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Disability, Citizenship and Education in England

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Abstract

The purpose of this thesis is to examine the relationship between disability and the notions of citizenship, human rights and education. It aims to analyse the UK watershed 1978 Warnock Report on special education and its application and relate them to models of disability, citizenship and UN human rights law. Education in England serves as a case study to show how these models are expressed in theory and practice and their implication for full citizenship for disabled people.

There are eight chapters in this thesis. Chapter One is the introduction and discusses the scope of this thesis. Chapter Two examines the medical and social models of disability. Chapter Three discusses the classical and modern notions of citizenship as they relate to disability. Chapter Four compares citizenship and human rights concepts and the application of UN human rights law prior to 2006 in relation to disability. Chapter Five examines the 2006 United Nation Convention on the Rights of People with Disabilities (CRPD) legislation in detail. Chapters Six and Seven discuss the Warnock Reports of 1978 and 2005 in relation to models of disability and citizenship. Chapter Eight is the conclusion. These chapters collectively examine the notion of classical and modern citizenship and their consideration of disability; the role of human rights in promoting disability and attempt to show their strengths and weaknesses in relation to education for the disabled.

The thesis seeks to establish whether models of disability, citizenship and human rights are adequate in providing full citizenship for disabled people. To do so the thesis examines models of disability, notions of citizenship and human rights legislation and whether the UN sponsored CRPD is a superior way forward for gaining recognition for disabled people rights as full citizens.

This thesis concludes with the view that disabled people have progressed in achieving rights of inclusive citizenship, but that the medical, social, political and legislative responses remain flawed. Disabled people's right to full inclusivity in both educational levels and throughout society remain a challenging work in progress.

Dedication

This doctoral thesis is dedicated to my son Mohamed who exposed me to a world of disability I did not know existed. And for being the first to make me realize there is no difference between disability and ability. Only what we make of them.

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Writing a Doctoral thesis may well be a solitary task, but it is rarely completed alone. I have many people to thank.

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Chapter One

Introduction

Persons with disabilities make up the world's largest minority group. They are disproportionately poor, are more likely to be unemployed, and have higher rates of mortality than the general population. All too often, they do not enjoy the full spectrum of civil, political, social, cultural and economic rights. For many years, the rights of persons with disabilities were overlooked.

Kofi Annan, Former Secretary General of the United Nations¹

Summary of Thesis

In this thesis I analyze how social and political attitudes and models about disability, theories of citizenship, UN human rights legislation, and educational reports and legislation have been articulated and expressed as they concern disabled people. I maintain that each of them fails in adequately addressing the needs of disabled people in some ways and renders disabled people as second-class citizens. I argue that the United Nations human rights approach, particularly the 2006 Convention of the Rights of People with Disabilities (CRPD) specifically (Article 12 and Article 24), has the potential to resolve issues in catering for disability and education and guaranteeing disabled people full citizenship rights and is therefore a preferable alternative for disabled people. I review the 1978 Warnock Report on special education in England and its application as case studies and suggest how they exemplify problems in approaches wedded to the social model of disability and liberal notions of citizenship.

Social and medical models of disability underpin approaches to disabled people and reflect society's understanding of disability. The notion of citizenship is central to explaining the inclusion or exclusion of disabled people from society as a whole and it is crucial in any attempt to judge whether policies counter, or indeed erect, barriers to their emancipation.²

The two main theories of citizenship - liberal and civic republican models of citizenship - have different ways of defining membership in a community. When applied to disabled people these models do not perceive disabled people as full citizens because their membership requirements fall short, particularly for those with intellectual disabilities. Moreover, prior to December 2006 and the Introduction of the CRPD, no specific human rights treaty expressly fully protected disabled people.³ Prior to 2006, to claim protection

¹ The secretary general, message on the international day of disabled Persons, 3 December 2005.

² People with disability are amongst the most marginalised in the world and are seen negatively by almost every culture, religion and ethnic group. See Pfeiffer, Sam, Guinan, Ratcliffe, Robinson & Stodden, (2004). More than alcoholism, criminalist behaviour, depression, or sexual orientation, research shows that the social stigma from disability is the most debilitating. See Smith, (2004), p. 10.

³ Prior to 2006 disabled people's human rights were enshrined in the 1948 Universal Declaration of Human Rights. It wasn't until a new disability rights convention was agreed at the UN in December 2006 that disabled people had a specific disability convention. The UK signed the convention on 30 March 2007 and ratified it on 8 June 2009. See

under a United Nations convention a disabled person must either invoke a universal provision or embody a separately protected characteristic. The universal provision was in the form of seven core UN treaties.⁴ Each of the seven core United Nations treaties⁵ theoretically applies to disabled persons in varying degrees, but are rarely applied in practice. Compounding this problem, General Assembly emollient laws explicitly referencing disability are legally unenforceable.

The flaws inherent the models of disability, citizenship and human rights prior to 2006 are expressed in the writings in the Warnock 1978 and Warnock 2005 educational reports and subsequent legislation. None of the models and approaches adopted a holistic application which would be helpful to the equality of disabled people at the individual, community and educational levels.

While the Warnock Reports helped all disabled children to access education in England, I show the Warnock Report to be contradictory and falling short of equality of treatment. The Warnock Report is used in two ways: first to examine how it shows more generally the ways in which models of disability and citizenship have informed legislation and thinking about disability; and secondly to show how the report does not affect normative issues affecting disability and education in the way it reflects models of disability and citizenship both in theory and in practice.

Disability poses the challenge of difference. How can we respect radical difference while also promoting equality? The challenge is one of uniting people while also providing for their distinct needs. This thesis will examine the development and application of models of disability, citizenship, human rights and the Convention on the Rights of People with Disabilities (CRPD), and how each of these models operates with different assumptions and

www.un.org/disabilities/conventions/facts.shtml. Although it does not specifically refer to disability many subsequent conventions at the UN and much legislation passed by member states as a result of the significant influence of this 1948 declaration and later UN conventions do. In an introductory document on disability and human rights, the office of the UN High commissioner for Human Rights states the four core values of human rights law that are of particular importance to disability. The four core values of human rights law are: 1. the dignity of each individual, who is deemed to be of inestimable value because of his/her inherent self-worth, and not because s/he is economically or otherwise useful; 2. the concept of autonomy or self-determination, which is based on the presumption of a capacity for self-directed action and behaviour, (and requires that the person be placed at the centre of all decisions affecting him/her); 3. the inherent equality of all regardless of difference; and 4. the ethic of solidarity, which requires society to sustain the freedom of the person with appropriate social supports. By emphasizing that the disabled are equally entitled to rights as others, this human rights model builds upon the spirit of the 1948 Universal Declaration of Human Rights, according to which, all human beings are born free and equal in rights and dignity.⁴ This model's emphasis on viewing persons with disabilities as subjects and not as objects, thus locating the problem outside the disabled persons, addresses the manners in which the economic and social processes accommodate the differences of disability or not, as the case may be.

⁴ Equality and freedom from discrimination lie at the heart of all international treaties on Human rights. Most constitutions will contain a declaration to the effect that all people are born equal and should receive equal protection under the law and this principle is projected in the preamble of the United Nations Charter 1945, which reaffirms faith in the equal rights of men and women . . . Every person, therefore, has a moral right to be treated equally and in particular to enjoy their human rights free from discrimination on grounds such as race, sex, or social status; consequently, discriminatory treatment is viewed as an affront to human dignity and worth.

⁵ Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), are universal in scope. The same is true for the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). Although disability is not specifically mentioned in any of these treaties, they technically include all human beings within their respective provinces.

in its understanding and application of disability. This thesis takes an evolutionary approach and shows how even as each of these models progressed flaws in the understanding and treatment of disability continued and even expanded. It analyses how the limitations, features and assumptions of the models of disability, models of citizenship and human rights are reflected in theory and practice through analyzing the education policy and practice of the disabled in England from the 1970s to 2005.

Ironically, while attempts at refinement were happening there was a morphing of greater differences and gaps in the understanding and treatment of disability. While progress was being made in some areas of education for the disabled, inconsistencies and gaps were accruing in other areas. Even as progress was made in the refinement of terms, categories and practice of inclusiveness on disability through theoretical developments and evolving legislation, simultaneously there accrued along with old problems, the creation of new inconsistencies.

This thesis provides a philosophical and practical examination and critique of notions of disability, citizenship and human rights as they apply to disability. It is not meant to give a comprehensive analysis of education in England; rather it achieves this aim through analyzing the two 'watershed' Warnock Reports (1978 and 2005) on special education in England and the 1981 Education Act. It analyzes and critiques models of disability, notions of citizenship and human rights. It criticizes the medical model of disability and the shift to the social model and the partial and problematic way the social perspectives are adopted. At the same time, it will look at how more contemporary notions of citizenship, while committed to greater inclusiveness, do not effectively include all the disabled.

It is argued here that the UN human rights regime offers a way forward, particularly the 2006 UN Convention on the Rights of People with Disabilities. The UN human rights regime is a development of contemporary citizenship in that it spells out the requirements of inclusion in communities and builds on the classic liberal regime of natural human rights. It is more specific in spelling out the needs of the defined individuals, such as the disabled, who have been left out of the picture.

With regard to human rights conventions, I specifically examine the 2006 Convention on the Rights of Persons with Disabilities (CRPD), particularly Article 12 which recognizes the right of persons with disabilities to equal recognition before the law and the attendant right to legal capacity, and Article 24 which address the elimination of disability-based discrimination in educational settings, as well as the provision of inclusive education at all levels. The CRPD is thought to have transformative potential for the lives of the world's largest minority. However, the CRPD, like all international instruments, is ultimately a negotiated text. It is therefore unrealistic to expect it to reflect a fully coherent or comprehensive exposition of disability rights. Ultimately, the CRPD has been most influenced by an uncritical and populist

understanding of the social model of disability. There are limits in what it can do.

Moreover, as rights-based policies allow for many interpretations as to how they are to be implemented, there will be on-going debates and differences on what inclusion will mean in practice for the disabled. Structures will not be specified by rights, hence, problems over how the disabled will be included that are identified by them are not easily resolved. This is clearly reflected in education policies for the disabled in England.

Given the issues identified in the thesis – the problems of the medical and social models and the problems in formulating and applying liberal and civic republican models of citizenship and human rights conventions to disability – if disability varies and we cannot essentialise it, can we say there is a clear-cut path to citizenship for the disabled? The more the topic of disability is refined, the more problems and questions are raised. For many problems addressed, new ones arise. This is evident in the reports and policies on special education. This dilemma/paradox leaves the disabled in vulnerable circumstances and caught amidst the attempted ongoing refinements and categories trying to help them. As attempts try to get closer to a resolution of the problem, it is never reached because new problems arise. The solutions create endless subdivisions and new issues arise creating an infinite regress. The development of education policy for the disabled, and of special education although positive, continues to reflect the shortcomings of the models of disability, citizenship and human rights even today.

Thesis Structure and Outline of Chapters

This thesis examines issues on disability in regard to citizenship and human rights. It considers models that reach beyond current perspectives on citizenship. In particular, it analyses and critiques models of disability, notions of citizenship and human rights conventions for the disabled, and questions whether they are sufficiently inclusive of citizenship to accommodate disabled people in society. Education in England is used as a case study.⁶

⁶ Methodology includes looking at many different primary and secondary materials are reviewed and analysed in this thesis in order to examine the inter-relationships between disability, citizenship, human rights and education policy and practice in England.

The thesis structure is organized by looking at medical and social models of disability, and how they advance yet fail to fully address the issues of the problems of disabled people. Models of citizenship both classic and contemporary exclude disabled people from full citizenship. UN human rights regimes attempted to build on models of disability and citizenship and in doing so accord disabled people legal protection. However, UN legislation prior to 2006 fails to achieve this aim. The 2006 UN CRPD attempts to bridge these gaps by legally binding legislation particularly Article 12 and Article 24 but leaves us with the question of how important now are models of disability and citizenship after the CRPD highlighted their limitations? Should we abandon all models of disability and citizenship? I argue that perhaps the answer to this questions is yes, and the CRPD is all we need to empower disabled people in achieving full citizenship rights. However, the reservation the UK government put on Article 24 might make the full realization of citizenship rights in education problematic. The general criticism of UN legislation – that structures cannot be specified by rights – is also problematic in according disabled people their CRPD rights in practice.

Chapter One highlights the purpose, scope and methodology of the thesis and outlines its format over the subsequent eight chapters.

Chapter Two reviews the existing medical and social models of disability, and how the medical model serves to relieve society of any responsibility to provide civil rights and to accommodate disabled people beyond what is considered necessary as defined and applied in the medical world. This chapter analyses the medical model of disability and the shift to the social model and the incomplete, limited and problematic way social perspectives are adopted.

It examines the impact of the medical model on the daily lives of disabled people and how the disability community is fragmented by medical diagnostic approaches which do not address their daily needs and frustrations in coping in civil society. A comparative analysis of the social model versus the medical model is then presented. The social model of disability has many ambiguities and inconsistencies, and attempts to iron these out create more ambiguities and unresolved issues.

Chapter Three examines different models of citizenship. After considering various definitions, a discussion of the classical liberal and civic republican models is presented. Following that there is a discussion of modern liberal, civic republican theories, and modern 'difference' theories. At the same time, it considers how more contemporary notions of citizenship attempt to define an inclusive notion of citizenship that draws on classical liberal theory, and also contemporary forms of liberal citizenship and republican theories. Again its inclusiveness widens notions of citizenship yet it also highlights problems in that it does not effectively include all the disabled. Different notions of citizenship over three centuries are discussed—from Locke to Marshall to Rawls—along with feminist writings on citizenship as well as alternative frameworks to current notions of citizenship. These writings are scrutinized in terms of addressing the position of the disabled in society from each author's perspective.

Chapter Four considers the issue of human rights as developed through the United Nations and the applications of this perspective to existing rights and to furthering the rights of disabled communities. The United Nations Declaration on Disability of 2006 has become a landmark declaration on the development of a convention for the recognition and rights of disabled individuals and disabled communities. Yet this 2006 declaration contains flaws regarding disabled people's rights which need to be addressed and resolved.

Chapter Five examines the UN Convention on the Rights of Persons with Disabilities. It looks at this convention in the context of civil, political, economic, social, customary rights, as well as international rights and cooperation. The UN human rights regime is a very significant development, which connects contemporary citizenship with the human rights of

disabled people and communities. It stipulates and describes the requirements for the inclusion of disabled communities in civil societies worldwide and builds on the classic liberal regime of natural rights which it claims are in fact human rights. It specifically enumerates the needs of the defined individuals, such as the disabled, who have been traditionally ignored or marginalized.

These regime efforts by the United Nations serve to complement and support the work of current liberal human rights advocates and agencies across the globe, and serve as a focal point for worldwide efforts towards theorizing the requirements of the disabled. Furthermore they have led to concrete applications in international and domestic laws and also in practice.

The CRPD has transformative potential for the lives of the world's largest minority. The CRPD is regarded as having finally empowered the world's largest minority to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection.

The chapter examines and evaluates the intellectual antecedents of the CRPD and its continuity and discontinuity with years of international law and its struggles with disability and human rights. It then explores the text of the CRPD, critically examining its potential contribution to the realization of the rights of persons with disability.

Chapters Six and Seven critique the two Warnock Reports of 1978 and 2005 on special educational needs in England. These chapters analyze how the two reports express models of disability, citizenship and human rights as they relate to education for the disabled both in theory and practice. These chapters analyse how the failure of the social and medical models, notions of citizenship and human rights are reflected—or not reflected—in education policies for the disabled, and how the UN CRPD might offer a better way forward for disabled people in education in achieving equal citizenship.

Both in theory and practice these reports and models show how many disabled groups are not accorded the full rights of citizenship in education, and how government has prolonged a state of affairs where a particular group of people (the disabled) has been denied their basic human rights. Disability is a human rights issue and to be a disabled student in Britain today is to be denied the rights of citizenship. The reality of this denial is amply demonstrated throughout these chapters.

Chapter Eight concludes this study with a review of the previous examination of the issues, and notes the pattern of paradoxical development regarding notions of citizenship and their application to disability education policy. Some of the old problems regarding notions on citizenship and disability return during the efforts to refine ideas on citizenship and their application.

Each model provides a limited understanding of disability and reveals shortcomings in accommodating disabled communities and in treating disability. The evolutionary approach undertaken in this study demonstrates that each of these models continued to have flaws even when efforts were made to cure them.

For disabled communities and disabled individuals in education, this means that although progress in alleviating their marginalization is being made by governments through legislation and public awareness campaigns, much work remains to be done. Disabled people are still vulnerable as a result of unaddressed issues, and may be exposed by setbacks or deterioration in government commitments to keep abreast of the issues confronting disability.

This thesis attempts to show that any progress made by governments in terms of alleviating the marginalization of disabled people as citizens, has been accompanied by regression in some areas and the creation of new problems, notably in education. It is hoped that such a critique will advance the daily lives of both disabled individuals and the community at large, and to advance their rights in education systems. The models of disability, citizenship and human rights examined in this thesis all aim to respect difference while promoting forms of equality. But the models are flawed, and analysing how their failure impacts on and is reflected in education policies for the disabled and how the UNCRPD might offer a better way forward for disabled people in education is a subject worthy of study.

Chapter Two

The Medical and Social Models of Disability

The two models of disability (the social model and medical model) examined in this chapter aim to respect difference while promoting forms of equality. But they both fall because they are incapable of achieving this objective due to their conceptual limitations.

Each model is important because it underpins many of the assumptions and concepts pertaining to citizenship, legislation and educational reports regarding disabled people. One must understand the context in which theories of citizenship, legislation and educational reports were deliberated and written during the period of the 1978 Warnock Report's conception as they relate back to basic perceptions delineated in the medical and social models.

The "medical model" of disability holds that disability results from an individual person's biological limitations, and is largely unconnected to the social or geographical environments. The "social model" of disability asserts that contingent social conditions rather than innate biological limitations constrain individuals' abilities and create a disability category. The medical model is part of the wider conceptual framework of 'medicalization.' The social model is a process of social change. This chapter analyses how although the medical and social models of disability separately fail, their synthesis through incorporating concepts from each model can more precisely identify and address issues confronting the disabled.

Prior to the 1970s, the international 'emollient laws' addressing disability usually focused on functional limitations (the medical model). Beginning in the 1970s international and domestic law started to adopt and reflect social model precepts and laws in England increasingly started to be addressed from the social model perspective.⁷ Nevertheless, because advocates have limited the social model to formal equality theory, its application is limited within the human rights arena and it is argued here that it creates limits for equal citizenship for disabled people.

The Medical Model of Disability

In the field of disability studies, it is essential to distinguish between the medical and social models of disability. The medical model is the traditional model of disability, which sees the disadvantage experienced by disabled people as a consequence of their individual

⁷ The origins of the social model, which is now adopted by the World Health Organisation, primarily originated from the British Disability Rights Movements and has been developed to its present status. The 'social model' in Britain can be traced to an essay written by Paul Hunt a disabled Briton "A Critical Condition", published in the *Guardian* newspaper in 1966 calling for the formation of a national consumer group. "Wednesday September 20th 1972. Severely physically handicapped people find themselves in isolated unsuitable institutions where their views are ignored, and they are subject to authoritarian and often cruel regimes. I am proposing the formation of a consumer group to put forward nationally the views of actual and potential residents of these successors to the Workhouse."

impairments. It is argued here that in twentieth and twenty-first century society, this is still the dominant model used by the general population (although most people do not think about what model they are using), including the medical profession. This model is also sometimes called the individual or personal tragedy model, as it focuses on the individual disabled person and on the negative experience of impairment.⁸

Under the medical model, disability is caused by impairment and the solution, therefore, is to cure the impairment. Obviously, even with recent advances in medical science, this is not always possible, so according to the medical model disabled people must be treated in an effort to make them more normal; otherwise, they are seen as dependent, weak, a problem and a drain on society's resources. Disabled people are therefore expected to cooperate with all medical procedures recommended by doctors, regardless of their efficacy and desirability, in an attempt to reduce the burden on society. Much of our understanding of disability has been dominated by the medical model, which sought to compartmentalize acute illness into the medical trilogy of sickness, disease and rehabilitation.⁹ The crux of this model is that persons with disabilities are sick and weak in their present state and that it is therefore necessary to improve their health so their entire self can be improved.¹⁰ The medical model is not only applied as an academic tool at the analytical or conceptual level, it also appeals to health care professionals at a practical level. Thus it is not uncommon to find comments in the educational literature indicating that the medical model was clearly not purely an analytical tool, but related to actual ways of practice.

The Medical Model and the Role of Professionals

Support for the medical model has been drawn from our unquestioning attitude towards the medical profession as the authoritative group. As Sandra Carpenter argues, what the medical model created was:

an essential power imbalance created by the so-called helpers and the helpees, or by what has come to be known as the mystification of professionalism. This mystification of professionalism can be maintained through language or jargon, and/or through education or credentialism and through a jealously guarded knowledge or expertise¹¹

The belief in the medical profession as the only legitimate source of medical knowledge is coupled with society's vision of what it means to be healthy, along with societal pressure to achieve an acceptable level of healthfulness.¹²

⁸ Borsay, 2005

⁹ See Talcott Parsons, *The Social System* 429–79 (1951) (introducing the “sick role” as an institutional role “necessary to enable the physician to bring his competence to bear on the situation”); Talcott Parsons, *The Sick Role and the Role of the Physician Reconsidered*, 53 *Health & Society* 257, 261–62, 266–77 (1975) (suggesting the power inequality of the typical doctor/patient relationship).

¹⁰ See Claire H. Liachowitz, *Disability as a Social Construct: Legislative Roots* 12 (UPenn 1988); Michael Oliver, *Understanding Disability: From Theory to Practice* 31–32 (1996).

¹¹ Sandra Carpenter, *“Doing it the Independent Living Way”* Navigating the Waters Conference, Toronto. 15 June 2001.

¹² See David Pfeiffer, *The Conceptualization of Disability*, in Sharon N. Barnartt and Barbara M. Altman, eds, 2 *Research in Social Science and Disability: Exploring Theories and Expanding Methodologies* 29, 30–31 (2001);



As the medical model defines disability as being contained strictly within the body, the model does not represent the social environment as being part of the “problem” of disablement, as it fosters and authorizes the assumption that obstacles are given and cannot, or need not, be altered in order to accommodate people with disabilities.¹³

The focus on the body as the site of the disability has led the medical theory to conclude that remedying the body of the disability was the best possible solution. Therefore rehabilitation has played a major role in trying to get a person with a disability to a healthy state, so that they may fit in with the rest of society and when this goal could not be accomplished, institutions became the answer. During this period, persons with disabilities had no choice over how to live their life, as the doctor was the gatekeeper,¹⁴ acting as the expert who could determine the best course of action for resolving the person’s disability. Society’s inability to accept difference among its citizens was responsible for ensuring that this approach to disability was all encompassing.

