGs), the development benchmarks set by the international community in key target areas, and their implicit link to disability issues, see Janet E. Lord & Katherine N. Guernsey, *Inclusive Development and the Comprehensive and Integral International Convention on the*



disabilities,<sup>186</sup> leading to the widening of equity gaps between disabled and mainstream populations and missing the unique opportunities for socialization and meaningful participation fostered in sport and recreational activities, particularly at the community level.<sup>187</sup> In creating a framework for international cooperation to be implemented in accordance with its general principles including, for example, the principles of non-discrimination and participation, the CRPD thus affords opportunities for advancing sport and other social rights.<sup>188</sup> Part and parcel of implementing the inclusive development requirement in the realm of sport and recreation is to ensure that national human rights institutions are proactively monitoring and seeking to promote such rights for disabled persons,<sup>189</sup> along with the engagement of relevant government agencies, such as Ministries of Sport, Youth, Tourism, and Education.<sup>190</sup> Given the role that international development plays in strengthening human rights institutions and government ministries, along with community-based programming,<sup>191</sup> the inclusive development obligation can enhance implementation of Article 30(5).

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*Protection and Promotion of the Rights and Dignity of Persons with Disabilities* 6-9 (IDDC Task Group in the UN Convention, January 2005), available at <http://www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5iddc.doc>.

<sup>186</sup> See BILL ALBERT, *IS DISABILITY REALLY ON THE DEVELOPMENT AGENDA?: A REVIEW OF OFFICIAL DISABILITY POLICIES OF THE MAJOR GOVERNMENTAL AND INTERNATIONAL DEVELOPMENT AGENCIES* 7 (Sept. 2004), [http://www.disabilitykar.net/pdfs/disability\\_on\\_the\\_agenda.pdf](http://www.disabilitykar.net/pdfs/disability_on_the_agenda.pdf) (detailing the historical disregard of inclusive development practice among donor governments in their development assistance programming); see also Amy T. Wilson, *The Effectiveness of International Development Assistance from American Organizations to Deaf Communities in Jamaica*, 150 AM. ANNALS DEAF 292, 293, 298 (2005) (describing how USAID, in working "on behalf of" deaf-based development, did not work in conjunction with the local deaf community).

<sup>187</sup> See generally BRITISH COUNCIL OF DISABLED PEOPLE'S INT'L COMM., *IMPROVING DFID'S ENGAGEMENT WITH THE UK DISABILITY MOVEMENT* 4 (2005), <http://www.dfid.gov.uk/pubs/files/bcodp-dfid-disability.pdf>.

<sup>188</sup> See CRPD, *supra* note 5, at art. 3.

<sup>189</sup> See generally Steve Estey & Janet E. Lord, *The Potential Role of NHRIs and DPOs in Implementing the Right to Sport, Recreation and Play in the UNCRPD*, in UN SPORT 20, *supra* note 19.

<sup>190</sup> Notably, the CRPD recognizes the cross-cutting nature of disability and advance cross-governmental coordination on disability issues. See CRPD, *supra* note 5, at art. 33, ¶ (1).

<sup>191</sup> For an overview of several organizations focused on community-based sport and development programming, see International Platform on Sport and Development, [http://www.sportanddev.org/about\\_this\\_platform/funding\\_partners/index.cfm](http://www.sportanddev.org/about_this_platform/funding_partners/index.cfm) (last visited Apr. 2, 2009).

## VI. CONCLUSION

The enjoyment of human rights by persons with disabilities can only be secured through a human rights framework that accords due attention to social rights and the dismantling of discrimination that serves to segregate and isolate and dehumanize persons with disabilities in all areas of life, including sport, recreation and play. The application of a holistic and integrated human rights approach as set forth in the CRPD recognizes the importance of a comprehensive rights framework, inclusive of social rights. A measure of success in Convention implementation will be the elevation of social rights as witnessed in the domestic legislation of ratifying States Parties, the enrichment of social rights jurisprudence in domestic as well as international courts, and, most trenchantly, in community-based practices of inclusion and access, including in international development programming.