Many disabled writers have recorded the lengths to which the medical profession was prepared to go, particularly prior to the 1980s, in an attempt to make them normal.¹ Vic

Mark Priestley, *Constructions and Creations: Idealism, Materialism and Disability Theory*, 13 *Disability & Society* 75, 82–83 (1998); see also Sharon Barnartt, *Using Role Theory to Describe Disability*, in 2 *Research in Social Science and Disability* at 58–68 (cited in note 19) (discussing disability as a master status); Gerben DeJong, *The Movement for Independent Living: Origins, Ideology and Implications for Disability Research*, in A. Brechin et al, eds, *Handicap in a Social World* 239, 442–47 (Hodder and Stoughton 1981) (describing “the impaired role” of permanent dependency).

¹³ Jerome E. Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993) 90.

¹⁴ Bickenbach, Jerome E. *Physical Disability and Social Policy* Toronto: University 73.

Finkelstein's experience of rehabilitation in the 1960s was that if cure was not possible, the medical profession became almost obsessed with the aim of enabling disabled people's functioning to be brought as close as possible to that of non-disabled people, rather than accepting that some people would be best served by using wheelchairs or other aids to enable them to function differently but effectively. Finkelstein recalls endless soul-destroying hours at Stoke Mandeville Hospital trying to approximate to able-bodied standards by "walking" with callipers and crutches.¹⁵

It is clear from the writings of disabled people like Finkelstein in the 1960s and 1970s that medical treatment and rehabilitation was imposed on them in a way which was oppressive and disempowering, by a medical profession whose professional and social status meant that non-compliance was often not a realistic option. For example, Barbara Lisicki wrote:

I had begun to realise the oppressive nature of the medical model but on a very individual level. At that time I did not know any better but they [the doctors] would want to do experimental operations and I let them. I just believed them. I didn't know how to resist.¹⁶

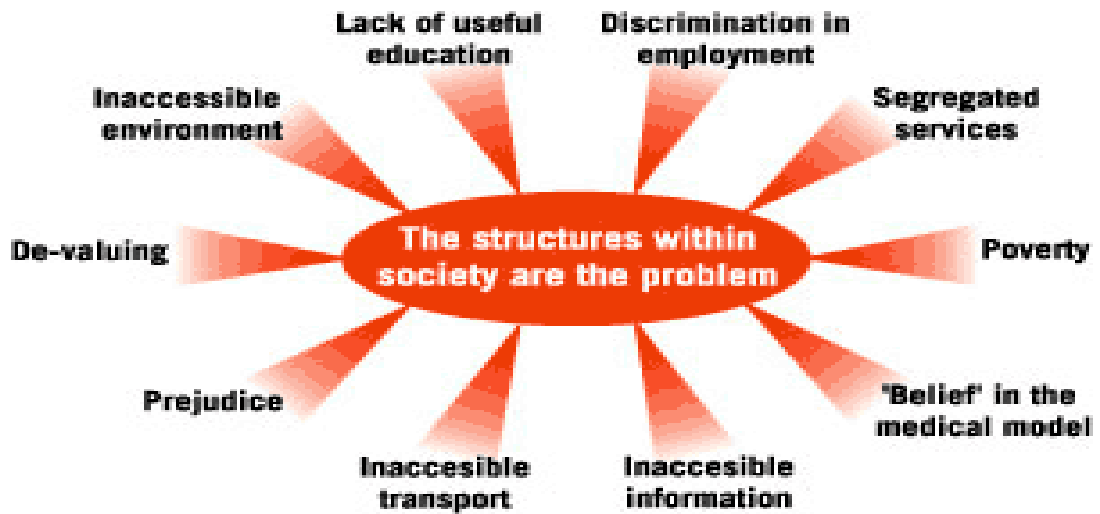
The Social Model of Disability

The social model is a proposed definition of disability that is connected to human disadvantage. Stripped down to basics, the model moves responsibility for disadvantage from physically and mentally impaired individuals to their built, social, and economic environment. Not necessarily moral responsibility, although that might follow, but causal responsibility. Either way, the model is powerful within its domain. This is especially true when conventional wisdom attributes a disabled life to personal tragedy, or curse, or sin, or some other fairly individualized phenomenon. The social model redirects attention to the environment surrounding an impaired individual.¹⁷

¹⁵ Oliver 1996b cited in Borsay 2005 p 60

¹⁶ (Campbell and Oliver 1996, pp 37-38) *Disability Politics: Understanding Our Past. Changing Our Future*. London: Routledge.

¹⁷ Recent restatements of the social model in disabilities legal scholarship include Bagenstos, 86 Va L Rev at 426-30 (cited in note 9);



**Disabled people as active fighters for equality
working in partnership with allies.**

Key to the social model is a distinction between personal impairments and disability.¹⁸ Akin to the sex/gender distinction of the 1970s, the social model indicates that at least some impairments disadvantage only because of their interaction with a social setting.¹⁹ Thus the model defines disability as disadvantage caused by the confluence of (a) personal impairment and (b) a social setting comprising architecture, economics, politics, culture, social norms, aesthetic values, and assumptions about ability. Different scholars stress different social factors: some American disability scholars have emphasized stigma and role theory, while some British writers concentrate on the mode of production.²⁰ However their messages are similar: because social settings change over time and space, disability is not an entailment of impairment but at least sometimes an artifact of environment.^{21 22} As these

¹⁸ See, for example, Oliver, *Understanding Disability* at 32–33 (cited in note 16); Oliver, *The Politics of Disablement* at 10–11 (cited in note 2) (separately defining impairment and disability); Silvers, *Formal Justice* at 53–56 (cited in note 8) (tracing the development of the conflation of disability and impairment in Western society); see also Liachowitz, *Disability as a Social Construct* at ch 1 (cited in note 16).

¹⁹ Compare Ann Oakley, *Sex, Gender, and Society* 204 (Harper & Rowe 1972) (comparing gender to socially constructed caste). Another strain of thought in disability studies emphasizes that some impairments are caused by social systems, like employment and war. See Paul Abberley, *The Concept of Oppression and the Development of a Social Theory of Disability*, 2 *Disability, Handicap & Socy* 5, 9–13 (1987). I set aside that strain, which is in turn different from the claim that traits become “impairments” only after social construction. See Part I.B.

²⁰ See Pfeiffer, *The Conceptualization of Disability* at 32–34 (cited in note 19).

²¹ See Priestley, *Constructions and Creations* at 76–82, 89–90 (cited in note 19) (outlining four approaches among British and American scholars with an “individual-social dimension and [a] materialist- idealist dimension”).

²² On cultural contingency, see Colin Barnes, *Theories of Disability and the Origins of the Oppression of Disabled People in Western Society*, in Len Barton, ed, *Disability and Society: Emerging Issues and Insights* 43 (Longman 1996); Martha L. Edwards, *Deaf and Dumb in Ancient Greece*, in Lennard J. Davis, ed, *The Disability Studies Reader* 29, 35–36 (Routledge 1997) (suggesting that Ancient Greek elites connected deafness to intellectual impairment because the latter was connected to linguistic inability); Ida Nicolaisen, *Persons and Nonpersons: Disability and Personhood Among the Punah Bah of Central Borneo*, in Benedicte Ingstad and Susan Reynolds Whyte, eds, *Disability and Culture* 38, 44–46 (University of California 1995) (explaining that the Punah Bah do not hold the physically and mentally impaired responsible for their condition” because they view these impairments as imperfections in the soul of the body part afflicted, and not the soul of the body itself); Aud Talle, *A Child Is a Child: Disability and Equality Among the Kenya Maasai*, in id at 56, 56–69 (finding no disfavored category of “disabled” among the Maasai, although certain impairments and deformity are associated with divine punishment or curse). See, for example, Minow, *Making all the Difference* at 12 (cited in note 15); Crossley, 75 *Notre Dame L Rev* at 654 (cited in note 8).

settings are generated in part by the choices of others, responsibility for a person's disadvantage cannot be attributed solely to that person's impairment.

The Social Model versus the Medical Model

As discussed in the previous section, the social model arose in response to the critique of the medical model of disability. It has generated a caucus of academic writing, predominantly written by academics and activists who themselves have disabilities and is the total antithesis to the medical model.²³ It is not intended in this section to provide a comprehensive review of the medical model but to refer to it in relation to the social model. The primary focus of analysis is the manner in which the social model shifts away from consideration of the deficits of the functional, physiological and cognitive abilities of the impaired individual, to the ability of society to systematically oppress and discriminate against disabled people, and the negative social attitudes encountered by disabled people throughout their everyday lives. Disability is therefore situated in the wider, external environment, and is not explicable as a consequence of an individual's physical and/or cognitive deficiencies. Thus, in focusing upon the manner in which disability is socially produced, the social model gives precedence to the importance of politics, empowerment, citizenship and choice. Furthermore, disability is the result of society's failure to provide adequate and appropriate services. Consequently, the needs of disabled people are not adequately accounted for within the contemporary social organization of society. It is perceived in attitudinal terms, as a socio-cultural rather than a biological construct. Harlan Hahn, writing within the North American context, stated that disability stems from: the failure of a structured social environment to adjust to the needs and aspirations of citizens with disabilities rather than from the inability of the disabled individual to adapt to the demands of society.²⁴

Disability scholars contrast the social model with an individual' (or medical') model of disability. This model focuses on the disadvantaging impact of physical or mental impairments rather than that of the environment in which they operate. The impairments themselves are thought to be disabling.²⁵ If any assistance is appropriate, therefore, it would presumably be the delivery of individualized services – hearing aids, wheelchairs, guide dogs, personal care attendants, pharmaceuticals, and the like.²⁶ Descriptions of the medical model often include a subordination theme as well. Inspired by Talcott Parsons' notion of the sick role' in Western society, critics of the medical model associate it with belittling norms that relieve impaired persons from social obligations yet demand they abide by professional medical judgment.²⁷ Both responsibility and liberty are thereby reduced.²⁸ But it is difficult to

²³ See Pfeiffer, *The Conceptualization of Disability* p. 32

²⁴ Hahn, H. (1986), "Public Support for Rehabilitation in Programs: The Analysis of US Disability Policy", *Disability, Handicap & Society*, 1(2): 121-138.

²⁵ See Claire H. Liachowitz, *Disability as a Social Construct: Legislative Roots* 12 (UPenn 1988); Michael Oliver, *Understanding Disability: From Theory to Practice* 31–32 (1996).

²⁶ Theodore P. Seto and Sande Buhai, *Tax and Disability: Ability to Pay and the Taxation of Difference*, 154 U Pa L Rev 1053, 1059–62 (2006) (discussing social security as a program based on the "medical/charity paradigm").

²⁷ See Talcott Parsons, *The Social System* 429–79 (1951) (introducing the "sick role" as an institutional role

find scholars who promote any such model of disability. Parsons was interested in describing social equilibria, and disability studies scholars hold out the medical model as error. It is their perception of how traditional health and welfare systems (mis)understand disability.²⁹

Medical model thinking	Social model thinking
Child is faulty	Child is valued
Diagnosis	Strengths and needs defined by self and others
Labelling	Identify barriers and develop solutions
Impairment becomes focus of attention	Outcome-based programme designed
Assessment, monitoring, programmes of therapy imposed	Resources are made available to ordinary services
Segregation and alternative services	Training for parents and professionals
Ordinary needs put on hold	Relationships nurtured
Re-entry if normal enough OR permanent exclusion	Diversity welcomed, child is included
Society remains unchanged	Society evolves

(Adapted from Micheline Mason 1994, R. Rieser 2000)

The common misperception of disability conforms to the medical model, which views a disabled person's limitations as wholly innate, properly and naturally excluding them from participating in mainstream culture. Under this model, people with disabilities are believed unable of performing social functions because of medical conditions that hinder numerous major life activities. As a consequence of this model, disabled persons are either systemically excluded from social opportunity such as receiving welfare benefits instead of employment, or are accorded limited social participation such as the case of educating disabled children in separate schools.³⁰

-necessary to enable the physician to bring his competence to bear on the situation"); Talcott Parsons, *The Sick Role and the Role of the Physician Reconsidered*, 53 *Health & Society* 257, 261–62, 266–77 (1975) (suggesting the power inequality of the typical doctor/patient relationship).

²⁸ See David Pfeiffer, *The Conceptualization of Disability*, in Sharon N. Barnartt and Barbara M. Altman, eds, 2 *Research in Social Science and Disability: Exploring Theories and Expanding Methodologies* 29, 30–31 (2001); Mark Priestley, *Constructions and Creations: Idealism, Materialism and Disability Theory*, 13 *Disability & Society* 75, 82–83 (1998); see also Sharon Barnartt, *Using Role Theory to Describe Disability*, in 2 *Research in Social Science and Disability* at 58–68 (cited in note 19) (discussing disability as a master status); Gerben DeJong, *The Movement for Independent Living: Origins, Ideology and Implications for Disability Research*, in A. Brechin et al, eds, *Handicap in a Social World* 239, 442–47 (Hodder and Stoughton 1981) (describing "the impaired role" of permanent dependency).

²⁹ See, for example, Gary L. Albrecht, *The Disability Business: Rehabilitation in America* 67–68 (Sage Draft of April 22, 2007 7

³⁰ See generally Kenny Fries, *Introduction*, in *Staring Back: The Disability Experience From the Inside Out* 6–7 (Kenny Fries ed., 1997) (noting that "the medical view of disability . . . puts the blame squarely on the individual"); Claire H. Liachowitz, *Disability as a Social Construct* (1988) (The "medical/pathological paradigm" of disability stigmatizes the disabled by conditioning their inclusion only "on the terms of the able bodied majority.").

In contrast to the medical model, disability studies scholars have long argued for an understanding of disability through a 'social' model.³¹ This model maintains that the socially structured environment and the attitudes reflected in its construction play a central role in creating 'disability.' According to the social model, collectively administered decisions determine what conditions constitute the bodily norm in any given society.³² Thus factors external to a disabled person's limitations are really what determine that individual's ability to function.³³ Just as some cultures view females as less capable than males in leadership roles,³⁴ most societies have historically assumed disabled persons are less capable than nondisabled persons.³⁵ The social model draws attention to the way in which disability is culturally constructed.³⁶

³¹ Disability studies is an academic discipline analogous to that of critical race or feminist theory.. See Gary L. Albrecht et al., *Introduction: The Formation of Disability Studies*, in *Handbook of Disability Studies* 1, 1-8 (Gary L. Albrecht et al. eds., 2001).

³² The medical model starts from a biological and anatomic definition of normal structure and function of what constitutes "normal", and of the situation of disabled people within it. Apart from the fact that a healthy body is usually considered a normal body, it can be argued that health is fundamental to the achievement of all other norms. George Canguilhem argues that; Viewed in this way, structure and function can be seen as a key norm for the medical model, a necessary factor in the attainment of all other social norms See Osborne 1997. The assumption about health is that it was always a problem whose logical solution involved the surveillance and examination of individual bodies. While health is classically defined as a state of well-being, its main utility from the nineteenth century onwards has been in the maintenance of a newly constructed workforce see Henriques et al. 1984, 132. A healthy pool of labourers was essential for progress during the industrial revolution and for the development of capitalism and capitalist explanation. see A comprehensive discussion of the transition to capitalism and its implications for disabled people is provided by Mike Oliver in *The Politics of Disablement* (1990) also see Vic Finklestein (1980). See also Richard K. Scotch & Kay Schriener, *Disability as Human Variation: Implications for Policy*, 148 (1997).

³³ See Harlan Hahn, *Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas*, 4. S. Cal. Rev. L. & Women's Stud. 97 (1995); Ron Amundson, *Disability, Handicap, and the Environment*, 23 J. Soc. Phil. 105 (1992). The framework derives from both British and American disability rights scholars. Some scholars credit Michael Oliver with originating the social model theory. See Michael Oliver, *Social Work with Disabled People* 23 (1983) (the social model is "nothing more 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"). A disabled Political scientist and Law Professor Jacobus tenBroek made an early contribution to the development of the social model of disability in an article, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 Calif. L. Rev. 841, 842 (1966) (demonstrating how people with disabilities were historically held to higher duties of care in respect to the law of torts because they were perceived as inherently less able to engage in social functions).

³⁴ See, e.g., *A Vindication of the Rights of Women* (1792) (in which she argues that women are not naturally inferior to men, but because they lack education they might appear so.) The First World War provided the first opportunity to take on traditional male jobs in the UK so it is not surprising to know that in 1918 women over the age of thirty were given the same political rights as men. This change was not a result of war, women have been campaigning for decades to be given the right to vote which they saw as a gradual improvement in women's rights that had been going on throughout the 19th century. Traditionally a woman's place was seen in the home. An Oxford university study by the Thomson Reuters Foundation shows that women in countries like Afganistan, Congo, Pakistan, and Somalia still show that women in these countries are subjected to extreme abuse and practically no rights. <http://reuterinstitute.politics.ox.ac.uk>.

³⁵ See, e.g., Jerome E. Bickenbach, *Disability Human Rights, Law, and Policy*, in *Handbook of Disability Studies* *supra* note 56, at 565, 567 (noting the commonly held assumption that "disability is an abnormality, a lack, and a limitation of capacity"). The results of a recent study of prevailing attitudes towards individuals with intellectual disabilities across ten very different countries reflect this misperception. See *Multinational Study of Attitudes Toward Individuals with Intellectual Disabilities: General Finding and Calls to Action* (2003). The report, "Disabled People's Attitudes Toward Other Impairment Groups", from City University, London, 2007, was compiled from anonymous questionnaires by Dr. Mark Deal. The study's author, himself disabled, reports findings that reveal a tendency of an established "hierarchy" of disability among both disabled people and wider society. For example, disabled and non-disabled people regard those with a learning disability or a mental illness as the least desirable groups. The research points to a hierarchy of impairment amongst disabled people, ranking Deafness as the most 'desirable' impairment followed by Arthritis, Epilepsy, Cerebral Palsy, HIV/ Aids, Down's Syndrome and Schizophrenia. These prejudices are almost identical to those held by the non-disabled sample, with the only difference being that Cerebral Palsy and HIV/Aids were placed in reverse order. However, a minority of cultures believe people with disabilities are especially capable of various functions. In certain Asian countries—for example China—visually-impaired people are frequently trained and valued as masseuses. Moreover, it is illegal for those with ordinary vision to be employed as a masseuse in Taiwan. See *DPP City Councilors Say Lein Received Sighted Massage*, Taipei Times, Sept. 27, 2003, at 3, available at <http://www.taipetimes.com/News/taiwan/archives/2003/09/27/2003069422>. Indeed, there are social anthropologists who claim that the notion of "disability," at least as a negative concept, is Western in origin and remains unknown to

The social model of disability should not be considered as a monolithic entity, but rather as a cluster of approaches to the understanding of the notion of disablement. As will be demonstrated below, different variants of the model ascribe differing and relative importance to a multiplicity of factors that result in the oppression and discrimination that disabled people experience. However, common to all variants of the social model is the belief that, at root, 'disability' and 'disablement' are socio-political constructions. It is therefore the inhospitable physical environment, in concert with the negative social attitudes that disabled people encounter which result in the systematic oppression, exclusion and discrimination of disabled people.

It can therefore be appreciated that the consideration of the theoretical understandings of disability is not solely of semantic, academic interest. The manner in which disability is popularly perceived has a profound impact upon the way in which 'stakeholders' are considered (by disabled persons' organizations, policymakers and NGOs alike) to have a legitimate role in deciding how resources are distributed. The manner in which disability has been variously conceptualized, with the resultant ramifications for the provision of disability services, has become a highly emotive and politically charged issue.

The Shift From a Medical model to a Social Model of Disability and its impact on Social Policy

This experience of oppression and disempowerment by the medical profession, as well as the disempowering nature of residential care for some and a total lack of support in the community for others, led some disabled people in the 1960s and 1970s to develop what eventually came to be described as the social model of disability. Some of the earliest work on the social model was undertaken in the 1970s by the 'Union of the Physically Impaired against Segregation,' a group of people with physical impairments who realised that they were limited more by the oppressive attitudes and actions of those 'caring' for them than by their impairments.³⁷

The Union of the Physically Impaired believes that the reality of our position as an

certain cultures, including some African societies. See, e.g., Aud Talle, *A Child is a Child: Disability and Equality among the Kenya Maasai*, in *Disability and Culture* 56 (Benedicte Ingstad & Susan Reynolds Whyte eds., 1995); Benedicte Ingstad, *Mpho ya Modimo—A Gift from God: Perspectives on "Attitudes" Toward Disabled Persons*, in *Disability and Culture*, *supra*, at 246.

³⁶ Philosopher Anita Silvers provides an eloquent application of the social model of disability in her *Formal Justice*, in *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* 13 (Anita Silvers et al. eds., 1998). She argues that being physiologically deviating from the norm is viewed as abnormal only because a dominant group imposed conditions favorable to its own circumstances, and not because of "any biological mandate or evolutionary triumph." *Id.* at 73. Accordingly, the social model of disability recognizes the source of disabled people's relative disadvantage as a hostile environment that is "artificial and remediable" instead of "natural and immutable." *Id.* at 74-75. "If the majority of people, instead of just a few, wheeled rather than walked, graceful spiral ramps instead of jarringly angular staircases would connect lower to upper floors of buildings." *Id.* at 74. Thus, a wheelchair-user experiences disability through antagonistic surroundings, including lack of access to workplaces, educational programs, medical services, and other areas open to the public. Because the accommodations seek to eliminate subordination of individuals with disabilities, Silvers argues that the statute implicitly utilizes the social model of disability, and as such is a product of formal and equalizing justice.

³⁷ (Campbell and Oliver 1996, Oliver 1990).

oppressed group can be seen most clearly in segregated residential institutions, the ultimate human scrap-heaps of this society.³⁸

By reducing the identity of persons with disabilities to that of a patient only, the ability of persons with disabilities to participate in society was greatly restricted. As a result, social policy constructed persons with disabilities as an unemployable group, thereby increasing their dependence upon others for their survival. Education in England is just one example of the results of this narrow-minded understanding.³⁹

By restricting their understanding of disability to the confining medical model, the state has been absolved of its responsibility to ensure that society is where all persons with disabilities are valued members of their communities. Furthermore, as the medical model views disability as rooted solely within the body, there was no compulsion to ensure that many persons with disabilities were part of the education system or society. The response from the disability community to this theory has been to argue, this medicalized representation is one of the major obstacles they face in the achievement of full participation in society.⁴⁰ As Bickenbach argues, the role of a sick citizen came to be reflected in our social policy:

this so-called sick role is based on socially visible, physical differences that would usually constitute a form of social deviance, but that instead create a legitimating role exempting people from blame and normal role obligations. This exemption, however, is conditional: to benefit from the role the sick individual must be a “good patient” and actively seek to recover. The sick role, in other words, is premised on reversibility.⁴¹

Therefore, when applied to the development of social policy, the medical model of disability concludes that a person with a disability is relieved of their citizenship duties, notably labour market participation as a consequence of their being disabled. The problem with this theory is that in turn, persons with disabilities must focus all their efforts on getting better and achieving a level of health and normality that is acceptable to society.

Disabled People as an Oppressed Group

A further central tenet of the social model is that, irrespective of the political, economic and religious character of the society in which they live, disabled people are subject to oppression and negative social attitudes that inevitably undermine their personhood and their status as full citizens. Underlying the notion that disabled people are oppressed is the assumption that all societies are characterized by conflict between two competing groups: the dominant and the subordinate. Writing within the context of the politics of disability, James I. Charlton defined oppression as follows:

³⁸ (UPIAS, 1976b p 2).

³⁹ See Pfeiffer, The Conceptualization of Disability at 32–34 (cited in note 19).

⁴⁰ B Bickenbach, J. E. (2001). Disability human rights, law and policy. In G. L. Albrecht, K. D. Seelman & M. Bury (Eds.), Handbook of disability studies (pp. 68. Thousand Oaks, California: Sage Publications.

⁴¹ Bickenbach, Jerome E. Physical Disability and Social Policy Toronto: University, 82-83.

Oppression is a phenomenon of power in which relations between people and between groups are experienced in terms of domination and subordination, superiority and control. Those with power control; those without power lack control. Power presupposes political, economic and social hierarchies, structured relations of groups of people, and a system or regime of power. This system, the existing power structure, encompasses the thousand of ways some groups and individuals impose control over others.⁴²

Charlton also maintains that the majority of disabled people have been so psychologically oppressed by society that their oppression has become internalized. As a result, they have developed a Marxian notion of false consciousness,' whereby they come to believe that they are less capable than others. Consciousness can be defined as an awareness of oneself in the world. It is a process of awareness that is influenced by social conditions, chance and innate cognition. With regard to false consciousness,' as a lethal mixture of self pity, self-hate and shame, this state of awareness can:

... prevent people with disabilities from knowing their real selves, their real needs, and their real capabilities and from recognizing the options they in fact have. False consciousness and alienation also obscure the real source of oppression. They cannot recognize their self-perceived pitiful lives are simply a mirroring of a pitiful world order. In this regard people with disabilities have much in common with others who have internalized their own oppression.⁴³

Paul Abberley has also analyzed the concept of social oppression as it applies to disabled people. He argued that other groups within society, such as women and ethnic minorities, encounter oppression, but that is not possible to construct a monolithic theory that provides an adequate explanatory framework to comprehensively analyze the phenomenon for all marginalized groups. Social oppression is specific in the manner in which it operates in relation to form, content and location, so to analyze the oppression of disabled people in part involves pointing to the essential difference between their lives and other sections of society, including those who are, in other ways, oppressed.'⁴⁴ Abberley delineates four supplementary defining characteristics of social oppression as it relates to disabled people. He stated:

To claim that disabled people are oppressed involves, however, arguing a number of other points. At an empirical level, it is to argue that on significant dimensions disabled people can be regarded as a group whose members are in an inferior position to other members of society because they are disabled people. It is also to argue that these disadvantages are dialectically related to an ideology or group of ideologies, which justify and perpetuate the situation. Beyond this it is to make the claim that such disadvantages and their supporting ideologies are neither natural nor inevitable. Finally, it involves the identification of some beneficiary for this state of affairs.⁴⁵

⁴² Charlton, J. (1998) p.30, Nothing About Us Without Us: Disability, Oppression and Empowerment, University of California Press, Berkeley.

⁴³ Charlton, J. (1998) p.27, Nothing About Us Without Us: Disability, Oppression and Empowerment, University of California Press, Berkeley.

⁴⁴ Abberley, P. (1987; 63) "The Concept of Oppression and the Development of a Social Model of Disability", Disability, Handicap & Society, 2(1): 5-19.

⁴⁵ Abberley, P. (1987; 63) "The Concept of Oppression and the Development of a Social Model of Disability", Disability, Handicap & Society, 2(1): 5-19.

Social oppression in turn gives rise to institutional discrimination, analogous to that experienced with sexual and racial discrimination. Barton (1993) on commenting upon the meaning of institutionalized discrimination within the British context stated:

An extensive range of research findings has demonstrated the extent of the institutional discrimination which disabled people experience in our society. This involves access and opportunities in relation to work, housing, education, transport, leisure and support services. Thus, the issues go far beyond the notion that the problem is one of individual disabled attitudes. These are not free floating but are both set within and structured by specific, historical, material conditions and social relations. Goodwill, charity and social services are insufficient to address the profundity and stubbornness of the factors involved.⁴⁶

Disabled people have been subjected to a multiplicity of oppressive social attitudes throughout history, which have included horror, fear, anxiety, hostility, distrust, pity, over-protection and patronizing behavior.⁴⁷ Such pejorative attitudes, coupled with an inhospitable physical environment such, as inaccessible buildings and unusable transport systems, are considered to be the real concerns of disability. It is therefore maintained that disabled people live within a disabling world.⁴⁸

Problems and Critique of the Medical Model of Disability by the Social Model

While the medical model considers pathology, impairment, or dysfunction to cause disability, scholars and disability advocates who subscribe to the social model assert that it is society that disables people who have impairments. Proponents of the social model of disability define disability as a loss or limitation of opportunity brought about by social and physical barriers and, therefore, the appropriate solutions are the transformation of policies, laws, and public attitudes.

Moreover, advocates of the social model believe that much of the prejudice and discrimination experienced by people with disabilities occurs not *in spite of* the medical Model, but *because* of the medical model. Indeed, Harlan Hahn⁴⁹ termed the medical model of disability a meta handicap,' while others state the search for the origins and causes of prejudice against people with disabilities inevitably leads back to the medical model. Their specific challenges to the medical model include:

1. The medical model relieves society of any responsibility to provide accommodations or civil rights to people with disabilities

⁴⁶Barton, L. (1996, 8), "The Struggle for Citizenship: The Case of Disabled People", *Disability, Handicap & Society*, 8(3): 235-248.

⁴⁸Barnes, C. (1991), *Disabled People and Discrimination in Britain: The Case for Anti-Discrimination Legislation*, Hurst & Co, London.

⁴⁹See Hahn, H. (1985). *Towards a politics of disability*. *Social Science Journal*, 22(4), 87-105. See also Harlan Hahn (1985, 1988, 1993)

2. The medical model has guided both legislation and the payment systems for people with disabilities and therefore has resulted in the daily-lived lives of people with disabilities
3. The medical model has fragmented the disability community into diagnostic categories and thus robbed them of their collective history and memory.

The rather dated criticisms of the medical model of disability, including the pathologization, categorization, objectification, and privatization of disability, are once again discussed, but in the social model, these shortcomings are viewed as having far-ranging effects, which in response to the above concerns include:

1. The medical model of disability relieves society of any responsibility to provide civil rights and accommodations

The medical model has had dominance in shaping the public's understanding of disability because of the following factors:

- a) The long history of the medical model;
- b) Its reliance on the prestigious and authoritative academic disciplines of medicine and science;
- c) Its strong explanatory power, and the public's intuitive understanding of medical diagnoses.

Many disability scholars feel that the dominance of the medical model will continue and increase as the profession of medicine evolves into more specializations. According to proponents of the social model, society considers disability to be solely a medical concern and therefore society has not afforded people with disabilities the right to make claims on social justice.⁵⁰

Indeed, until recently, the medical model itself has been silent on issues of social justice.⁵¹ While no one believes that medical professionals deliberately created injustice and discrimination, nonetheless, the result has been injustice. Scholars feel that disability has been misrepresented as only a health concern and because of this discrimination and prejudice based on disability result, but also frequently remain unrecognized.⁵² Further, to the general public, this discrimination and prejudice does not appear to be prejudice and discrimination because it is the medical professions which have been given the mandate to respond to all the needs of people with disabilities. Defining disability as solely a medical concern that requires high levels of expertise, training, and technology also lends scientific

⁵⁰ (Liachowitz, 1988; Longmore, 1995

⁵¹ Liachowitz, 1988; Longmore, 1995.

⁵² Barnes, C. (1991), *Disabled People and Discrimination in Britain: The Case for Anti-Discrimination Legislation*, Hurst & Co,

credibility to the idea that all of the difficulties experienced by people with disabilities are the result of their physical abnormalities or physical inferiority. However, many individuals with disabilities report that their greatest difficulties have nothing to do with the disability itself. Rather, their greatest difficulties are the result of social isolation, prejudice, and discrimination.⁵³

A disability scholar, Higgins, summarized this when he remarked that we make people with disabilities foreigners in their own country.⁵⁴ The well-defined normative basis of disability in the medical model also relieves society of any need to provide accommodation. The entire focus is on changing the individual (rehabilitation) rather than changing the environment (accommodation). In the medical model, impairment is thought to be dysfunction, abnormality, pathology, disease, or defect. Simply stated, it is better not to have a disability. Disability is deviance, not a valued difference. Therefore, individuals with a disability understand that they belong to a devalued group, regardless of their individual attributes, achievements, or resources. Often individuals with disabilities eventually accept the disabled role of inferiority and deviance. Others, like the deaf culture, refuse the 'disabled role' and consider themselves to be a cultural group defined by the use of sign language, rather than a disability group.⁵⁵

Due to the normative basis of the medical model, many individuals with disabilities have felt that physicians and other medical professionals have consistently underestimated their quality of life. While medical professionals often view disability as an unending, personal tragedy, many individuals with disabilities feel that the disability is a valued part of their self-identity and take pride in their mastery of the disability. Difficulty does not automatically translate to tragic.

In addition, the medical model considers the disability to exist solely within the individual and, due to this privatization of the source of the disability; the responsibility attribution for the treatment of the disability is also privatized, resting solely with the individual and his or her family. In the medical model, pathologizing and privatizing disability was another way in which to effectively absolve society from any responsibility to deal with disability issues. It was the individual who was required to adapt and adjust.

⁵³ Barton, L. (1996, 8), "The Struggle for Citizenship: The Case of Disabled People", *Disability, Handicap & Society*, 8(3): 235-248.

⁵⁴ Higgins, p (1992) *Making Disability: Exploring the Social Transformation of Human Variation*

⁵⁵ Higgins, p (1992) *Making Disability: Exploring the Social Transformation of Human Variation*

2. The medical model of disability has resulted in the daily, lived lives of people with disabilities

The medical model has provided the basis for much of the legislation that mandates services for people with disabilities and also guides the reimbursement and payment systems of government agencies.⁵⁶ Therefore, both the services and funding an individual with a disability receives are based on the medical model. The profession of medicine has for centuries been based on the two outcome paradigm of cure or death, and vestiges of this paradigm are reflected in payment systems. Therefore, after medical stabilization, much of the funding is withdrawn, not taking into consideration the individual's whole needs.⁵⁷ Nonetheless, disabilities are chronic conditions which require care and not cure. Health maintenance, patient education, maintaining the highest quality of life, avoiding secondary conditions, and responding to interaction of the disability with the ageing process are all medical services that are necessary for someone with a disability, but typically are not funded enough.

The cultural identification of the individual is often ignored because the medical model is based only on biological, organic needs. Psychiatric disabilities, which are highly dependent upon the environment of the individual, are not well funded. Such environmental accommodations could render the individual highly functional.⁵⁸ It is true that the *International Classification of Impairments, Disease, and Handicaps* (World Health Organization 2001)⁵⁹ does provide a separate axis or domain on which to code some aspects of the individual's environment. However,

the user of the ICIDH cannot record or measure the effect that an unaccommodating environment has on people's lives. The user can record changes in a person's level of ability, but would have no way of knowing whether that was the result of changes to the person (rehabilitation) or changes to the social and physical environment (accommodation.) As far as the ICIDH is concerned, the social and physical world is immutable and benign.⁶⁰

3. The medical model has fragmented the disability community into medical diagnostic categories

The social model asserts that the medical model, by dividing individuals into groups based on diagnostic categories or functional traits, has effectively fragmented people with disabilities into competing interest groups. Thus, there are interest and advocacy groups for the blind, the deaf and for the

⁵⁶ Berkowitz & Hill, 1986; Wolfensberger, 1972; Zola, 1993.

⁵⁷ Yelin E. 1992. *Disability and the Displaced Worker*. New Brunswick, NJ: Rutgers University Press.

⁵⁸ Yelin E. 1992. *Disability and the Displaced Worker*. New Brunswick, NJ: Rutgers University Press.

⁵⁹ WHO is the directing and coordinating authority for health within the United Nations system. It is responsible for providing leadership on global health matters, shaping the health research agenda, setting norms and standards, articulating evidence-based policy options, providing technical support to countries and monitoring and assessing health trends <http://www.who.int/classifications/icf/en/>

⁶⁰ Bickenbach, J. E., Chatterji, S., Badley, E. M., & Üstün, T. B. (1999). Models of disablement, universalism and the international classification of impairments, disabilities and handicaps. *Social Science & Medicine*, (.p. 1175).

mentally ill' and each of these groups must compete with each other for social attention. The various disability groups must compete for tangible resources and services. When disability groups are polarized, a victory for one category of disability is often viewed as a loss for competing groups.⁶¹ The lack of broad coalitions has also deprived individuals with disabilities of a collective history or memory.

Physicians and other medical professionals understand the purpose of diagnoses and categories as being simply to direct the treatment and intervention plans. Nonetheless, people with disabilities are often sensitive to such categorization. Many individuals with disabilities resist this categorization because they feel that the different resources and needs of individuals with the same diagnosis can differ greatly but, nonetheless, all individuals with the same medical diagnoses are treated with uniform procedures.

The Materialist Variant of the Social Model

Since the 1960s, some disabled people, particularly those aligned with the radical disability movement' in the UK and the United States, have attempted to develop a theoretical understanding of the concept of disablement, from a socio-political perspective. The early writers in this field were strongly influenced, as will be demonstrated below, by structuralist and Marxist sociology. The theoretical foundations of the social model have developed during the ensuing period, embracing other schools of sociological thought. However, it is important to review these early writings in some detail, for they provide a basis for understanding how the model has subsequently developed.

Foundational to the materialist understanding of disability is the important conceptual distinction drawn between impairment and disability, the formal definitions provided by the Union of the Physically Impaired Against Segregation cited in Box 1 below.

According to the definition cited above, the social construction of physically impaired people as disabled' arises, in the first instance, from the specific ways in which society organizes its basic material activities (work, transport, leisure, domestic activities and so forth). Impairment is simply a bodily state characterized by malfunction of the physical and/or cognitive abilities of the individual, as the result of altered physiology or psychology, which defines the physicality of certain people.

⁶¹ ⁶¹ Theodore P. Seto and Sande Buhai, Tax and Disability: Ability to Pay and the Taxation of Difference, 154 U Pa L Rev 1053, 1059–62 (2006) (discussing social security as a program based on the "medical/charity paradigm").

Box 1 Definition of Impairment and Disability (The Union of the Physically Impaired Against 1976)

□ “Impairment (is) lacking part of or all of a limb, or having a defective limb, organism or mechanism of the body;

□ Disability (is) the disadvantage or restriction of activity caused by contemporary organization which takes no or little

account of people who have physical impairments and thus excludes them from the mainstream of social activities.”

In a very embryonic account of the materialist explanation of disability, commenting upon the crucial distinction between disability and impairment, Paul Hunt, on behalf of UPIAS, wrote:

In our view, it is society which disabled physically impaired people. Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society. To understand this, it is necessary to grasp the distinction between the physical impairment and the social situation, called disability, of people with such impairment. Thus we define impairment as lacking part of or all of a limb, or having a defective limb, organ or mechanism of the body; and disability as the disadvantage or restriction of activity caused by a contemporary social organization which takes no or little account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities. Physical disability is therefore a particular form of social oppression.⁶²

A further tenet of the materialist thesis is that disability is not a fixed, absolute category, but has been defined differently throughout history, and in order to understand the contemporary position in which disabled people are situated, it is imperative to analyze disability from an historical perspective. Furthermore, given the two premises that disability is a socio-political construction, and to a large extent is culturally produced, disability theorists such as Oliver and Finklestein maintain that the phenomenon of disability can be adequately explained with reference to the mode of production and the dominant ideological hegemony.

Vic Finklestein was one of the pioneers in developing a materialist explanation. He postulated that history can be divided into three distinct and sequential phases, and that within each phase the manner in which disabled people are socially included or excluded within contemporary society differs.⁶³ Firstly, the period before the European industrial revolution was characterized by agrarian feudalism and some cottage industries. During this period, there was scant social mobility, and this mode of production did not preclude

⁶² UPIAS, (1976,p.3-4),Fundamental Principles of Disability, Union of the Physically Impaired Against Segregation, London.

⁶³ Finklestein, V. (1980), Attitudes and Disabled People: Issues for Discussion, World Rehabilitation Fund, New York.

disabled people from active participation in their local communities. During the second phase, spanning the industrial revolution and its immediate aftermath, disabled people were effectively excluded from being in paid employment, due to the fact that they were not able to maintain the pace set by the factory system. As a consequence, disabled people were separated and thereby socially excluded from mainstream social and economic activity. Finkelstein maintained that during the third phase, which was just commencing, disabled people will witness and experience their liberation from social oppression.⁶⁴ This will be achieved through disabled people and their allies working collaboratively to achieve commonly agreed goals, through the aegis of the disability movement.

Oliver's Analysis of Disablement

Mike Oliver, a disabled academic, developed the work of the UPIAS in the 1980s and 1990s, using a Marxist materialist perspective to explain the social, as opposed to biological, construction of disability. In his seminal work, *The Politics of Disablement* (Oliver, 1990) has produced a variant of the social model of disability. This construction is considered at some length, for it constitutes the foundation for the subsequent development and maturation of disability studies, particularly in the UK and the United States.⁶⁵ The model is constructed and expressed in Marxist terms, and assumes that human nature, and the resultant choices that individuals can make for themselves, are determined by the structure and ideology of society. It is therefore argued that the kind of society in which a disabled person lives has a profound effect upon how their disability is experienced and structured. Furthermore, an individual's personal experience of disability within capitalism is itself defined, to some extent, by the structural features of capitalism including ideology, culture and the influence of race and gender as well as the activities of key groups and institutions (professionals and professionals). The overall purpose of Oliver's analysis is to provide conclusive evidence that disability as a category can only be understood within a framework which suggests that it is culturally produced and socially structured.⁶⁶ Oliver began his analysis by questioning whether the medicalised, and tragic conception of disability, which he observed to be prevalent within Britain in the late 1980s, had been replicated across other cultures and societies, and also between historical periods. He concluded that the individualist, medicalised and tragic conception of disability was indeed unique to capitalist societies.

Oliver referred to and quoted the work of two social anthropologists, Hanks and Hanks, who showed that within pre-capitalist societies, the spectrum of attitudes encountered by disabled people have varied from ruler to outcast, from warrior to priest, from infant to aged.⁶⁷ Oliver's analysis of the social structuring of disability is founded upon two concepts; the mode of production and the central core values, or ideology that are present within any

⁶⁴ Finkelstein, V. (1980), *Attitudes and Disabled People: Issues for Discussion*, World Rehabilitation Fund, New York.

⁶⁵ Michael Oliver, *The Politics of Disablement* (London: Macmillan, 1990), pp. Oliver, M. 1990:22

⁶⁶ Oliver, M. 1990:22

⁶⁷ Hanks, J, and Hanks, L. (1980)p. 12, "The Physically Handicapped in Certain Non-Occidental Societies" in Phillips, W. and Rosenberg, J. ed., *Social Scientists and the Physically Handicapped*, Arno Press, London.

given society. Both interact and determine how disabled people are perceived within their local contemporary societies. The former is understood to refer to the type of economy and its constituent productive units, as well as the manner in which production is organized – for example, through the network of family units, or through the factory system utilizing wage labour. The latter concept refers to the basic values upon which a society is premised, which could be based upon religion, science and medicine.

Different ideological premises have profound implications for the explanation of disability. Oliver argued that in some societies, the presence of an impairment may not be perceived by society in pejorative terms, as it has been seen as a sign of being chosen. Hence, Safilios-Rothschild has stated:

Throughout history, discriminatory practices against the sick and disabled have varied greatly from country to country and from century to century; they have ranged from complete rejection and ostracism to semideification and the according of special privileges and humours.⁶⁸

Oliver maintained that the economic structure and ideological hegemony of modern western society have had a major detrimental impact upon the lives of disabled people, and also other marginalised groups such as those with differing ethnic affiliations, or those with homosexual orientations. The rise of the factory system and the introduction of individual wage labour transformed the means of production, resulting in the separation of the home from the workplace, and in the marginalisation of disabled people, because they were unable to meet the demands of capitalist society.⁶⁹

Disabled people have become further isolated from their family and communities through the establishment of closed and segregated institutions, (which first came into existence in the late nineteenth century), whose function was to act as a mechanism for social control. In the latter half of the twentieth century, closed and socially isolating institutions still exist which warehouse disabled people – for example, many so called special schools and sheltered training workshops. However, during the past years, throughout western democratic societies, there has been a shift in government policy towards ensuring that disabled people live in community settings, where the package of care is bespoke to the individual needs. Within the UK context, this is referred to as the care in the community programme.⁷⁰

Oliver further argued that in the wake of capitalism, dominant ideological presuppositions and modes of thought became commonly accepted, which again had detrimental consequences for the lives of disabled people. Analogous to Gramsci's distinction between organic and arbitrary ideologies, he distinguished between core and peripheral ideologies, with the latter being derived from the former. In relation to ideology, it was argued

⁶⁸ Safilios-Rothschild, C. (1970) p.4, *The Sociology and Social Psychology of Disability and Rehabilitation*, Random House, New York.

⁶⁹ Michael Oliver, *The Politics of Disablement* (London: Macmillan, 1990), pp. Oliver, M. 1990:34

⁷⁰ Priestley, M. (1999), *Disability Politics and Community Care*, Jessica Kingsley Publishers, London.

that the rise of capitalism necessitated the separation of work from home (as stated above), which in turn gave rise to the ideological construction of individualism, which became the core ideology vis-a-vis disability. Consequently, the rise of capitalism gave rise to the premise that disability is in essence an individual pathology, since a distinction needed to be drawn between those considered able-bodied (and by implication able to work), and those who were considered disabled. Hence, within the modern capitalist era, disabled people could not meet the demands of individual wage labour and so became controlled through exclusion.⁷¹

This process of individualism gave rise to the peripheral ideologies of categorization and medicalisation of disability. In order to make a valid distinction between the deserving and undeserving poor, the agencies of the state assigned the medical profession the role of deciding who was disabled and who was not. This process, initiated during the nineteenth century, continues to have important ramifications for contemporary service provision, where it is commonly assumed that the greatest problems encountered by disabled people are directly related to their medical conditions. The medical profession still has a great deal of influence in the manner in which disabled people live, invariably being seconded by agencies of the state to make assessment of their needs and abilities, often in areas which have little to do with the application of medical science. Examples falling into this category would include the entitlement for financial grants, wheelchairs and other appliances, assessing the ability of a person to drive, and selecting appropriate educational provision. A possible explanation of the continued and, some would argue, expanding influence of the medical profession in the lives of disabled people is that the profession has widened its remit within the field of medical science to incorporate rehabilitation. Oliver, in support of this thesis, quoted Albrecht and Levy:

As demand for rehabilitation services increased and insurance benefits expanded, there was an incentive for physicians to enter the rehabilitation field. Under the aegis of designing comprehensive medical rehabilitation programs, hospitals, and physicians began to incorporate rehabilitation services into the medical model. Definitions of disabling conditions and appropriate treatment were expanded to include medical interventions and physical control.⁷²

Oliver continued his analysis by arguing that the economic and social structures of society, in combination with the dominant ideological hegemony, have resulted in disabled people being perceived as dependent. Consequently a great deal of the social welfare legislation enacted during the post-war period has compounded this notion. The term dependency is used in a two-fold manner. Firstly, welfare states have categorized entire groups of people, of which disabled people are but one, who have become dependent upon the state for the provision of education, health care, as well as financial support. Secondly, in specific relation to disability, attention has focused upon the functional limitations of disabled people who are

⁷¹ Oliver, M. (1990). *The Politics of Disablement*. Basingstoke: Macmillan. P.30

⁷²Albrecht, G. and Levy J. (1981,p.22), -Constructing Disabilities as Social Problems" in Albrecht, G. ed., *Cross National Rehabilitation Policies: A Sociological Perspective*, Sage, London

perceived to be unable to care for themselves.

There is also a professional basis for the creation of dependency. Many of the services provided for disabled people, often within institutionalized settings, engender such a state. Traditionally, these services have been established and subsequently managed with little or no regard of the needs and aspirations of disabled people. Furthermore, the professional-client relationship is itself dependency creating, as undue power and influence is vested with the professional. The structure of the economy within industrial society has invested professionals with the function of acting as gatekeepers of scarce resources, (in terms of financial benefits, medical and rehabilitation services) and this inevitably affects disabled people's lives.

Despite cosmetic changes that have been made with regard to the professional-client relationship, Oliver remained pessimistic about changing this aspect of dependency. He therefore stated:

Economic structures determine the roles of professionals as gatekeepers of scarce resources, legal structures determine their controlling functions as administrators of services, career structures determine their decisions about whose side they are actually and cognitive structures determine their practice with individual people who need help - otherwise, why would they be employed to help them? This is not just another attack on overburdened professionals, for they are as much trapped in dependency creating relationships as are their clients.⁷³

The task of transforming modern industrial society, so that disabled people do in fact live as full and free citizens, free from social oppression and negative social attitudes, is profoundly revolutionary. Merely by tinkering with and modifying the institutions of the welfare state, irrespective of whether it adheres to the ideological presuppositions of capitalism or socialism, will ultimately prove to be inadequate. The dominant hegemony of individualism, the medicalisation and categorization of disability, and the resultant dependency of disabled people will remain unaltered. Furthermore, the *raison d'être* of service provision needs to change from one that is based upon defining needs (principally by able-bodied professionals), to one based upon social rights. Such a move would run counter to the dominant ideology of individualism that has hitherto pervaded services provision, as well as beginning to break the cultural linkage between political and professional dependency.

In order for this to become a reality, thereby creating a non-disablist society, Oliver proposed a three-fold strategy. Firstly, states should enact anti-discrimination legislation, thereby making it an offence to discriminate against disabled people in the fields of education, employment, housing and so forth. Secondly, within western societies, more emphasis should be given to securing freedom of information, so that disabled people can have access to information that has previously remained confidential.

⁷³Oliver, M. (1990). *The Politics of Disablement*. Basingstoke: Macmillan., p.:91).

Thirdly, an infrastructure should be established in which the needs and aspirations of disabled people can be met, with the appropriate range of services being provided. This can only happen with adequate state funding, to assist organizations of disabled people to secure their rights. Hence, it is ultimately disabled people themselves who are defining how they wish to live their lives. In the last twenty years, organizations of disabled people have been established in the majority of countries throughout the world. The vast majority of these adhere to the principles of empowerment, and human rights, independence and integration, and self-help and self-determination.⁷⁴ In commenting upon the consequences of adopting a human rights approach to disablement, Dimitris Michailakis stated:

A human rights approach implies legal reasoning. ... The human rights approach implies, thus, among other things, the creation of a legislation which shall give persons with disabilities and their organizations the lever to ensure that there is effective advocacy for their rights. ... Implicit in any application of the human rights' strategy is structural transformation, involving redistribution of economic and political power. As in the struggle against racism, advocates and policy-makers chose to combat discrimination against persons with disabilities by reference to human rights.⁷⁵

This human rights approach to disability has been adopted, within the last decade, by the United Nations, which in 1993 at its 85th Plenary Meeting of the General Assembly, passed the resolution Standard Rules for the Equalization on Opportunities for Persons with Disabilities.⁷⁶ Although this internationally agreed document does not have the status of a legally binding document upon any sovereign state, it has nevertheless been very influential in the development of disability policy throughout the developed and developing world. In explaining the rationale that underpins the Standard Rules, the Resolution stated:

The term 'equalization of opportunities' means the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities. The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation. Persons with disabilities are members of society and have the right to remain within their local communities. They should receive the support they need within the ordinary structures of education, health, employment and social services.⁷⁷

Experience, Embodiment and the Social Model

It is beyond doubt that the genesis and subsequent development of the 'disability movement', underpinned by the theoretical foundation of the social model, both within the United Kingdom and throughout the world, has created a quantum shift in the manner in which

⁷⁴ (Charlton, J. 1998:130). Charlton, J. (1998), *Nothing About Us Without Us: Disability, Oppression and Empowerment*, University of California Press, Berkeley.

⁷⁵ (Michailakis, D. 1997: 19-20) *Disability and Society* Volume 12, Number 1, 1 February 1997, pp. 19-20(14)

⁷⁶ United Nations, (1993), *Standard Rules on the Equalisation of Opportunities for Persons with Disabilities*, Document A/RES/48./96, United Nations, New York.

⁷⁷ United Nations, (1993), Introduction, Paragraph 25, *Standard Rules on the Equalisation of Opportunities for Persons with Disabilities*, Document A/RES/48./96, United Nations, New York.

disability has been perceived, and what is now considered to be the appropriate and legitimate manner in which disability policy is to be developed and implemented. It has now become the dominant hegemony underpinning policymaking and service provision. In the past, and to a significant extent today, it has certainly been the case that disabled people have experienced, as have other marginalized groups, ostracism, discrimination and oppression, which has resulted in them being classified as “second class citizens” in the contemporary societies in which they live. The movement has been successful in raising the profile of disability upon the political agenda, by poignantly highlighting the social, economic and political structures, as well as the pejorative attitudes that have contributed to disabled people being ascribed the status of second-class citizenship.

Notwithstanding the significant contribution that the structuralist and historical-materialist theoreticians have made in constructing a socio-political understanding of disability, recently a new generation of disability scholars have emerged, who have attempted to develop and build upon the earlier work described above. Two issues are considered to be of central importance within the ensuing debate. First, the dualistic Cartesian distinction between disability and impairment is now beginning to be questioned, in particular Oliver’s assertion that disablement has nothing to do with the body,⁷⁸ and that impairment is in fact nothing less than a description of the physical body.⁷⁸ It is therefore argued that an individual’s own experience of living with an impairment on a daily basis, sometimes in a state of acute physical pain, has an important and valid role in experiencing disablement. Secondly, those working in disability studies are now beginning to question to what extent disabled people can be considered as a monolithic, homogeneous entity, and to what extent the understanding of disablement is contingent upon social and cultural factors. In other words, is it possible to construct a grand theory of disablement that is valid and pertinent for all impairment groups, across all cultural settings?

Within the current disability studies literature, most writers would adhere to and acknowledge the general principles and axioms of the social model outlined above. However, opinion is indeed divided as to what significance should be given to the personal experience of individual disabled people within an analysis of disablement. Some within the disability movement argue that the discussion of the personal experience of disabled people detracts from achieving its main objective – that is to challenge the structure and processes that exist within contemporary society that oppress them. It is contended that such considerations dilute the potency of the social model to act as a force for political change, for it de-politicises the debate. Finklestein has therefore stated:

... attitudes and emotions that came from experiencing discrimination ... Writers like Jenny Morris have elevated the importance of personal, psychological in understanding disability. Such a work encouraged a shift away from thinking about changing the real world. Finding insight in the experience of discrimination is just a

⁷⁸ Oliver M. (1996). *Understanding Disability: From Theory to Practice*. Basingstoke: Macmillan 4-5.

return to the old case file approach to oppression, dressed up in social model jargon.⁷⁹

Conversely, other disability theorists, such as Hughes and Patterson, influenced by post-modern ideas, have argued that engaging with debates concerning the body in relation to the notion of disablement in fact strengthens the potency of the explanatory power of the social model. They have stated:

–The social model of disability presupposes an untenable separation between body and culture, impairment and disability, while this has been of enormous value in establishing a radical politics of disability, the cartesianized subject that it produces sits very uneasily in the contemporary world of identity politics. This is an internal critique: It argues not for the supersession, but for the expansion of the social model and it proposes embodied, rather than a disembodied, notion of disability.⁸⁰ Hughes and Paterson have thus argued that while the social model has provided a penetrating critique of the medical model, it has nevertheless left discourses regarding the body and impairment to the domain of bio-medicine, thus exiling the study of impairment from sociological examination. Furthermore, Hughes argues that the social model, as originally conceived, provided a pertinent critique of capitalism, but has largely been ineffective in critiquing modernity. Consequently, maintaining the rigid distinction between disability and impairment: ... restricts the analytical power and reach of disability studies: in particular, it confounds the possibility of developing a social theory of impairment which is largely dependent upon escape from Cartesian categories.⁸¹

Writers such as Hughes and Paterson maintain that the relationship that exists between disabled people and their bodies is mediated through medicine and therapy, devoid of policy and political analysis. Such an approach results in the dualism of a medical analysis of disabled peoples' bodies and a political analysis of disabled peoples' social existence. They therefore stated:

In the social model, the body is rendered synonymous with its impairment or physical dysfunction. That is to say, it is defined - at least implicitly - in purely biological terms. It has no history. It is in essence, a timeless ontological foundation. Impairment is therefore the opposite of disability: it is not socially produced. ... Indeed, there is a powerful convergence between bio-medicine and the social model with respect to the body. ... Impairment is consequently entrenched in the biomedical and reduced to its dysfunctional anatomo- physiological correlates. Yet impairment is more than a medical issue. It is both an experience and discursive construction. ... The social model of disability has not entertained debates that problematize the body.⁸²

⁷⁹ Finklestein, V. (1996), "The Disability Movement has run out of Steam", *Disability Now*, February, 11.

⁸⁰ Hughes, B. and Paterson, K. (1997), "The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment", *Disability & Society*, 12(3): 325-340.

⁸¹ Hughes, B. (1999), "The Constitution of Impairment: Modernity and the Aesthetic of Oppression", *Disability & Society*, 14(2): 155-172.

⁸² Hughes, B. and Paterson, K. (1997), "The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment", *Disability & Society*, 12(3): 328-329.

Deborah Marks has cogently argued that the dichotomizing of disability and impairment, as posited by the historical materialist variants of the social model, paradoxically results in the social model becoming, in fact, highly individualistic. By excluding a sociological analysis of experience and the body, a theoretical vacuum is thereby created.⁸³

Feminist disability theorists, such as Liz Crow and Jenny Morris, concur with the analysis presented by Hughes and Paterson, and have called for the social model of disability to be reconceptualised, to incorporate a sociology of impairment.⁸⁴ Jenny Morris maintained that the social model has effectively denied the fact that the physical and emotional pain and suffering experienced by disabled people due to their impairments has any impact upon their practical daily living.⁸⁵ The sharp distinction drawn between disability and impairment has compartmentalized bodily experience from social experience – pain from politics. In addition, Liz Crow has persuasively argued that the social model of disability has not made adequate accommodation for the subjective experiences of pain, fatigue, depression, and to an extent, the uncertainty that disabled people inevitably experience as a result of their impairment. The existence of impairment is indeed an objective reality as well as being subjectively experienced. She therefore states that:

an impairment such as pain or chronic illness may curtail an individuals' activities so much that the restriction of the outside world becomes irrelevant ... for many disabled people personal struggles relating to impairment will remain even when disabling barriers no longer exist.⁸⁶

Sally French has delineated four definitive factors that have a profound influence upon the way disabled people experience the consequences of their impairments: 1) the precise period in a person's life when they acquired their impairment; 2) the relative visibility of that impairment; 3) how severe the impairment is considered to be from the model of other people; and 4) whether the impaired individual also has other illnesses.

Furthermore, while recognizing that the concept of disablement is a socio-political construction Bickenbach et al questioned whether sufficient rigor has been given by protagonists of the early versions of the social model to establishing the mechanisms of the causal linkage between impairment and disability. It is indeed difficult to devise social indices that identify and measure this linkage. Bickenbach et al made the following insightful comments:

Despite its intuitive power, the insight that disablement is a complex phenomenon in part created by the social environment cannot easily be translated into researchable questions. How precisely does the social environment create disablement? Should

⁸³ Marks, D. (1999), "Dimensions of Oppression: Theorising the Embodied Subject", *Disability & Society*, 14(5): 661-626.

⁸⁴ Crow, L. (1996), "Including all our Lives; Renewing the Social Model of Disability", in Morris, J. ed. *Encounters with Strangers: Feminism and Disability*, Women's Press, London.

⁸⁵ Morris, J. (1991), *Pride Against Prejudice*, The Women's Press, London. Oliver, M. (1990), *The Politics of Disablement*, MacMillan, London.

⁸⁶ Crow, L. (1996), "Including all our Lives; Renewing the Social Model of Disability", in Morris, J. ed. *Encounters with Strangers: Feminism and Disability*, Women's Press, London. (1996:9 and 209)

we expect patterns of disadvantage linked to specific physical or mental conditions? How do we identify which aspects of the social environment are responsible for disadvantage? Which interventions will make a difference and can we measure the improvement?

The data from these research questions could lay the medical model to rest, and provide disability advocates with hard evidence of how the social world disables them. Yet these questions are too vague, multifactorial and imprecise for the basis of research. As a result, very little empirical research has been done on the fundamental question of how intrinsic features of an individual interact with features of the social environment to produce disablement.⁸⁷

The World Health Organization and the Cultural Understanding of Disablement

Protagonists of the historical materialist variant of the social model, such as Mike Oliver, maintained that irrespective of the category of impairment, all disabled people encountered oppression.⁸⁸ Indeed, oppression was perceived as the common denominator that unites all disabled people, notwithstanding differences in socio-economic or cultural background. However, it is contended here such an understanding of oppression is problematic, as both disability and impairment are socially and culturally constructed. What it means to have an impairment and experience disability is therefore, by implication, culturally defined and will vary between societies. For example, consider the case of an individual who has dyslexia. In a predominantly rural agrarian society, such as South India, the fact that an individual cannot read and write is not likely to inhibit their ability to work and participate fully in local community life, and will not be popularly considered to be disabled, and thereby encounter oppression. However, a person who is dyslexic living in a western-based society is more likely to be unemployed, for in a myriad of ways, in order to function within society, there is a prerequisite for an individual to be literate.

The Department for Education and Employment, as part as its Labour Force Survey, published in Autumn 2009, examined the relationship between disability and employment.⁸⁸ The survey found that although disabled people constitute nearly a fifth of the working-age population in Great Britain, they nevertheless constitute one-eighth of all those in employment. Furthermore, disabled people are over six times as likely as the able-bodied counterparts to be unemployed and claiming state benefits. The survey also found the employment rates varies accord to type of impairment. Some impairment groups, such as those with diabetes, skin conditions and hearing impairments attain relatively high employment rates. However, three-quarters of those with mental illness and two-thirds of those with learning difficulties are unemployed.^{89 90} It can therefore be appreciated that the

⁸⁷ Bickenbach, J., Chatterji, I., Badley, E. and Ustun T. (1999), "Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps", *Social Science & Medicine*, 48(9): 1173-1187.

⁸⁸ Department for Education and Employment, (2009) DfEE Disability Briefing: Disability Statistics - February, 2009, <http://www.disability.gov.uk/>

⁸⁹ Department for Education and Employment, (2009) DfEE Disability Briefing: Disability Statistics - February, 2009, <http://www.disability.gov.uk/>

⁹⁰ World Health Organisation, (1997), *International Classification of Impairment, Activities and Participation: A Manual of Dimensions of Disablement - Beta-1 Draft*, WHO, Geneva.

prospects of disabled people gaining employment are far greater in South India than they are in a western country such as Great Britain.

The above also illustrates that the notion of impairment, as conceived by the historical-materialists, is very physicalist' in its understanding. As demonstrated by the disability theorists cited above, the notion of an impairment is indeed a more sophisticated phenomenon, which can encompass cognitive and psychological manifestations. Those with cognitive difficulties and mental illness may in fact have bodies that the majority would deem to be normal, but this does not necessarily mean that such individuals do not encounter the negative connotations and reality of experiencing impairment. The World Health Organization has also begun to recognize the intricate relationship between disability and impairment, and that both are socially constructed. Consequently in 1993 they began the process of revising their 1976 classification of disability, handicap and impairment. According to the newly devised scheme, the multifaceted nature of disablement is essentially comprised of three principal components, which interact with each other. These have been defined in the following manner:

Emphasis is now placed upon highlighting the social aspects of disability. The newly devised classification has abandoned the word disability' and handicap' altogether, replacing these terms with activities' and participation.' It emphasizes the dynamic relationship between the health condition of the individual, together with their own personal' characteristics as well as the broader social environment. All these factors are seen as determining how an impairment affects the participation of that individual. WHO, commenting on the revised classification, stated:

The new classification that has been devised by the World Health Organization is an attempt to measure the multifaceted dimensions of disablement. Furthermore, the notion of disablement is not perceived in terms of an attribute of a person, but as a complex collection of conditions many of which are created by the social environment. Hence, the management of the problem requires social action and it is the collective responsibility of society to make the environmental modifications necessary for the full participation of people with disabilities into all areas of social life. The issue is, therefore an attitudinal or ideological one which requires social change, while at the political level it is a matter of human rights.⁹¹

WHO's latest conceptualization of disablement constitutes a substantive improvement upon the previous classification, for it attempts to take the social dimensions of disablement fully into account, indicating a movement along the continuum from a medical to a social understand of disablement. It is also aware of the cultural and material factors which sometimes have a significant bearing upon a particular individual's ability to participate in contemporary society. Thus the new classification recognizes that poverty, the lack of adequate housing, or inferior environmental factors such as inadequate sanitation, as well as

⁹¹ World Health Organisation, (1997), International Classification of Impairment, Activities and Participation: A Manual of Dimensions of Disablement - Beta-1 Draft, WHO, Geneva.

the gender status of a disabled individual, may well affect their ability to participate in contemporary society.

Bickenbach et al identified WHO's revised classification of disablement as attempting to encompass a 'biopsychosocial' conception, principally by providing a synthesis of the medical and social perspectives of disability. In commenting upon the symbiotic relationship between the malfunction of the body, and the manner in which society is structured, Dimitris Michailakis stated:

... the person-environment approach implies a view of handicap as something that involves the individual's functional limitation, as well as his environment will lead to another understanding. Handicap is not a property, a characteristic of the individual in the first hand, but something that develops between the individual and the environment. ... The inability to walk, to talk, to see and so on (functional limitations) is clearly distinguished in the person-environment approach from the inability to go to school, to work and generally participate in community life. A functional limitation becomes a handicap when the environment impedes action and participation. ... The implications of functional limitations vary according to sociol-economic circumstances of each society and the provisions it makes for its citizens. From a person-environment approach, handicap is a problem which exists in relation to society and which each society, therefore, has the capacity to reduce or control.⁹²

Imrie also found the original conceptualization of the social model to be problematical. By purporting that the origins of oppression are located exclusively in 'attitudes,' it is difficult to determine their social location, and how these in turn result in oppressive action.⁹³ The model is deficient in failing to analyze the socio-political contexts in which attitudes and values are constructed, and how they are in turn transformed into oppressive actions and practices.

A further question arises concerning the appropriateness in developing countries of the western-based notion of empowerment, which presupposes that rights are exercised and that decisions are made in accordance with the preferences and wishes of the individual. Such an individualized notion of empowerment, as espoused by the international disability movement runs contrary to accepted social customs and practices found within many developing countries. In societies such as those found in Asia, it is customary that all major decisions – for example, who one should marry or the purchase of property or career decisions – are taken not by the individual, but collectively through consultation within extended family and kinship networks. This is particularly the case in rural areas, and operates irrespective of whether disability is present within the family. Thus, a focus on rights and decision-making practices rooted in the ideology of individualism is, in many societies, particularly in an African and South Asian context, often at variance with established cultural and social norms and practices. It is surely right to question the efficacy of proselytizing western-based individualism, which runs contrary to longstanding local practices.

⁹² Michailakis, D. (1997), "When Opportunity is the Thing to be Equalised", *Disability & Society*, 12(1): 17-30.

⁹³ Imrie, R. (1997), "Rethinking the Relationships between Disability, Rehabilitation and Society", *Disability and Rehabilitation*, 19(7): 263-271.

A further matter for discussion is the most appropriate strategy for achieving social change so as to result in the construction of a non-disablist world. As the previous section has shown, one of the principal tenets of the social model is that disabled people experience discrimination and social oppression, resulting in disabled people living within a disabling world.' Upon the supposition that disabled people are indeed an oppressed group, the movement has advocated that conflict should be used in combating such oppression and discrimination.

While appreciating the foundation of such sentiments, and without denying the validity of the assertion that disabled people do indeed face discrimination and oppression, it is contended that disability is a far more complex phenomenon than can be solely and adequately explained by social oppression and discrimination. It is my experience that vast numbers of people, rather than actively oppressing disabled people, are in fact fearful and ignorant of disability, which leads them to relate to disabled people in inappropriate and often demeaning ways. In agreement with this position, the feminist disability writer, Jenny Morris stated:

Our disability frightens people. They don't want to think that this is something that might happen to them. So we become separated from common humanity, treated as fundamentally different and alien. Having put up clear barriers between us and them, non-disabled people further hide their fear and discomfort by turning us into objects of pity, comforting themselves by their own kindness and generosity.⁹⁴

Oppression is often of an unwitting nature. If oppression and discrimination were the sole factors in the creation of a disablist society, then conflict might be the most appropriate strategy to adopt. However, if as is contended here, fear and ignorance also provide a significant explanation to societal attitudes towards disability, then a more appropriate and pertinent strategy for the creation of a non-disablist society might be through the medium of education. It is an undisputable fact that disabled people are in the minority within society, albeit a significant one, comprising approximately ten percent of the world's population. Disabled people, in order to create a society which is indeed non-disablist and which secures effective and full citizenship, need to foster and build alliances with their able-bodied peers, and this is best achieved through consensus building and education.

Critique of the Social Model

The social model of disability, offering as it does a radically different and more empowering way to explain and address the difficulties faced by disabled people, has become widely used both by disabled people themselves and by those wishing to address the discrimination and disadvantage they experience. One downside of this widespread adoption of the social model, however, is that it has become widely misunderstood, and this misunderstanding has led to its misapplication and to doubt about its efficacy in addressing the range of difficulties

⁹⁴ Morris, J. (1991), *Pride Against Prejudice*, The Women's Press, London. Oliver, M. (1990), *The Politics of Disablement*, MacMillan, London.p. 192

experienced by disabled people in the late twentieth and early twenty-first centuries. In particular, many have questioned the relevance of the social model in addressing the experience of disabled people. For example Liz Crow, a disabled academic argues: Most of us simply cannot pretend with any conviction that our impairments are irrelevant.⁹⁵

Thus for all its conceptual potency, or perhaps because of it, the social model has attracted challenges. One might have expected them to have come earlier. After all, some social model users made strikingly broad claims about disadvantage. Perhaps the emerging critiques are a sign of progress for disability studies scholars, who are sometimes ignored by those worried that the field is too technical, trivial, or partisan. Whatever the case, three lines of critique can be identified. They involve the model's scope, the ambiguity of disadvantage, and the connections between impairment and social setting. Some of these challenges are powerful but none eliminate the model's value.

1. Over claiming the Social Aspect

The first concern is common. It is that the strongest claims arising from a social model are indefensible. Personal traits can be inhibiting by themselves or in addition to a disabling social context, albeit depending on the individual's goals.⁹⁶ Furthermore, the degree of this independent effect is related to the state of technology. It could be that at time X a physical or mental trait is independently disadvantageous, while at time Y inexpensive technology greatly reduces the negative effect. Consider the world before and after eyeglasses. We might guess that a greater proportion of human disadvantage was attributable to personal traits before the invention than afterward – assuming roughly equal levels of stigma suffered by poorly sighted and eyeglass-wearing people. Here disadvantage is shifting but not because of inclusive social forces (apart from technological change). Similar observations can be made about new impairments that are physically debilitating yet not an important source of stigma. Perhaps certain repetitive stress injuries associated with the modern assembly line and keyboard use are illustrative. Now the balance is shifting in the other direction, toward individual impairment as a more significant source of disadvantage. Either way, the relative mix of individual and social factors in producing disability will fluctuate over time. It makes little sense to claim that all 'disability' is socially constructed, now and forevermore.

This criticism is empirical. It aims at accuracy in measuring the causes of disadvantage and so it does not necessarily deny that the social model has value. But concluding that the

⁹⁵ Liz Crow, *Including All of Our Lives: Renewing the Social Model of Disability*, in Colin Barnes and Geof Mercer, eds, *Exploring the Divide* 55, 58 (Women's Press 1996).

⁹⁶ See Sally French, *Disability, Impairment or Something in Between?*, in John Swain et al, eds, *Disabling Barriers: Enabling Environments* 17, 19 (Sage 1993) (claiming that the refusal to admit that traits can be inhibiting oppresses those who experience the inhibitions); Tom Shakespeare and Nicholas Watson, *The Social Model of Disability: An Outdated Ideology?*, in Barnartt and Altman, eds, *Research in Social Science and Disability* at 9 (cited in note 19). A similar logic, pointing in a different direction, is the claim that traits can generate unique experiences and valuable cultures.

model can account for only a fraction of all impairment related disadvantage will prompt a different concern: critics will begin to question whether the social model contains an acceptably broad definition of disability.⁹⁷ Once it is granted that some disadvantage happens independently of social context, there will be a class of people the model will not attend to and who nonetheless suffer from a physical or mental trait.⁹⁷

But this critique reveals nothing seriously amiss with a social model of disability. Some proponents acknowledge that the model cannot explain everything about disadvantage. They have chosen the label disability for a field of study and concern involving socially produced disadvantage triggered by individual traits. No one can deny that social systems influence disadvantage at least sometimes. The frequency of animus and irrationality as causes of disadvantage is not zero, for example. As long as the model can identify real social factors that contribute to disadvantage more than occasionally, it is no devastating objection that the model has limits. Every model does. Oliver's message is perhaps responsible for some of the confusion. Even he acknowledges limits, however. After declaring that disability is wholly and exclusively social,⁹⁸ he concedes that the social model is not an attempt to deal with the personal restrictions of impairment.⁹⁹ One should be aware that social model theorists use the term disability in this manner, and theorists ought to concede that the model thereby leaves room for a distinct and perhaps large field of inquiry into independently inhibiting personal traits.

Those who worry that the social model claims too much in terms of causation might have been distracted by crude restatements. Those who worry that the model covers too little in terms of what is worthy of a policy response are not undermining the model's use. These critics are probably dedicated to helping people who do not fit the model, but that is a separable issue. For the same reason, cost is not an objection to the social model. As will become clear below, the model does not generate costs on its own, beyond any cost of information collection due to its use.

2. Vagueness in Disadvantage

The second challenge is more serious, although it does not seem to have attracted attention. Social model adherents are often vague about which notion of disadvantage or the problem of disability they are interested in.¹⁰⁰ There is more than one plausible specification. Clearly social model users are interested in negative consequences produced by traits plus settings. For instance, many scholars are troubled by false inferences of mental incapacity too often

⁹⁷ See Shakespeare and Watson, *The Social Model of Disability* at 16 (cited in note 37) (worrying that the model's focus might distract us from preventing impairment).

⁹⁸ Oliver, *Understanding Disability* at 35 (cited in note 16).

⁹⁹ *Id.* at 38; see also *id.* at 41-42.

¹⁰⁰ See, for example, Oliver, *Understanding Disability* at 32 (cited in note 16) (referring to "the problem" of disability); UPIAS, *Fundamental Principles of Disability* at 14 (cited in note 1) (referring to "the disadvantage or restriction of activity caused by a contemporary social organisation"). Amundson, 23 *J Soc Phil* at 108-09 (cited in note 15) (concentrating on lost opportunities to construct life plans).

associated with traits like stuttering and deafness, while mystical powers associated with blindness are more likely to be used as evidence of cultural contingency.¹⁰¹ Obviously the social model targets bad consequences. But which?

The options might be separated into absolute and relative disadvantage. First, social model users could incorporate a theory of inadequate human wellbeing that does not depend on how others are faring. The threshold of inadequacy is difficult to define but this theory is a coherent option. It is related to notions of subordination and human necessities. Second, model users might view disadvantage in a relative sense. There is more than one available baseline, however. The basis for comparison could be the human species norm,¹⁰² or a similarly situated human being the same in every way except for the trait in question, or something else.¹⁰³ In addition, decisions must be made with respect to dimensions and severity of disadvantage. Perhaps scholarly attention is not warranted for small negative effects on particular components of human wellbeing. Rightly or not, disability scholars seem uninterested in male baldness or uncommonly short and tall people, although obesity and ugliness might attract more of their consideration.

There is no stock answer to which form of disadvantage is most worthy of attention. But these sorts of choices are inevitable. And old. These options begin to suggest the normative judgments that surround – and are not made by – a social model of disability.

Still, vagueness in ‘disadvantage’ is only a problem of specification and judgment about proper emphasis, a gap that can be filled without jeopardizing the social model. Both absolute and relative disadvantages can be produced by an individual trait combined with an adverse social environment. For instance, social stigma attached to what is seen as deformity can result in severe blows to social standing, isolation, and objectively determined subordination; but less severe social responses might yield only disadvantage relative to the non-deformed, or to the similarly situated non-deformed. Other combinations are possible. The upshot is that environmental factors may contribute to all sorts of disadvantage. The social model cannot be discarded on account of any undue reticence.

3. Reconnection

A third critique targets the boundary between trait and setting. With the development of postmodernism, this line of attack should have been predictable. The social model presents another conceptual dichotomy within western thought, nearly all of which are deconstruction targets. In any case, the critique has some force.

¹⁰¹ See Michael E. Monbeck, *The Meaning of Blindness* 59–63 (Indiana University 1973) (tracing the connection between blindness and mysteriousness in Western culture). But see Silvers, *Formal Justice* at 57, 56–59 (cited in note 8) (describing a “moral model” of disability).

¹⁰² See Ani B. Satz, *A Jurisprudence of Dysfunction: On the Role of “Normal Species Functioning” in Disabilities Analysis*, 6 *Yale J Health Policy, L & Ethics* 221 232–238 (2006) (following the Rawlsian, normal-species functioning theory of Norman Daniels, *Just Health Care* 27–28 (Cambridge 1985)).

¹⁰³ See Wasserman, *Philosophical Issues* at 226–27 (cited in note 10).

To an extent, the two components of the model interact with each other. Physical or mental traits recognized by the community as impairments (or as otherwise significant to interaction) become part of the social setting. It is hard to believe that such traits can be held constant over time, or that changes in their prevalence or features will not affect the social environment. This is not to assert either a hopeful evolutionary path or a self-reinforcing dynamic of stigma and subordination. The only point is that these two causes of disadvantage will often be impossible to completely separate.¹⁰⁴

Similarly, the model might underestimate the social construction it means to emphasize. Shelley Tremain contends that impairment is itself a socially ascribed characteristic, an outgrowth of practices that demand the identification of difference. To her it seems politically naive to suggest that the term impairment is value-neutral, . . . as if there could ever be a description that was not also a prescription for the formulation of the object.¹⁰⁵ Social model users at least implicitly understand that impairment is a subset of all traits. Even setting aside their disinterest in common ailments such as arthritis and back pain, disability studies scholars seem to prefer a boundary between disability and race or gender studies.¹⁰⁶ But of course race and gender easily fit into a generic connection between traits and social reactions. For disability studies to be even partly independent from these inquiries, a notion of impairment separate from social construction might be necessary. Yet insofar as both impairment and disability are socially constructed, disabilities scholarship might miss something important.¹⁰⁷ When combined, the critiques described in this section suggest that the distinction between impairment and disability begins to collapse.

Still, these deconstruction efforts are hardly at odds with the spirit of the social model. This perspective channels attention to surrounding social structures rather than people identified as disabled. It doesn't eliminate the central insight of the social model, or call for anything like the individualized causation story of the medical model. While it is true that the social model of disability cannot account for every human disadvantage linked to every individual trait, the issue is specification and scope.

Even its most modest claim—that traits of individual human beings are not always the sufficient cause of disadvantage—is powerful when set against a conventional wisdom that

¹⁰⁴ It will sometimes be difficult to discern a medical response from a response that restructures the social environment. One example is a telecommunications device for the deaf (TDD) or a telecommunications relay service to assist deaf/hearing communication over the telephone. Do these technological and human intermediaries count as personal services or environmental revision?

¹⁰⁵ Tremain, 21 Soc Theory & Prac at 621 (cited in note 33) (emphasis omitted); see also Carol Thomas and Mairian Corker, A Journey Around the Social Model, Mairian Corker and Tom Shakespeare, eds, in *Disability/Postmodernity: Embodying Disability Theory* 18, 19 (Continuum 2002).

¹⁰⁶ See Shelley Tremain, On the Subject of Impairment, in Corker and Shakespeare, eds, *Disability/Postmodernity* at 32, 41-42 (cited in note 50) (noting that social modelists do not treat race as an impairment). Perhaps the field is defined by an interest in stigma plus functional impairment, arbitrary academic convention, and/or a reflection of interest group politics.

¹⁰⁷ See, for example, Shakespeare and Watson, *The Social Disability* at 24 (cited in note 37) (“[W]e are all impaired.”).

physical and mental disability is only a series of personal tragedies. The fundamental question is what the social model accomplishes on its field is defined by an interest in stigma plus functional impairment, arbitrary academic convention, and/or a reflection of interest group politics.

The Future of Disability Theory: Towards an “Affirmation” Model?

This chapter has so far outlined the genesis and subsequent development of the social model of disability, as well as highlighting some of the difficulties that are inherent in its universal application across cultural settings. The social model of disability continues to evolve and develop. We are in danger of constructing a ‘straw person’, it will be suggested. After all, no one really takes such an extreme position. The issue of impairment was never really ignored. The social model does not really produce such a rigid dichotomy. However the contention is that many British activists in their public discourse use exactly this ‘strong’ version of the social model that is critiqued in this chapter. It may be that in private, their talk is at odds with the ‘strong social model.’ Most activists concede that behind closed doors they talk about aches and pains and urinary tract infections, even while they deny any relevance of the body while they are out campaigning. Yet this inconsistency is surely wrong: if the rhetoric says one thing, while everyone behaves privately in a more complex way, then perhaps it is time to reexamine the rhetoric and speak more honestly.

John Swain and Sally French (2000), building upon the intellectual work described above, have outlined an ‘affirmation’ model of disability, which seeks to ‘celebrate the difference’ that characterise the lives of disabled people. It is therefore contended that disabled people can be ‘proud’ of the fact that they are different from the majority of the population.¹⁰⁸ Swain and French begin their analysis by rejecting the tragedy conception of disability as purported by the medical model. They proceed by maintaining that it is not possible to make a stark distinction between those who are disabled and those who are not, since all people, to some extent have a degree of impairment, but do not necessarily encounter the negative consequences of disability. Those who wear glasses to compensate for low vision are a case in point. Neither can a stark distinction be maintained between those who encounter oppression and those who do not, for it is possible disabled people themselves to be oppressors, by having racist, homophobic or sexist attitudes.

They further contend that the social model of disability has clearly shown how contemporary society has oppressed and discriminated against disabled people. However, in contrast the majority of disability studies theorists, they maintain that the vast majority of disabled people accept the analysis of the social model. They have candidly stated:

The social model was born out of the experiences of disabled people, challenging

¹⁰⁸ Swain, J. and French, S. (2000), “Towards an Affirmative Model of Disability”, *Disability & Society*, 15(4): 569-582.

the dominant individual models espoused by non-disabled people. Nevertheless, it is our experience that many non-disabled people readily accept the social model, albeit superficially and at a very basic conceptual level. Non-disabled people can generally accept that a wheelchair-user cannot enter a building because of steps. ... Non-disabled people are much more threatened and challenged by the notion that a wheelchair-user could be pleased and proud of the person he or she is.¹⁰⁹

Ascribing to the notion of an affirmative model of disability questions the analysis of early variants of the social model, since it is argued that the adoption of the precepts of the latter does not necessarily result in a non-tragic view of disablement. Swain and French again state:

While the social model of disability is certainly totally incompatible with the view that disability is a personal tragedy, it can be argued that the social model, in itself, underpinned a non-tragedy view. First, to be a member of an oppressed group within society does not necessarily engender a non-tragic view. There is, or instance, nothing inherently non-tragic about being denied access to buildings. Secondly, the social model disassociates impairment from disability. It, thus, leaves the possibility that even in an ideal world of full civil rights and participative citizenship for disabled people, an impairment could be seen as a personal tragedy.¹¹⁰

Swain and French further develop their thesis by stating that, in contrast to the tragic view of disablement, the occurrence and onset of an impairment can result in an improvement of the quality of lives of an individual disabled person. Examples are given of disabled people being able to escape the underlying social oppressive practices and structures that characterise some societies. Thus, disabled people may indeed be liberated from the responsibilities in the realms of sexual relations, responsibility within the domestic household, and may be more attuned to comprehend the oppression encountered by other minority groups.

The above demonstrates that it is possible for disabled people to inculcate and project a positive identity, thereby celebrating the diversity and richness of the lives that they invariably lead. In summarising the philosophy of an affirmative model of disability. Swain and French state:

The affirmative model directly challenges presumptions of personal tragedy and the determination of identity through the value-laden presumptions of non-disabled people. It signifies the rejections of presumptions of dependency and abnormality. ... Embracing an affirmative model, disabled individuals assert a positive identity, not only in being disabled, but also in being impaired. In affirming a positive identity, disabled people are actively repudiating the dominant view of normality. The changes for individuals are not just transforming of consciousness as to the meaning of disability, but an assertion of the value and validity of life as a person with impairment.¹¹¹ Swain and French conclude their analysis by stating that embracing an affirmative view of disablement in fact strengthens the political leverage of the disability movement. Disabled people cannot only look towards a future society devoid of structural, environmental and attitudinal barriers, but one that can celebrate difference and values people irrespective of race, sexual preference,

¹⁰⁹ Swain, J. and French, S. (2000), "Towards an Affirmative Model of Disability", *Disability & Society*, 15(4): 570.

¹¹⁰ Swain, J. and French, S. (2000), "Towards an Affirmative Model of Disability", *Disability & Society*, 15(4): 571.

¹¹¹ Swain, J. and French, S. (2000), "Towards an Affirmative Model of Disability", *Disability & Society*, 15(4): 578

gender, age and impairment.¹¹²

The desire to celebrate diversity and difference, and take pride in the positive value of living with impairments, has also been expressed by those who are deaf. Some deaf people are of the opinion that they are not in fact disabled, but constitute a distinct and coherent social minority, complete with their own culture and language. A distinction is drawn between those who can hear, and those who cannot. By implication, then, those with a physical disability such as paraplegia or cerebral palsy would, in the minds of some of those who are deaf, as belonging to the latter category. Ladd and John, in investigating the relationship between the deaf community and disabled people have stated:

... we do not want mainstream society to restructure so that we can be part of it. Rather, we wish for the right to exist as a linguistic minority group within society ... Labelling us as disabled demonstrates a failure to understand that we are not disabled within our own community. ... Many disabled people see Deaf people belonging with them outside the mainstream culture. We, on the other hand, see disabled people as hearing people in that they use a different language to us, from which we are excluded, and see them as being members of society's culture.¹¹³

However, the position outlined above has been criticised from within the deaf community itself. By claiming that they constitute their own distinctive cultural identity, Mairian Corker argues that protagonists of such a position are in fact, accepting as a *fait d'accompli*, the norms and social mores of a disablist society, which is invariably oppressive. She states:

... the allusion to withdrawal from mainstream society suggests withdrawal from something; all accounts suggests that this something is cultural and linguistic oppression. But Western society, together with the dominant human services culture and its governance and legal systems which at present control to a large extent how we live, still view all deaf people, including those who are Deaf, in terms of the individual/medical model. Hence, though sign language is increasingly acknowledged as a viable means of communication, it does not follow that there is a widespread cultural acceptance within such frameworks for thinking and service development.¹¹⁴

The Social Model, Social Justice and United Nations Instruments

Historically, research on justice has focused primarily on equity. However, the modern trend has been to incorporate other conceptions of justice.¹¹⁵ Broadly speaking, justice is –something higher than a society's legal system. It is in those cases where an action seems to violate some universal rule of conduct that we are likely to call it unjust¹¹⁶ and respond by saying –we need a law against that.” In a narrower sense, –justice is fairness”. It is action that pays due regard to the proper interests, property, and safety of one's fellows.” Parties that

¹¹² Swain, J. and French, S. (2000), –Towards an Affirmative Model of Disability”, *Disability & Society*, 15(4): 580

¹¹³ Ladd, P. and John, M. (1991) *Deaf People as a Minority Group*, The Open University, Milton Keynes. :14-15

¹¹⁴ Corker, M. (1998), *Deaf and Disabled, or Deafness Disabled?*, The Open University, Milton Keynes. 5-9.

¹¹⁵ Folger, Robert; Sheppard, Blair H. & Buttram, Robert T.. *Equity, Equality, and Need: Three Faces of Social Justice*. In Bunker, Barbara Benedict Bunker; Rubin, Jeffrey Z. & Associates (1995). *Conflict, Cooperation, and Justice: Essays Inspired by the Work of Morton Deutsch*. San Francisco: Jossey-Bass Publishers.

¹¹⁶ James. W. Vice, "Neutrality, Justice, and Fairness," (Loyola University Chicago), available at www.ombuds.uci.edu/JOURNALS/1997/neutrality.html. In: Maise, Michelle. –Principles of Justice and Fairness.” *Beyond Intractability*. Ed. Guy Burgess and Heidi Burgess. 1 Jun. 2005. Conflict Research Consortium, University of Colorado, Boulder, Colorado, USA.

concern themselves with fairness –strive to work out something comfortable and adopt procedures that resemble rules of a game. They work to ensure that people receive their –fair share” of benefits and burdens and adhere to a system of –fair play.”¹¹⁷

The social model moves towards a more inclusive notion of society similar to the UN human rights instruments. International resolutions relating to disabled persons were initially immersed in the medical model.¹¹⁸ Distinctly influential among post-war international instruments was the ‘whole man’ schema of vocational rehabilitation.¹¹⁹ This *modus operandi* sought to ‘treat’ disabled persons to facilitate their social participation. In this manner, the method further instantiated the medical model’s notion that people with disabilities, rather than society, must change.¹²⁰ For example, the General Assembly and the United Nations Economic and Social Council adopted a series of resolutions during the 1950s and 1960s directed both at preventing future disability and at rehabilitating existing disabilities.¹²¹ Clearly, the title of the Economic and Social Council’s 1950 resolution *Social Rehabilitation of the Physically Handicapped* express a policy targeting disabled people as the locus of treatment, rather than the external environment.

However, beginning in the 1970s international instruments evidenced a gradual shift from the medical model to the social model of disability.¹²² As a consequence, both the 1971 Declaration on the Rights of Mentally Retarded Persons and the 1975 Declaration on the Rights of Disabled Persons acknowledge the equality of disabled individuals.¹²³ Yet these instruments possessed vestiges of the medical model by assuming individuals are disabled due to ‘special’ medical problems that require segregated social services and institutions as remedies.¹²⁴ It was the following decade that saw a more thorough adoption of the social model of disability in United Nations tools.¹²⁵

¹¹⁷ Nicholas Rescher, *Distributive Justice*. (Washington, D.C.: University Press of America, Inc., 1982), 5. In: Maise, Michelle. –Principles of Justice and Fairness.” *Beyond Intractability*. Ed. Guy Burgess and Heidi Burgess. 1 Jun. 2005. Conflict Research Consortium, University of Colorado, Boulder, Colorado, USA.

¹¹⁸ The same may be said for Europe. See, e.g., Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 *Comp. Lab. L.J.* 62 (1996) (examining the theories informing European employment policies).

¹¹⁹ The term originates with political scientist Ruth O’Brien. See Ruth Ann O’Brien, *Crippled Justice: The History of Modern Disability Policy in the Workplace* (2001).

¹²⁰ See Howard A. Rusk, *Rehabilitation Medicine* (1964); Henry Howard Kessler, *Rehabilitation of the Physically Handicapped* (2d ed. 1953). The timing of the medical model, as advanced by these two medical practitioners, was hardly coincidental. Scientific advances made during World War II resulted in higher survival rates for severely wounded soldiers. See, e.g., *Surgery in World War II: Neurosurgery* (John Boyd Coates, Jr. ed., 1959) (describing medical advances in neurosurgery, particularly in relation to treating spinal cord injuries).

¹²¹ See Maria Rita Saule, *Disabled Persons and International Organizations* (1982) (providing a catalog of these resolutions); see also U.N. Econ. & Soc. Council [ECOSOC], *Social Rehabilitation of the Physically Handicapped, Report of the Social Commission*, 6th Sess., U.N. Doc. No. E/AC.7./L.24 (July 13, 1950).

¹²² International emollient laws are comparable to legislation passed in Europe and the US over that same period requiring the provision of reasonable accommodation as an ameliorative to disabling environments. See generally Brian J. Doyle, *Disability Discrimination: The New Law* (1996); Christopher G. Bell, *U.S. Comm’n on Civil Rights, Accommodating the Spectrum of Individual Abilities* (1983).

¹²³ For example, the Declaration on the Rights of Mentally Retarded Persons declares that persons with disabilities have the same civil and political rights as other human beings. Declaration on the Rights of Mentally Retarded Persons, *supra* note 33, at para. 4.

¹²⁴ See, e.g., *id.* at pmbl. (emphasizing the need to protect disabled persons and their access to segregated services); Declaration on the Rights of Disabled Persons, *supra* note 34, at para. 8 (underscoring the needs of disabled persons to –special” services).

¹²⁵ Quinn et al., *supra* note 1, at 30 (characterizing the change as –an irreversible shift”).

Acting on the axiom full participation and equality,¹²⁶ the United Nations proclaimed 1981 the International Year of the Disabled, and the succeeding decade as the International Decade of Disabled Persons.¹²⁶ More notably, in 1982 the General Assembly also enacted the path-breaking WPA¹²⁷. Although this pronouncement reiterated the twin medical model goals of preventing and rehabilitating disability, it also advocated equalized opportunities for the disabled.¹²⁸ The latter aspiration was defined as the process through which the general system of society, such as the physical and cultural environment¹²⁸ is rendered accessible to all.¹²⁹ Moreover, the WPA emphasized the insufficiency of rehabilitation to achieve this purpose. Instead, experience shows that it is largely the environment which determines the effect of an impairment or a disability on a person's daily life.¹³⁰

Continuing the trend toward full adoption of the social model, the 1990s were a banner period for disability law.¹³¹ Passed in 1993, the Standard Rules remained the central United Nations document regarding disabled persons prior to 2006. The Standard Rules build on the World Program of Action concerning Disabled people (WPA), both emphasizing the equality of people with disabilities and defining disability as a by-product of social construction. For example, the instrument underscores the need to change general societal misperceptions about the disabled as well as provide sufficient services to support their full inclusion.¹³² Though the Standard Rules are monitored by a Special Rapporteur, the instrument is emollient law¹³³ and legally unenforceable.¹³³ The Standard Rules nevertheless stress that States parties are under a strong moral and political commitment¹³³ to ensure the equalization of opportunities¹³⁴ for disabled persons.

The Vienna Declaration and Programme of Action (Vienna Declaration) was also enacted in 1993.¹³⁵ It was not directed specifically toward disability rights,¹³⁶ but it nonetheless stressed

¹²⁶ World Programme, *supra* note , at 185.

¹²⁷ *Id.*

¹²⁸ Equalizing opportunities was defined as the process through which the general system of society, such as the physical and cultural environment is rendered accessible. World Programme of Action Concerning Disabled Persons 1 (1982), available at <http://www.un.org/esa/socdev/enable/diswpa01.htm>.

¹²⁹ *Id.*

¹³⁰ See *id.* at 2.

¹³¹ Theresia Degener, *International Disability Law—A New Legal Subject on the Rise: The Interregional Experts' Meeting in Hong Kong*, December 13-17, 1999, 18 Berkeley J. Int'l L. 180, 184 (2000).

¹³² See Standard Rules, *supra* note 36, at rules 1, 4. The social model of disability is reflected in the articulation of the Standard Rules' aspirations: the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation. *Id.* at introduction, para. 25.

¹³³ Reports issued by the Special Rapporteur are available at U.N. Enable, *The Special Rapporteur on Disability of the Commission for Social Development*, <http://www.un.org/esa/socdev/enable/rapporteur.htm>.

¹³⁴ For a discussion of the unenforceability of the Standard Rules, see Dimitris Michailakis, *The Standard Rules: A Weak Instrument and a Strong Commitment*, in *Disability, Divers-ability and Legal Change* 117 (Melinda Jones & Lee Ann Basser Marks eds., 1999). The Standard Rules stress that States parties are under a strong moral and political commitment to ensure the equalization of opportunities for disabled persons. See Standard Rules, *supra* note 36, at introduction, para. 14. Moreover, the Standard Rules obligate States parties to create the legal bases to achieve the objectives of full participation and equality for persons with disabilities, to ensure that organizations of persons with disabilities are involved in the development of national legislation concerning their rights, and to eliminate any discriminatory provisions against persons with disabilities. *Id.* at rule 15.

¹³⁵ World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc A/CONF. 157/24 (July 12, 1993) [hereinafter *Vienna Declaration*].

¹³⁶ *Id.* at para. 5 (All human rights are universal, indivisible and interdependent and interrelated.).

the prevalence of disabled persons. Moreover, the Vienna Declaration helped in accelerating the trend toward the social model of disability by maintaining that disabled persons should be guaranteed equal opportunity through the elimination of all socially determined barriers,¹³⁷ including any physical, financial, social or psychological¹³⁷ obstacles that exclude or restrict full participation in society.¹³⁷

Finally, passage of the Disability Discrimination Act (DDA) during this period bears special notice.¹³⁸ While domestic in scope, it has to date influenced more than forty countries to enact similar and at times nearly verbatim legislation.¹³⁹ The European Union's Employment Framework Directive adopts key DDA definitions,¹⁴⁰ and the Draft Articles follow suit.¹⁴¹ Accordingly, international disability rights advocates point to the statute as a model worthy of emulation.¹⁴²

The social model has also been well supported in the new millennium. The General Assembly World Summit on Social Development acknowledged the significance of changing the socially constructed environment in agreement with the Standard Rules to empower persons with disabilities to play their full role in society.¹⁴³ But perhaps the most progressive enunciation in an international instrument is found in the Draft Articles, which recognize the importance of accessibility to the physical, social and economic environment¹⁴³ as a means of redressing the profound social disadvantage of persons with disabilities.¹⁴⁴ By this recognition, the Draft Articles transcend the social model and adopts a human rights model¹⁴⁴ approach, integrating first- and second-generation rights.

Human Rights and Limitations of the Social Model

The above historical overview affirms the social model's effective and powerful influence on international and domestic instruments. Nevertheless, because the social model's advocates have invoked only formal equality theory, the social model encounters two hurdles. First, because it expressly relies on notions of corrective justice, the social model must overcome

¹³⁷ *Id.* at para. 64 (disabled persons ~~should~~ be guaranteed equal opportunity through the elimination of all socially determined barriers," including any ~~physical~~, financial, social or psychological" obstacles that ~~exclude~~ or restrict full participation in society").

¹³⁸ 42 U.S.C. §§ 12101 (2000).

¹³⁹ See Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform*, in *Disability Rights Law and Policy: International and National Perspectives* 3 (Mary Lou Breslin & Silvia Yee eds., 2002).

¹⁴⁰ see Lisa Waddington, *The Framework Employment Directive from a Disability Perspective: Reasonable Accommodation and Positive Action*, in *Disability Rights' Activist And Advocates Training Manual* 19 (2005).

¹⁴¹ See, e.g., *Draft Articles*, *supra* note 42, at art. 27, para. i (requiring States parties to make reasonable accommodations).

¹⁴² See, e.g., Katharina C. Heyer, *The DDA on the Road: Disability Rights in Germany*, 27 *Law & Soc. Inquiry* 723 (2002); Eric A. Besner, *Employment Legislation for Disabled Individuals: What Can France Learn from the Americans with Disabilities Act?*, 16 *Comp. Lab. L.J.* 399 (1995). Despite this trend, there are some disability rights advocates, including myself, who caution against adopting ADA-type rights protection exclusively. See *infra* Part II.C.

¹⁴³ G.A. Res. S-24/2, para. 66, U.N. Doc A/RES/S-24/2 (July 1, 2000). See also Theresia Degener, *Disabled Persons and Human Rights: The Legal Framework*, in *Human Rights and Disabled Persons*, *supra* note 20, at 9, 20-33.

¹⁴⁴ *Draft Articles*, *supra* note 42, at pmb., paras. t, v.

inaccurate but strongly held notions that the world inevitably excludes disabled persons. Second, and of greater significance, because it exclusively concentrates on first-generation rights, the social model is prevented from invoking a full range of second-generation rights.

In asserting that the socially structured environment creates disabling conditions, the social model affirms that altering that environment allows disabled persons to participate in society at large. Reasonable accommodation in education settings are a typical example of correcting artificially prejudicial conditions previously held out as neutral.¹⁴⁵ Providing accommodations in education changes existing hierarchies, ultimately suggesting a lack of inevitability in the structure and conception of a particular school. By removing unnecessary barriers to participation, accommodations bring about equality as conceived by formal justice.

However, because the social model is based exclusively on this notion of corrective justice, it must overcome the deeply rooted misconception that society justifiably excludes disabled persons due to their inherent limitations.¹⁴⁵ In seeking to win this fight, social model advocates have taken an over-inclusive position of rejecting *all*, instead of many or most, disability-related exclusions as arising from arbitrarily selected biological norms.¹⁴⁶ This effort is unnecessary because correcting exclusionary conditions and the attitudes supporting them need not be contingent on the application of first-generation rights alone. Instead, social inclusion is better facilitated under a human rights model that applies civil and political rights that equalize treatment in combination with economic, social, and cultural rights (that equalize opportunity).

This brings forward the second, and more significant, problem: while the social model's precepts are essential to civil rights assertions, they ultimately fall short within the human rights field. The social model draws an inclusive, yet firm line at equal treatment of equally situated individuals,¹⁴⁷ thereby effectively excluding additional second-generation support for disabled persons not contingent on narrower corrective justice notions.¹⁴⁸ By contrast, second-generation rights recognize that all disabled persons are entitled to equal

¹⁴⁵ The view is so prevalent that one scholar has termed it "canonical." Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642, 643-44 (2001).

¹⁴⁶ A particularly strong version of this assertion is that of feminist and disability rights advocate Susan Wendell who avers that "the entire physical and social organization of life" has been created with the notion in mind that "everyone w[as] physically strong, as though all bodies were shaped the same, as though everyone could walk, hear, and see well, as though everyone could work and play at a pace that is not compatible with any kind of illness or pain." Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* 39 (1996). Wendell's point, although valid, should not be overstated. Because I generally agree with the disability studies perspective, but disagree on the extent of its application, I have used the term "artificial" to mean avoidable (because it is either arbitrary and/or can be remedied through a manageable cost) when discussing DDA accommodations. See Stein, *Same Struggle*, *supra* note 89.

¹⁴⁷ In other words, the social model is predicated on treating like cases alike. For what is perhaps the earliest exposition of this theory, see Aristotle, *Nicomachean Ethics* 118-19 (Martin Ostwald trans., 1962) (professing that things that are alike should be treated alike).

¹⁴⁸ Social, economic, and cultural rights are derived from the field of social justice which advocates treating all individuals equally, whether or not they are in fact equal. See, e.g., John Rawls, *A Theory of Justice* 302-03 (1971) (defining distributive justice generally as the theory that "[a]ll social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored").

opportunities because of their equal humanity, not because they reach levels of functional sameness,¹⁴⁹ and thereby allows for individual differences among people with disabilities.

In so doing, second-generation rights cover two circumstances. They encompass entitlements that benefit persons with disabilities who fall outside standard sameness arguments. This is because *some* individual variations are not accounted for, even when using broad and inclusive principles, for instance those contained in the architectural concept of Universal Design.¹⁵⁰ Second-generation rights also include measures that are necessary to effectuate first-generation rights. Thus, while first-generation rights may prohibit discrimination in education and employment, second-generation rights make labour market participation possible by providing health care, education, and employment preferences and quotas.

First-generation rights correspond to freedom (*liberté*) and entail civil and political rights that protect individuals from state power. These rights are primarily individualistic, however a few are collectively expressed, such as freedom of association, and the right to assembly. Civil and political rights include protection from proscribed discrimination, freedom of thought and conscience, freedom of speech, freedom of religion, the right to participate in civil society and politics. Second-generation rights, those relating to equality (*égalité*) encompass economic, social and cultural rights. They ensure the right to be employed, the right to equal working conditions, the right to social security, the right to education, the right to cultural participation and the right to unemployment benefits.

By limiting their advocacy to first-generation rights, social model proponents have neglected further empowering possibilities.¹⁵¹

¹⁴⁹ Jack Donnelly, *Universal Human Rights In Theory and Practice* 10 (2003). "Human rights are, literally, the rights that one has simply because one is a human being . . . Human rights are *equal* rights: one either is or is not a human being, and therefore has the same human rights as everyone else (or none at all)."

¹⁵⁰ The central tenet of Universal Design is an "approach to creating environments and products that are usable by all people to the greatest extent possible." R. Mace et al., *Accessible Environments: Toward Universal Design, in Design Interventions: Towards a More Humane Architecture* 155, 156 (Wolfgang Prieser et al. eds., 1991). Although the inclusive nature of Universal Design extends beyond disability, e.g., Selwyn Goldsmith, *Access all Areas*, 213 *Architects' J.* 42 (2001) (asserting that universal design encompasses not only people with disabilities but also parents with small children and women forced to wait for public toilets), it is nevertheless frequently described as a disability-specific issue. For rebuttals of this perspective, see Robert Imrie, *Disability and the City: International Perspectives* (1996).

¹⁵¹ Clarification is in order. Disability rights advocates applying the social model to this hypothetical instance would surely argue that both public transportation systems and education systems that excluded disabled persons based on socially contingent factors (e.g., physically inaccessible buses and ordinary schools that don't accept many disabled children) were artificial in nature (because there was no reason to have buses with steps as opposed to ramped ones, and that there was no intrinsic difference between funding a disabled child in special schools as opposed to ordinary schools). What disability rights advocates have not traditionally done is link the two concepts so that equality in the artificially excluded in workplace setting also mandates equality in the artificially excluded public transportation and education areas. The reason for this disconnect is that the two arguments cannot be joined so long as the underlying basis of their assertions is formal justice, meaning that the extent of disabled versus non-disabled equality is assessed in terms of sameness under civil rights statutes that focus on the acts or omissions of one actor (whether an employer or a public service entity) rather than of society at large. This subtle weakness of disability rights advocacy has been taken up by Richard Light *Disability Awareness in Action*, 2000

Conclusion

The above analysis of the medical and social model should lead to an adequate social theory of disability which would include all the dimensions of disabled people's experiences: bodily, psychological, cultural, social, political, rather than claiming that disability is either medical or social.

The claim here is that the British version of the strong' social model has outlived its usefulness. Rather than developing piecemeal criticisms or supplying alternative arguments to fill the gaps and compensate for the inadequacies of the social model, it is time to put the whole thing to one side and start again. The dangerous tendency to equate the social model with purity and orthodoxy in disability politics and disability studies has to be rejected. After all, it is only in Britain that the social model has played this role. In the USA and other countries, civil rights and social change have successfully occurred in the absence of the strong' social model of disability.

Indeed, in Britain itself, the UPIAS-led social model approach was not the only perspective at the beginning of the disability movement. For example, the Liberation Network of People with Disabilities developed the concept of disabled people as an oppressed minority group without needing to define disability as social oppression: Allen Sutherland, a member of the Network, wrote the pioneering *Disabled We Stand* without drawing upon the social model in his argument for a radical politics of disability.¹⁵²

Feminist commentators argue that the social model has traditionally either avoided or excluded the issue of impairment. As French suggested, this seems mainly to have been for reasons of radical rhetoric. It sounds much better to say people are disabled by society, not by their bodies' than to say people are disabled by society as well as by their bodies.' But the result is that impairment is completely bracketed, just as sexual difference was the taboo subject for the women's movement in the early 1970s. In properly rejecting the causal role of the body in explaining oppression, disabled radicals have followed their feminist precursors in denying difference entirely: after all as Anne Phillips argues:

Once feminists admit the mildest degree of sexual difference, they open up a gap through which the currents of reaction will flow. Once let slip that pre-menstrual tension interfered with concentration, that pregnancy can be exhausting, that motherhood is absorbing, and you are off down the slope to separate spheres.¹⁵³

It is argued here that the denial of difference is as big a problem for disability studies, as it was for feminism.

Experientially, impairment is salient to many. As disabled feminists have argued, impairment is part of their daily personal experience, and cannot be ignored in social theory or political

¹⁵² Sutherland (1984) *Ability, merit and measurement: mental testing and English education 1888–1940*. Oxford: Clarendon Press

¹⁵³ (Ann Phillips, quoted in Cockburn, 1991, 161).

strategy. Politically, if the analysis does not include impairment, disabled people may be reluctant to identify with the disability movement, and commentators may reject our arguments as being idealistic and ungrounded. They are not just disabled people, they are also people with impairments, and to pretend otherwise is to ignore a major part of their biographies. As Linda Birke argued in the case of gender: Feminist theory needs to take into account not only the ways in which our biology is interpreted, but also the very real ways in which biology does in practice affect our lives.¹⁵⁴

Analytically, it is clear that different impairments impinge in different ways. That is, they have different implications for health and individual capacity, but also generate different responses from the broader cultural and social milieu. For example, visible impairments trigger social responses while invisible impairments may not—the distinction which Goffman draws between discrediting and discreditable stigma.¹⁵⁵ Congenital impairments have different implications for self-identity than acquired impairments. Some impairments are static, others are episodic or degenerative. Some mainly affect appearance, others restrict functioning. All these differences have salient impacts at both the individual and psychological level, and at the social and structural level. This is not an argument for disaggregating all disability, and referring solely to clinical diagnoses, but for recognising that the different major groupings of impairment, because of their functional and presentational impacts, have differing individual and social implications.

Moreover, denying the relevance of impairment has some unfortunate consequences. Thus, the disability community has often criticised the mainstream emphasis on cure for impairment, and have opposed the maximising of functioning. For example, Oliver and others have argued against conductive education for people with cerebral palsy.¹⁵⁶ There has been a backlash from people directly involved, arguing that some of the Peto interventions can generate significant outcomes for people with these impairments.¹⁵⁷ Why is it so wrong to maximise functioning and seek to reduce the impact of disease? Clearly, some of these interventions cause more harm than good. Equally, the obsession of many clinicians with cure is misguided. Yet, at the same, it would be to commit an equivalent error if we discounted all possibility or benefit of impairment-avoidance and reduction.

A special case of this argument applies to genetics. Many activists have opposed all attempts to reduce the incidence of genetic conditions. Yet, while here I would have major criticisms of contemporary genetic rhetoric and practice, I cannot see a problem in seeking to avoid serious and debilitating conditions. The woman who takes folic acid in her pregnancy is being sensible, not being oppressive to people with spina bifida. While I would

¹⁵⁴ (Birke, 1986, 47), French, S. (ed.) (1994). *On Equal Terms: Working With Disabled People*. Oxford: Butterworth Heinemann.

¹⁵⁵ Goffman, E. (1968). *Stigma: Notes on the Management of Spoiled Identity*. Harmondsworth, Penguin.

¹⁵⁶ In Oliver, M. (1996). *Understanding Disability: From Theory to Practice*. London: Macmillan.

¹⁵⁷ (Beardshaw, 1989; Read, 1998).

oppose blanket selective screening of all impairments, there are times where it seems appropriate and desirable to take advantage of genetic technologies. Impairments such as Tay-Sachs disease and anencephaly are both terminal and very unpleasant and most people would want to avoid them if at all possible.

Social model theory in the UK rests on a distinction between impairment, an attribute of the individual body or mind, and disability, a relationship between a person with impairment and society. A binary division is established between the biological and the social.¹⁵⁸ This distinction is analogous to the distinction between sex and gender, as it was established by feminists such as Ann Oakley.¹⁵⁹ As with second-wave feminism, the move enables disability studies to illustrate that disability can only be understood in specific socio-historical contexts, and that it is a situation which is dynamic and can be changed.

Yet, within feminism, the sex/gender distinction has largely been abandoned (see for example Butler, 1990). Theorists and activists do not thereby root woman's being in biology, as the patriarchal tradition has done. Instead, it is observed that sex itself is social. Everything is always already social. John Hood-Williams concludes his discussion of the problems of dualism by saying:

The sex/gender distinction dramatically advanced understanding in an under-theorised area and, for over twenty years, it has provided a problematic which enabled a rich stream of studies to be undertaken, but it is now time to think beyond its confines.¹⁶⁰

The same, surely, applies to impairment. Impairment is not a pre-social or pre-cultural biological substrate as Tremain has critiqued the untenable ontologies of the impairment-disability and sex-gender distinctions.¹⁶¹ The words used and the discourses deployed to represent impairment are socially and culturally determined. There is no pure or natural body, existing outside of discourse. Impairment is only ever viewed through the lens of disabling social relations. As a crude example, one could cite the labels used to describe a particular impairment. Idiocy, mongolism, Down's syndrome, trisomy-21, are all words which have been used to describe the same impairment situation. Yet their connotations differ, as does a generic term such as person with learning difficulties' which might be preferred by many people with that condition. Therefore I agree with Mike Oliver, when he seeks to deal with the problem of impairment by arguing that a social model of impairment is needed alongside the social model of disability.¹⁶² While his recognition of the importance of

¹⁵⁸ Barnes C, Mercer G, eds.(1996). *Exploring the Divide: Illness and Disability*. Leeds: The Disability Press.

¹⁵⁹ In Pateman, C. (1992) *Equality, difference, subordination: the politics of motherhood and women's citizenship*,

¹⁶⁰ John Hood-Williams, John, P. (1996) *Damaged goods? An interpretation of excluded pupils' perceptions of schooling*, in: E. Blyth & J. Milner (Eds) *Exclusion from school: inter-professional issues for policy and practice*. London: Routledge.

¹⁶¹ Thomas, 1999, 124. Thomas, C. (1999a) *Narrative identity and the disabled self*. In M. Corker & S. French (eds) *Disability Discourse*. Buckingham: Open University Press.

¹⁶² Mike Oliver 1996, 42. *Understanding Disability: From Theory to Practice*. New York: St Martin's

impairment, and the limitations of the social model is welcome, it would be not be straightforward to make the distinction between impairment and disability that he takes for granted.

The unsustainable distinction between impairment (bodily difference) and disability (social creation) can be demonstrated by asking where does impairment end and disability start? As Corker and French argue not only can sensory conditions include pain, but pain itself is generated through the interplay of physiological, psychological and socio-cultural factors.¹⁶³ While impairment is often the cause or trigger of disability, disability may itself create or exacerbate impairment. Other impairments, because invisible, may not generate any disability whatsoever, but may have functional impacts, and implications for personal identity and psychological wellbeing.

Of course, some impairment/disability distinctions are straightforward. If architects include steps in a building, it clearly disadvantages wheelchair users. If there is no sign language interpreter, deaf people are excluded. Yet, it could be suggested that the barrier free environment is an unsustainable myth (a fairy tale, such as in Finkelstein).¹⁶⁴ For a start, removing environmental obstacles for someone with one impairment may well generate obstacles for someone with another impairment. It is impossible to remove all the obstacles to people with impairment, because some of them are inextricable aspects of impairment, not generated by the environment. If someone has an impairment which causes constant pain, how can the social environment be implicated? If someone has a significant intellectual limitation, how can society be altered to make this irrelevant to employment opportunities, for example? Does mainstream sport disable impaired athletes by imposing oppressive criteria such as being able to run to play football? Some of these examples may seem ridiculous. But they point to the problem of pushing the social model to its implications, and highlight a flaw in the whole conception.

Again, Paul Abberley has been one of the pioneers in pointing out this limitation.¹⁶⁵ He suggests that a barrier-free utopia, in which all disabled people can gain employment, is not viable. He points out that however much investment and commitment and energy is devoted to making work accessible, there will always be a residuum of people who, because of their impairment, cannot work. However, again I would disagree with his solution to the problem. While displacing work as the central social value would be an undoubtedly important social development, it is not the most obvious solution to a problem which is generated mainly by the limitations of social model reasoning. I see no reason why we cannot accept that not

¹⁶³ Corker and French 1998, 6, see also in this respect Wall, 1999

¹⁶⁴ Finkelstein, V. (1993). The commonality of disability. In J. Swain, V. Finkelstein, S. French & M. Oliver (Eds.), *Disabling barriers-- enabling environments*. London ; Newbury Park, Calif: Open University. Retrieved May/16, 2009,

¹⁶⁵ Abberley, P (1987) 'The Concept of Oppression and the Development of a Social Theory of Disability' in *Disability, Handicap and Society*, 2, 1, pp. 5

everyone will be able to achieve inclusion into the economy, and argue instead that a mature society supports everyone on the basis, not of the work they have done, but of the needs they have.

Impairment and disability are not dichotomous, but describe different places on a continuum, or different aspects of a single experience. It is difficult to determine where impairment ends and disability starts, but such vagueness need not be debilitating. Disability is a complex dialectic of biological, psychological, cultural and socio-political factors, which cannot be extricated except with imprecision.

Much opposition to the medical model' is an opposition to being defined solely on the basis of impairment, or having clinicians rule the lives of disabled people. Yet it is possible to challenge these processes, without having to resort to the equally crude determinism of the social model. Disability should not be reduced to a medical condition. It should not be overlaid with negative cultural meanings. Neither should it be reduced to an outcome of social barriers alone, however important these might be in people's lives.

It remains vital to distinguish between the different levels of intervention, as Oliver also argues.¹⁶⁶ Sometimes it is most appropriate to intervene at the medical or individual level. For example, a newly spinal-injured person will almost inevitably require spinal stabilisation, rehabilitation, and possibly counselling. Yet subsequently, alterations to their personal environment will be important. In a broader sense, anti-discrimination measures will be vital to their future quality of life. Intervention at physical, psychological, environmental and socio-political levels is the key to progressive change, yet one cannot be a substitute for the other. Social change remains the most expedient measure to remove the problems presented by impairment and its consequences: this emphasis encapsulates the distinction between disability studies and medical sociology.¹⁶⁷

The ubiquity of impairment is an empirical fact, not a relativist claim. I am not trying to say that short-sightedness is equivalent to blindness, or that being unfit is a similar experience to being paralyzed. Clearly, the limitations which individual bodies or minds impose (always in specific contexts) vary from the trivial to the profound. There are important differences to which theory and practice should be sensitive, but these differences cannot be straightforwardly allocated to two distinct ontological statuses. The point is that everyone has limitations, and that everyone is vulnerable to more limitations and will, through the ageing process, inevitably experience functional loss and morbidity. Many of us will be supportive of attempts to minimize or eliminate these limitations, where possible, which does not mean cure at all costs.'

¹⁶⁶ Oliver, M. (1997). The disability movement is a new social movement! *Community Development Journal*, 32(3), pp. 244–251.

¹⁶⁷ Thomas, C. (1999) *Female forms: experiencing and understanding disability*. Buckingham, UK: Open University Press

Moreover, while all living beings are impaired—that is, frail, limited, vulnerable, mortal—we are not all oppressed on the basis of this impairment and illness. Only a proportion of people experience the additional disabling processes of society. Put another way, societies have evolved to minimize the problems of the majority of people with impairment, but have failed to deal effectively with the problems of a minority of people with impairment. In fact, societies have actively excluded, disempowered and oppressed (disabled) this minority. Of course, the size and nature of this minority changes. It is very difficult to achieve a core definition of disabled people, because it is not clear who counts as disabled or not. This is because different societies treat particular groups of people with impairments in different ways. For example, in the medieval period, being unable to read was not a problem, because social processes did not demand literacy: learning difficulties only became salient and visible once a complex social order required literate workers and citizens.

Rather than trying to break the definitional link between impairment and disability, we should expose the essential connection between impairment and embodiment. After all, as Shakespeare (1994) also argues, part of the psychological origins of hostility to disabled people may lie in the tendency of non-disabled people to deny their vulnerability and frailty and mortality, and to project these uncomfortable issues onto disabled people, who they can subsequently oppress and exclude and ignore. The continuum of impairment and embodiment is translated into a dichotomy between able-bodied people and disabled people, as Davis (1995) and others have demonstrated. Understanding these processes of exclusion and discrimination is where the core focus of an empowering disability studies should lie.

The central argument of this chapter has been that the British social model has been an excellent basis for a political movement, but is now an inadequate grounding for a social theory. This social model was a modernist project, built on Marxist foundations. The world, and social theory, has passed it by, and we need to learn from other social movements, and from new theoretical perspectives, particularly those of post-structuralism and post-modernism. It is believed here that the claim that everyone is impaired, not just disabled people, is a far-reaching and important insight into human experience, with major implications for medical and social intervention in the twenty-first century. I entirely concur with the political imperative to remove disabling barriers. I also believe that the overwhelming stress on medical research, corrective surgery and rehabilitation at all costs is important. Equally important, and a priority, should be social change and barrier removal, as social models of disability have suggested. Yet there is no reason why appropriate action on impairment—and even various forms of impairment prevention—cannot co-exist with action to remove disabling environments and practices. People are disabled both by social barriers and by their bodies. This is straightforward and uncontroversial.

I would also claim that a modernist theory of disability—seeking to provide an overarching meta-analysis covering all dimensions of every disabled person's experience—is not a useful or attainable goal. For disability is the quintessential post-modern concept, because it is so complex, so variable, so contingent, so situated. It sits at the intersection of biology and society and of agency and structure. Disability cannot be reduced to a singular identity: it is a multiplicity, a plurality.

Chapter Three

Models of Citizenship

The previous chapter examined how disability poses the challenge of difference. How the two models of disability individually dealt with the challenge of uniting people while also providing for their distinct needs and how they each failed to respect radical difference and issues over how difference and equality are to be interpreted. This chapter on citizenship deals with models of citizenship, both classical and recent, and how they fall down precisely because they do not achieve this aim. The notion of citizenship is central to explaining the inclusion or exclusion of disabled people from society as a whole and it is crucial in any attempt to judge whether policies counter, or indeed erect, barriers to their emancipation.¹⁶⁸

This chapter examines past and current perceptions and notions of disability in civic republican, liberal and difference models of citizenship theory by analysing perceptions according to their social and historical context. It is an exploration of the way in which civic republican and liberal models of citizenship conceive of disability. These models of citizenship pose norms and values, which are dominant in society and arise from particular conceptualizations of reality. It is argued here that these citizenship models and their application have limitations for full citizenship for disabled people. These models have strongly influenced current debates on social justice, equality and citizenship for disabled people, which highlight the extent to which these notions are currently underpinned by exclusive medical notions¹⁶⁹ of normality.¹⁷⁰ Medical discourses define individuals by their deficits, rather than by external factors,¹⁷¹ they are criticised for being heavily patriarchal¹⁷² and dismissing disabled people under a single metaphysical category, which buries personalities¹⁷³ it is suggested that medical discourse also individualises disabilities as attributes and professionalises them by making them part of a person's technical trouble¹⁷⁴.

¹⁶⁸ People with disability are amongst the most marginalised in the world and are seen negatively by almost every culture, religion and ethnic group see Pfeiffer, Sam, Guinan, Ratcliffe, Robinson & Stodden, (2004). More than alcoholism, criminalist behaviour, depression, or sexual orientation, research shows that the social stigma from disability is the most debilitating see Smith, 2004, p. 10.

¹⁶⁹ Medical discourses define individuals by their deficits, rather than by external factors see (Fulcher, 1989; Sandow, 1993). They are criticised for being heavily patriarchal see (Corbett, 1993) and dismissing disabled people under a single metaphysical category, which buries personalities also see (Brisenden, 1986). Fulcher (1989) suggests that medical discourse also individualises disabilities as attributes and professionalises them by making them part of a person's technical trouble. Medical discourse, through its language of body, patient, help need, cure, rehabilitation, and its politics that the doctor knows best' see (Fulcher, 1989, p27) has dominated special educational practices see (Tomlinson, 1982). Corbett (1993) argues for a reconstruction, rather than abandonment, of medical discourses, giving disabled people power over their own bodies and healthcare.

¹⁷⁰ Some have interpreted the concept of normalization as meaning that people with disabilities have to change to be more normal to be accepted. This led to debate between the interpretations of Wolfensberger and Nirje about whether we should be seeking to normalise people or should be celebrating their differences (Nirje, 1985).

¹⁷¹ see (Fulcher, 1989) **Disabling policies?: A comparative approach to education, policy, and disability**, Falmer Press (London and New York)

¹⁷² see (Corbett, 1993)

¹⁷³ also see (Brisenden, 1986) *international journal Disability, Handicap and Society* (known as Disability and Society since 1993) Volume 1 (2) pp. 173-8, 1986).

¹⁷⁴ Fulcher (1989) Fulcher, 1989 **Disabling policies?: A comparative approach to education, policy, and disability**, Falmer Press (London and New York)

Medical discourse as reflected in both civic republican' and liberal' models of citizenship, through its language of body, patient, help need, irrationality, cure, rehabilitation, and its politics that the doctor knows best¹⁷⁵ has dominated disabled people's lives and rendered them second class citizens.¹⁷⁶

The models of citizenship examined in this chapter are classical notions of civic republican and liberal models of citizenship. The classical civic republican model deals with Kant, Rousseau and Hume. The classical liberal model examines Locke, who although he pre-dates the model, is considered to be the founder of liberalism, and his contributions in his essay *An Essay Concerning Human Understanding*, presented the most influential distinction to date between idiots' and madmen' which were related to the care and treatment of disabled people.¹⁷⁷

Contemporary analysis focuses on Marshall's social theories on citizenship and the post-welfare state and Rawls notion of citizenship. Rawls is discussed because of his connections with the classical and liberal model of Locke and with the civic republican model of Kant. In the 1970s, Rawls incorporates Locke's, Kant's and Rousseau's civic republican models regarding ideas on citizenship and disability. Continuity amongst them is shown. They view disability as having a place in citizenship, albeit second tier and peripheral to the mainstream. The civic republican models and liberal models of citizenship, although preferring different starting points, overlap in relation to their central notion of the rational citizen and the irrational' citizen. The chapter examines how the irrational' citizen (the intellectually disabled) is constituted in opposition to the rational' citizen in classical citizenship theory, analysing the problem of conflating physically' and mentally' disabled persons in these same texts. These concepts and negative images in texts are woven into notions of citizenship.

Marshall's writings reveal important insights post the welfare state.¹⁷⁸ It analyses how contemporary models have challenged the classic models exclusion of the disabled from full citizenship, but have not yet fully discarded the negative self-images of earlier models. The difference' model is not without its limitations for disabled people. However Section Two argues for a reconstruction, rather than abandonment, of medical discourses, giving disabled people power over their own bodies and healthcare through the difference' model of citizenship.

¹⁷⁵ see (Fulcher, 1989, p27) Fulcher, 1989 *Disabling policies?: A comparative approach to education, policy, and disability*, Falmer Press (London and New York)

¹⁷⁶ see (Tomlinson, 1982) *A Sociology of Special Education* by Sally Tomlinson (Jan 1982)

¹⁷⁷ See John Lock sEssay *An Essay Concerning Human Understanding*,

¹⁷⁸ Other liberal theorists, such as Mill are not considered because this thesis is not analysis of individual theorists, but instead examines selected theorists in order to show the continuity of the exclusion of disabled from full citizenship in both the civic republican model and the liberal model of citizenship.

What is Citizenship?

Citizenship is a complex concept. There is no definite theory of citizenship. The term has different meanings in various historical periods, traditions, ideologies, theories and languages. In recent years, much has been written about citizenship and its connection to minority groups, gender, race and disability. Consequently, a range of different perspectives has emerged.¹⁷⁹ It emerges from an individual's multiple social and political relationships in a stable or political community.¹⁸⁰

To be a citizen is to be able to take part in decisions that create the different aspects of society, and to be able to participate in key functions such as work, leisure, political debate, travel and consists of religious observance.¹⁸¹ The contrary of citizenship is social exclusion, those who choose not to exercise their right to participate in some or all of these activities or, as in the case of some disabled people, those who are unable to exercise their right.¹⁸² For example the only two citizen populations in England that aren't allowed to vote are convicted criminals and individuals with intellectual disabilities or mental illness.¹⁸³

Citizenship is a central concept in philosophy, law, and public policy which marks out those individuals to whom we owe special attention, those who have the right to determine their society's shape, and those who can command the full set of entitlements made available by the state. Many members of society continue to lack the full status of citizenship, because they do not possess the full set of citizenship rights, or, because, economic forces and social norms tend to push people to the margins. Achieving the goal of full citizenship continues to be a crucial social struggle.¹⁸⁴

The framework of citizenship has been applied to specific marginalised groups and has particularly challenged the liberal tradition of rights. It has provided a framework for marginalised groups to claim a sense of acceptance and membership as equal partners in the community. This sense of acceptance was applied by Lister to the poor, Smith and Ram Paul to minority racial groups and Lister, Jones, Walby and Young drew attention to the second class status of women. Oliver, Barnes, and Jenkin highlighted the issue of citizenship in relationship to disability. Jenny Morris made a case that disabled women are highly neglected and Jan Walmsley addressed the complex issue of relating citizenship to people with learning difficulties.

¹⁷⁹ (Hellsten 2006: 37), (Yuval-Davies and Werbner, 1999).

¹⁸⁰ Ruth Lister 2004, *Poverty*, see also Ruth Lister 1990 *The Exclusive Society, Poverty and the Poor*

¹⁸¹ (Drake p.40). Drake, R.F. (1994) The Exclusion of disabled people from positions of power in British Voluntary Organisations, *Disability and Society* 461-80.

¹⁸² Oliver, M. (1996). *Understanding disability: from theory to practice*. Basingstoke: Macmillan.

¹⁸³ See, Choice and control: the right to independent living, Experiences of persons with intellectual disabilities and persons with mental health problems in nine EU Member States FRA – European Union Agency for Fundamental Rights Schwarzenbergplatz 11 – 1040 Vienna – Austria, Luxembourg: Publications Office of the European Union, 2013 also see **Prisoners' voting rights** SN/PC/01764 4 July 2013 Isobel White Parliament and Constitution Centre

¹⁸⁴ Roche, M. (2002). Social citizenship: Grounds for social change. In E. F. Isin, & B. S. Turner (Eds.), *Handbook of citizenship studies* (pp. 69-86). London: SAGE. see also *Citizenship and Social Theory* edited by Bryan S Turner

In the case of disability, these citizenship structures are transgressed by the evolving disability movement. As social concepts, both citizenship and identity provide a broad framework within which to explore the material and cultural exclusion of people with disabilities in the western world. As Miles¹⁸⁵ has observed, accurate and credible information about disability outside of a Western context is vital but rare. The notions of citizenship and identity need to be recognized for their inability to easily translate beyond this milieu and into the contexts of non-Western cultures.¹⁸⁶ The established division between citizen and outsider has acted as a formative dimension of the disability rights movement and its quest for empowerment and autonomy, inclusion, valued citizenship and a positive identity.

On Citizenship

The classical definition of citizenship, based on Aristotle's account, separates the public realm from the private one. Aristotelian ideal of citizenship is a definition of the human being as an active, moral, and political being, however it was accessible only to a small group of males. The conception of public is a higher arena than the private one. It is the public that man exercise his highest capacities as a *political animal*. The modern liberal version of citizenship started with Hobbes and Locke in the Western political tradition, whereas democratic-participatory conceptualization was first developed by Rousseau and put into practice after French Revolution. The modern concept of citizenship constructed on Rousseau's notion of self-determination is represented by a contract between the people (*free and equal*) and to form a government. In the course of time, citizenship meant more than political membership but possession of certain civil rights. It gained a pluralist content in addition to membership into a democratic homogeneous community.

Modern citizenship consists of three features: (1) a judicial status which confers rights and obligations vis-à-vis a political collectivity; (2) a group of social roles for making choices in the political arena (political competence); (3) an ensemble of moral qualities required for the character of the "good" citizen.¹⁸⁷

Citizenship conceptualizations concern the questions of national identity, civic allegiance, and membership. Three theoretical perspectives can be distinguished in the contemporary literature on citizenship: liberal (with its emphasis on individual identity in a political

¹⁸⁵ Miles (2006), Hevey, D. (1993). The tragedy principle: Strategies for change in the representation of disabled people. In J. Swain, V. Finkelstein, S. French & M. Oliver (Eds.), *Disabling barriers-- enabling environments* (pp. 116-121). London ; Newbury Park, Calif: Open University.

¹⁸⁶ (see for example Ghai, 2002), Kymlicka, Will (1995) *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Clarendon Press.

¹⁸⁷ (Leca, 1992: 17-18), Laclau, Ernesto and Chantal Mouffe (1985) *Hegemony and Socialist Strategy*. London and New York: Verso.

community), communitarian (with its emphasis on cultural or ethnic identities), republican (with an emphasis on civic identity). In some of the classifications the communitarian model is included in republican one or vice versa. Liberal and republican models, in fact, have some common denominators: (1) the state is embedded in legal-rational authority; (2) state power should be framed by rule of law; and (3) protection of basic rights and freedom.

The Classic Models of Citizenship

The classical tradition of *civic republicanism* and the *liberal* tradition are the two main strands in the theory of citizenship. The current dividing lines in citizenship theory emerge from these two traditions of citizenship.¹⁸⁸ Each signifies a different understanding of what it means to be a citizen. The civic republican theory developed prior to the liberal tradition, however the latter has been dominant during the past two centuries.¹⁸⁹ Liberal citizenship is much less demanding of the individual than the republican tradition in that it is focused on individual rights which are honoured by the state.¹⁹⁰

The Classic Civic Republican Tradition

The original understanding of citizenship derives from the civic republican tradition and the political experience of the Greek city-states, in particular democratic Athens.¹⁹¹ The Republican tradition had its origins in Rome, in the writings of Cicero. It was revived in the Renaissance, in the constitutional thinking of Machiavelli, and played an important role in the self-conception of the northern Italian republics. Its language dominated the politics of the modern West during the English Civil War, and in the period leading up to the American and French Revolutions.¹⁹² In contrast to liberals' emphasis on rights, republicans underline the role of duties and active participation as the constitutive elements of citizenship. In fact, they reverse the relation between rights and politics as it is understood in liberalism: rights are regarded as the products of the political process by republicans, rather than its presuppositions.¹⁹³ Republicans define the moral framework of politics by a duty to participate in collective decision-making. Citizenship meant participating in a direct democracy. Civic republicans had an ideal of citizenship in which the *character* of individual citizens was very important.¹⁹⁴ A good citizen was active in politics, fought bravely for his country, and cared for the public good more than his private interests. This ideal contrasted with the liberal view, to be explored below, that citizenship was primarily a *legal and*

¹⁸⁸ *Introduction to political theory*, Ignatieff, Michael (1995) 'The Myth of Citizenship', pp. 53–78 in Robert Beiner (ed.) *Theorizing Citizenship*. Albany: State University of New York.

¹⁸⁹ (Heater, 1999). What is Citizenship? 1999, publication: Polity Press

¹⁹⁰ Faulks, Keith. *Citizenship*. London: Routledge, 2000.

¹⁹¹ Kymlicka, Will. *Multicultural Citizenship: A Liberal Theory of Minority Rights* Oxford: Oxford University Press, 1995.

¹⁹² (Pettit, 1997: 19).

¹⁹³ (Bellamy, 2000: 177), Bellamy, R. (2008). *Citizenship : A very short introduction*. Oxford; New York: Oxford University Press.

¹⁹⁴ Staven. R.Smith,(2005)Equality Identity and the Disability Rights Movement: from policy to practice and from Kant to Nietzsche in more than one uneasy move. *Critical Social Policy*. (Sage Publications)

administrative status. Early liberals did also restrict citizenship to men of property, but the reasons for excluding the poor and women were somewhat different.

Classic Civic Republican and Disability Jean Jacques Rousseau and Immanuel Kant

The civic republican model of citizenship depends not only upon participation but upon reason. Reason, for Jean Jacques Rousseau, does not define the rights of citizens so much as the general will of the people or *demos*.¹⁹⁵ The distinction between Rousseau and Locke's political theories has been famously described by Isaiah Berlin as the distinction between negative and positive freedoms. Locke thought of liberty as (negative) rights that cannot be violated by the state—citizens require reason in order to consent to the social contract and to decide if their rights are being protected by the state or, if not, whether to dissolve it.¹⁹⁶ Rousseau believed freedom was rooted in the moral capacity to govern oneself in accordance with reason (positive freedom); citizens require reason in order to form the social contract and political society. Thus, while reason defines the *citizen* for Locke, it defines what it is to be *human* or a *person* for Rousseau.¹⁹⁷

Classic Civic Republican and Disability and Immanuel Kant

Immanuel Kant takes up Rousseau's theory of the self-governing rational citizen. In the *Fundamental Principles of the Metaphysics of Morals*¹⁹⁸ Kant builds on Rousseau's insights into freedom by providing a metaphysical foundation.¹⁹⁹ As such, Kant's theory of reason, like Rousseau's, is decidedly non-instrumental.²⁰⁰ Rawls comments, Kant's aim is to deepen and to justify Rousseau's idea that liberty is acting in accordance with a law that we give to ourselves. And this leads not to a morality of austere command but to an ethic of mutual respect and self-esteem. Kant sought to give a philosophical foundation to Rousseau's general will. Kant's moral theory protects human dignity through the mutual recognition of others as rational self-legislating persons, and he famously argues that persons must act in accordance with a universal duty to see all rational beings as ends in themselves.²⁰¹ Kant

¹⁹⁵ Jean Jacques Rousseau, *Social Contract* (New York: Penguin Classics, 1968).

¹⁹⁶ Negative freedom is, a matter of which opportunities lie open to you, it is concerned exclusively with opportunities; positive freedom is a question of whether or not you can go access these opportunities, whether you are master of your life. Berlin points out that historically the concept of positive freedom has been used to control and repress individuals in the name of liberty. Isaiah Berlin. 2002. *Liberty: Incorporating Four Essays on Liberty* (New York: Oxford University Press)

¹⁹⁷ Jean Jacques Rousseau, *Social Contract* (New York: Penguin Classics, 1968).

¹⁹⁸ Immanuel Kant. *Fundamental Principles of the Metaphysic of Morals* (Lenox, M: Hard Press, 2006).

¹⁹⁹ Immanuel Kant. *Fundamental Principles of the Metaphysic of Morals* (Lenox, M: Hard Press, 2006).

²⁰⁰ Kant, *Fundamental Principles*, p.36. The practical necessity of acting on this principle, that is, duty, does not rest at all on feelings, impulses, or inclinations but solely on the relation of rational beings to one another, a relation in which the will of a rational being must always be regarded as legislative, since otherwise, it could not be conceived as an end in itself. Reason then refers every maxim of the will, regarding it as legislating universally to every other will and also to every action towards oneself, and this not on account of any other practical motive or any future advantage but from the idea of the dignity of a rational being, obeying no law but that which he himself also gives.

²⁰¹ The practical necessity of acting on this principle, that is, duty, does not rest at all on feelings, impulses, or inclinations but solely on the relation of rational beings to one another, a relation in which the will of a rational being must always be regarded as legislative, since otherwise, it could not be conceived as an end in itself. Reason then refers every maxim of the will, regarding it as legislating universally to every other will and also to every action towards oneself, and this not on account of any other practical motive or any future advantage but from the idea of the dignity of a rational being, obeying no law but that which he himself also gives. Immanuel Kant. *Fundamental*

concludes, Autonomy then is the basis of the dignity of human and of every rational nature.²⁰² Consequently, those who are not rational are by definition not autonomous and strictly speaking not persons and therefore not due the dignity accorded to rational beings. For Kant, what commands respect is our status as rational agents, capable of directing our lives through principles. Thus Kant's formulation excludes many mentally disabled people from the politics of equal dignity.

Problems in Kant's Civic Republican Argument

Kant's formulation excludes many mentally disabled people from the politics of equal dignity, because he defines personhood by the capacity for reason. We are then forced to define those incapable of rationality as outside the normal meaning of personhood, for they only have the *potential* to be human and are thus postulated persons, who are incapable of realizing their potential in the normal way. Kant's theory provides us with the basis for our intuitions of equal dignity ever since. For Kant what commanded respect in us was our status as rational agents, capable of directing our lives through principles.²⁰³ Kant's moral theory in relation to disability is problematic for a number of reasons. First, the use of abnormal and the deprecating self-images imply disabled people are to be stigmatised and expunged from modern political thought. Second, the term rationality which defines features of personhood is problematic. In accepting this understanding of person the mentally disabled are excluded from what is meant by human.

The Classic Liberal Theory of Citizenship

In liberal democracies, effective participation requires that individuals and groups possess some minimum conditions related to politically relevant knowledge and skills. Those who possess such knowledge and skills will be competent members of society, and they will have access to social and economic resources by exercising civil, political and social rights. But those who lack the minimum of politically relevant knowledge and skills will be marginalized. Not only has this classification contributed to a life long struggle but it highlights the narrow definition of full citizenship within liberal thought, which in turn raises questions about the formation and application of disability policies.

Classical Liberalism

Widely known as the father of liberalism,²⁰⁴ John Locke in his *Two Treatises of Civil Government*²⁰⁵ notes that every man has rights which are God given; they should have free

Principles of the Metaphysic of Morals (Lenox, M: Hard Press, 2006), p.37

²⁰² Immanuel Kant. *Fundamental Principles of the Metaphysic of Morals* (Lenox, M: Hard Press, 2006).

²⁰³ Kant, *Fundamental Principles*, 37

²⁰⁴ Greene, 1979; Cafagna, 1982; Santilli, 1982, Charles Taylor, "Politics of Recognition," in *Multiculturalism*, ed. Amy Gutmann (Princeton, NJ, Princeton University Press, 1995), 64-65.

²⁰⁵ Locke, *Two Treatises*, II:60 John Locke, *Two Treatises of Government*, ed. Peter Laslett, *Cambridge Texts in the History of Political Thought* (Cambridge, UK: Cambridge University Press, 1988).

and equal right to preserve life, liberty and estate, but it is the duty of the state to ensure their protection.²⁰⁶ Citizens should also have a right to vote and have a right of protection and just treatment by the law. Individualism is expressed morally through the typical liberal belief in individual natural' or human' rights.²⁰⁷

Classical Liberal Theory, Disability and Full Citizenship; John Locke

It is argued here that John Locke was incorrect when he wrote, in *An Essay Concerning Human Understanding*, that personhood is a concept that we articulate rather than a condition that exists in nature which we discover. He would acknowledge that there are some constraints upon our ability to ascribe the attribute of personhood to any particular type of entity. Locke says, for instance, that the term person belongs only to intelligent agents capable of law, happiness and misery.²⁰⁸ More specifically, a person is a thinking intelligent being that has reason and reflection, and can consider itself as a self, the same thinking thing in different times and places, which it does only by that consciousness which is inseparable from thinking, and essential to it.²⁰⁹

For Locke, personhood status has been applied only to those actual or theoretical beings who possess or can develop a sense of right and wrong and hence possess the capacity to participate as moral agents in a moral community. Beings without this capacity, such as animals, foetuses, and the profoundly demented, learning disabled may be, by virtue of their capacity to experience pain, appropriate objects of moral concern, but not members of the moral community with rights and duties.²¹⁰ Some disabled people therefore would not qualify for citizenship or even personhood on those grounds.

Locke considered human beings to possess certain capacities, and to be persons because of their capacity for self-consciousness and organisation of a concept of right and wrong, rather than simply having a body of a particular form or genetic composition. It is the same continuing consciousness, which constitutes the criterion for the identity of persons. In Locke's words:

Since consciousness always accompanies thinking, and it is, that makes every one to be, what he calls self, and thereby distinguishes himself from all other thinking things, in this alone constitutes personal identity, i.e., the sameness of a rational Being. And as far as this consciousness can be extended backwards to any past Action or Thought, so far reaches the identity of that Person; it is the same self now

²⁰⁶ (Locke, 1962, 87). Locke's Essay Concerning Human Understanding Books II and IV. Open Court Classics [Locke] Mary Whiton Calkins, Editor

Published by La Salle, Illinois, USA: Open Co, 1962

²⁰⁷ (Gray, 1986; Bellamy, 1992; Vincent, 1992: Ch. 2; Freedon, 1996: Part II).

²⁰⁸ John Locke *An Essay Concerning Human Understanding*.

²⁰⁹ In chapter 15 of the Second Treatise, Locke distinguishes between ~~p~~olitical," ~~p~~ater- nal" and ~~d~~espotic power," depending on the capacity of individuals for ~~r~~ason." Slaves, for example, have ~~q~~uitted" reason and are subject therefore to an unlimited ~~d~~espotic" power, children have immature reason and are subject to a limited ~~p~~arental" power, and citizens, who have a fully developed capacity for reason, exercise ~~p~~olitical" power. ~~F~~or having *quitted Reason*, which God hath given to be the Rule betwixt Man and Man . . . [the slave] is subject to a despotical power."

Locke, *Two Treatises*, II:172. Emphasis added

²¹⁰ (Locke, J).

as it was then; and its by the same self with this present one that now reflects on it, that Action was done.²¹¹

Locke commented that some human beings have irretrievably lost or will never have the capacity for personhood at any given moment, or for personal identity over time. Mental health patients, and many intellectually disabled people, do not qualify on Lockean grounds. The brains of such people will never develop or have suffered sufficient trauma or degeneration so as to preclude self-consciousness and rationality. Thus both categories of people are permanently unconscious because they have no functioning higher brain to the acceptable normal level and will thus never have a capacity for personhood. Based on these views, it can therefore be argued that disabled people are not full citizens.

Permanent insanity ‘Idiots’ vs. Temporary Insanity ‘Lunatics’

Locke distinguishes between the permanent incapacity of idiots and the temporary nature of lunacy, repeating the same logic found in his *Essay*, he says only the former are permanently deficient whereas madness may be temporary. Because the idiot lacks reason he cannot be sovereign of any law, possess property, comprehend the law of nature, or own his very body. He is never free. Here the Greek meaning of idiot-as-private-person is nestled within Locke’s notion of the idiot as cognitively deficient: because the idiot is incapable of reason, he is entirely removed from the public realm and is enfolded into the private sphere. In essence, the idiot’s life is depoliticised and his very body dissolves into the property of his sovereign and transgress the moral bounds of God’s duty.

While Locke clearly demarcates between paternal and political power—as his theory in fact hinges on the difference—elsewhere he describes paternal power as absolute. In *Some Thoughts Concerning Education*, Locke depicts the different degrees of parental power depending on the child’s level of maturity.

For Locke, the less reason they have of their own, the more are they to be under the absolute power and restraint of those, in whose hands they are.²¹² Younger children should be taught to fear and awe’ their fathers and to see them as their lords, and absolute governors.’ Idiots, who have *no* reason for Locke, are permanently subjected to absolute parental power. And because idiots are entirely isolated in the private realm, they are detached from anyone who could presumably intercede on their behalf. Although the *Second Treatise* repeatedly emphasises the importance of the right to appeal and the need for public laws, children, idiots and lunatics—because they are entirely under the purview of parental

²¹¹ There is, of course, an important distinction in this absolute power exercised in the domestic sphere over slaves and mentally/ill disabled persons, which is that while masters have absolute power over life/death of the former, the authority over the latter is tempered by the principle of charity, and hence, parents do not have the same kind of absolute power (meaning life/death) over their disabled children.

²¹² See John Lock *Some Thoughts Concerning Education*,

power—lack all means of resistance. Unable to own his own body, the idiot has no recourse to justice.²¹³

Although deficiencies in consciousness may logically preclude a man from civil law, the empirical difficulty of discerning unconsciousness requires that all persons be treated as fully sovereign to prevent the law from being perverted. This curious state of being both outside and within the law ensnares Locke's idiot: his cognitive deficiency absolves his moral standing but the law forbids any absolution.

Locke's treatment and construction of idiocy is irreconcilable with his theory of human equality. Waldron concedes that among the very grossest differences in mental capacity, Locke is evidently not committed to any thesis of equality.²¹⁴ Because Locke's conception of equality hinges on the necessary power of abstraction—without which men cannot comprehend God—idiots are legitimately excluded. Waldron presumably assumes that Locke's limitation on human equality poses no threat to his larger political project; in fact, he argues that Locke's foundation of equality demands it. In contrast, I argue that Locke's dehumanization of idiocy unravels the regulative norm of human equality as well as its concomitant tie to morality.

Physical Disabilities vs. Intellectual Disabilities according to John Locke's Citizenship Theory
The hierarchy of disabilities expressed in Locke's writing's, where idiots are being excluded from personhood due to their inability to learn, is significant to Locke's theory of a person. The other component of human understanding for Locke is *Reflection* which he describes as *the Perception of the Operations of our own Minds* within us, as it is employed about the *Ideas* it has got"²¹⁵

In the *Essay*, Locke accorded different significance to physical, sensory and mental disabilities, presuming that only the last undermines personal and political standing. Cognitive deficiency, unlike other disabilities, directly undoes our capacity to consent. While we are all equally prone to incapacity, incapacities are not all equal. This criticism, however, misconstrues two different types of equality: equal treatment and respect for equals.²¹⁶

The second reason for exclusion, the assurance of benevolent care, surfaces in the *Second Treatise* when Locke addresses the problem of idiocy in his chapter on paternal power. Locke maintains that political accountability is only expected from a person who possesses a state of maturity wherein he might be supposed capable to know that law, that so he might

²¹³ The child has reached adulthood when he has *the Reason and Ability to govern him- self and others.*" John Locke, *Two Treatises of Government*, ed. Peter Laslett, *Cambridge Texts in the History of Political Thought* (Cambridge, UK: Cambridge University Press, 1988), II:61. Emphasis added

²¹⁴ John Lock *An Essay Concerning Human Understanding* (1689) *An Essay Concerning Human Understanding* (1689). 38th Edition from William Tegg, London;

²¹⁵ John Lock *An Essay Concerning Human Understanding* (1689) *An Essay Concerning Human Understanding* (1689). 38th Edition from William Tegg, London;

²¹⁶ Kant, *Fundamental Principles*

keep his actions within the bounds of it.’²¹⁷ Hence, children are denied freedom until they reach the age of reason. If anyone is permanently defective in reason, according to Locke, he is *never capable of being a free man*, he is never let loose to the disposal of his own will (because he knows no bounds to it, has not understanding, its proper guide), but is continued under the tuition and government of others, all the time his own understanding is incapable of that charge. And so lunatics and idiots are never set free from the government of their parents.

In contrasting Locke with Rousseau, Barbara Arneil argues that while reason defines the *citizen* for Locke, it defines what it is to be *human* or a *person* for Rousseau.²¹⁸ Arneil separates two modern discourses that stigmatized disability: liberal strains that limited citizenship and republican that curtailed human membership. In the latter group, theorists like Rousseau and Kant exemplify radical dehumanization. My analysis, however, shows that Locke prefigured this development. Locke’s reliance on reason isn’t confined to politics, but draws the bounds of human equality.

Problems in Locke’s Notion of Liberal Equality

The continued exclusion of those with intellectual limitations into the early twentieth century based on their inability to reason or benefit from education is indicative of the barrier to liberal citizenship for those who do not conform to the norm. The justification for the exclusion is for benign reasons, according to Locke. Rationality guarantees moral status because it presumably implies a distinct relationship between men and God which enables men to understand and abide by moral codes.

David Hume, Disability and Citizenship

Like Locke, David Hume distinguishes between those in society who should be governed by justice and those he describes as inferior in body and mind’ who ought to be governed by the principle of gentle usage:'

Were there a species of creature intermingled with men, which, *though rational, were possessed of such inferior strength, both of body and mind*, that they were incapable of all resistance, and could never, upon the highest provocation, make us feel their resentment; the necessary consequence, I think is that we should be bound by the laws of humanity to give *gentle usage* to these creatures, but should not, properly speaking, lie under any restraint of *justice* towards them.²¹⁹

Justice, for Hume, is rooted in his principle of rough equality’ because individuals will only be willing to work out principles to govern themselves if they recognize that others are

²¹⁷ John Lock *An Essay Concerning Human Understanding* (1689) *An Essay Concerning Human Understanding* (1689). 38th Edition from William Tegg, London

²¹⁸ Barbara Arneil, “Disability, Self Image, and Modern Political Thought,” *Political Theory* 20 (April 2009)p.1-25, 24.

²¹⁹ Hardin, Russell, *David Hume: Moral and Political Theorist*, Oxford Univ. Press, Oxford, 2007.

equally capable of resistance. Those deemed incapable of such resistance are subject to a different set of rules. Once again, the disabled are defined by their incapacity, are seen as objects of pity and ultimately excluded from the principles of justice, governed instead by gentle usage or charity.

The idea of charity, defined in opposition to justice in both Locke and Hume's thought, is important for two reasons: first—unlike the later nineteenth century scientific images of the disabled as fundamentally different or abnormal degenerates who need to be separated out from normal people, institutionalized, and/or sterilized—Locke and Hume argue that the disabled are part of humanity but like all human beings fall short of the ideal image of God. They remain part of the community and ought to be treated with kindness by others (in accordance with Christian principles) rather than excluded. But the principle of charity also constructs the disabled as objects of pity and outside the remit of justice, an image that will last well into the twentieth century in both theory and practice as the disabled become represented, through the vehicle of numerous charitable campaigns, as dependent, tragic, and pitiable.

Problems with Hume's Notion of Citizenship for Disabled people

One of the most perplexing aspects of Hume's description of disability quoted above is his conflation of physical and mental disabilities within the principle of gentle usage, even though he states at the outset that it is rationality that defines the species man and puts them into the original condition of rough equality. It is unclear, within Hume's own account, why those with an inferior body (the physically disabled) should be governed by gentle usage since they presumably have the capacity to resist and make their resentment felt towards others as much as able-bodied humans. Hume's conflation of physical and mental disabilities is critically important, not only because Rawls incorporates it into his own theory but also because it suggests that there is *something about disability itself* and not simply the principle of irrationality that leads some liberal theorists to exclude *all* disabled people from their principles of justice. Even if one accepts that reason defines personhood, why should *physically* disabled people be deemed incapable of realizing their potential? The conflation of physical and intellectual disability in political theory is not so simply explained or dismissed, as this problem permeates contemporary political theory. The tendency to conflate both kinds of disability is critically important, for if the physically disabled are systematically excluded from political theories ostensibly rooted in rational agency, it suggests there is something about disability itself (beyond a simple categorical antonym to reason as we have been suggested so far) that explains the long-standing exclusion and discrimination of the physically disabled.

Complementary Features in the Classic Civic Republican and Liberal Models of Citizenship

These two different orientations to citizenship are not necessarily mutually exclusive. For example, it is not unusual for those on the right to combine a classical liberal conception of citizenship rights with an emphasis on the paid work obligations of poorer citizens, reflecting both ideas of contract and the combination of neo-liberal and neo-conservative strands in new right thought.²²⁰ Conversely, in the UK, the Labour leaders articulation of a Left view of citizenship has emphasised not only rights but also the duties that individuals owe to one another and a broader society.²²¹ How they are conflated today limits the full citizenship of many disabled people.²²²

On Cultural Pluralism

The rising interest in citizenship in political theory is the result of an increasing cultural diversity in contemporary societies. Given the fact that there is a crisis of national identities in Western societies, cultural pluralism is proposed as a model for the construction of political identities. The identities referred by cultural pluralism are based on sub-national or transnational elements such as language, ethnicity, religion, race and ability. With the advent of cultural pluralism, certain transformations are happening in the life practices of plural societies. For example, education systems become less sufficient for the minorities, so structures are arranged in more pluralist ways—in terms of cultural differences, languages, ability, religious values and opinions.

We can speak of a number of political problems arising from cultural pluralism. First of all, the new social movements (the feminist movement, black movements, the disability movement, nationalist movements, the gay and lesbian movements, and the ecological movement) are based on a sense of absolute and prescribed identity (such as race, ethnicity, gender, age and sexual practices and ability), rather than a position in the social contract (in the labor market, for example). Thus, these movements demand representation to establish their autonomy on a metaphorical terrain in which identity is non-negotiable.²²³ Secondly,

²²⁰ King, 1995, *Theorizing citizenship*, state University of New York Press, Albany, 1995 State University of New York, Page 45-46

²²¹ see Blair, 1994, p4

²²² To give an example, John Major's Conservative government promoted the Citizen's Charter as part of encouraging a market approach to public services, the citizen was defined as consumer and it was the promotion of the consumer's right to choice which, together with privatization, was considered to be the solution to the identified problem of inefficient public services. The Citizen's Charter was therefore situated within the liberal political tradition in which a limited state guarantees the freedom and formal equality of the individual. On the other hand, Tony Blair's Labour government, while also emphasizing consumer choice in the context of public services, has in addition launched a whole raft of policies aimed at encouraging people to be 'active citizens'. Here the emphasis, rather than being on the rights of individuals, is on the obligations that must be fulfilled in order to assure the health and stability of local communities and the wider society. Therefore as society continues to become more reliant on employment and participation as prerequisites of citizenship, there is a dangerous probability that a key disability group will find it increasingly difficult to operate equitably in society. This reflects what Maurice Roche (1992) has dubbed a duties discourse, which is becoming increasingly influential in Western European (and US) social policy (Kremer, 1994). Roche points to the influence of new social movements (in particular greens and feminists) in the development of this duties discourse. A key issue for some feminists is how care fits in to any configuration of citizenship obligations (Kremer, 1994; Bubeck, 1995).

²²³ Leca, 1992: 25

cultural fragmentation causes societies to appear as a mosaic of compartmentalized solidarities, each with its own political community.

Some scholars, such as Iris Marion Young, praise the advantages of cultural fragmentation in the name of the politics of difference.²²⁴ The idea behind this is to provide inclusion for traditionally excluded and marginalized groups. Her point of departure is the modern political assumption that the universality of citizenship implies a universality of citizenship in the sense that citizenship status transcends particularity and difference.²²⁴ She claims that while equality is conceived as sameness, universality is defined as in opposition to particular, and these misconceptions, in turn, perpetuates oppression and disadvantage. Besides its advantages, pluralism poses a threat to the idea of citizenship by causing individuals to stick together within their group identity and let them to ignore a larger common culture that is what Beiner calls groupism.²²⁵

When citizens become fixated on cultural differences, it is difficult to maintain a common ground for the members of the society. An absolute liberal citizenship would lessen the distinctiveness of a group. It can even promote oppression by not letting them to pursue their distinctiveness. On the other hand, it is not easy to find a compromising foundation in the republican notion.

Recent Models of Citizenship

Liberal citizenship conceptualization, based on individual freedom and equality and setting a bundle of individual rights against the state, failed to accommodate cultural pluralism raised in the late twentieth century. T. H. Marshall's notion of citizenship was concerned with the civil, political and social (welfare) rights bestowed by the state to the individual citizens in conformity with the principle of formal equality.²²⁶ This understanding failed to recognize distinct identities and cultures within a liberal state. John Rawls developed a political concept of justice that would be the basis of political arrangements of a liberal democracy. Reading Rawls on how he has constructed citizenship is important for understanding how liberal citizenship conceptualization is interwoven with the grounding political philosophy. Throughout his studies (from 1971 to 2001) his liberalism evolved to embody the requirements of a plural society. Nevertheless, Kantian liberal conceptualizations of citizenship have been criticized by scholars from different strands of political philosophy including communitarians, conservatives, radical democrats, and feminists. This section examines recent and contemporary perceptions and notions of disability in citizenship theory. It is an exploration of the way in which civic republican, liberal and difference' models of citizenship conceive of disability. It is argued here that these

²²⁴ (Young, 1989: 250), Young, I. M. (1997) *Intersecting Voices, Dilemmas of Gender, Political Philosophy, and Policy* (Princeton: Princeton University Press).

²²⁵ Young, I. M. (1990). *Justice and the Politics of Difference*. Princeton: Princeton University Press.

²²⁶ Marshall, T. H. ([1963] 1998). Citizenship and social class. In: G. Shafir (Ed.) *The Citizenship Debates. A Reader*. London: University of Minnesota Press.

citizenship models continue to have limitations for full citizenship for disabled people.

Contemporary Civic Republican Model of Citizenship

Contemporary models of civic republican discourse advocate that a citizen should undertake duties and responsibilities and be loyal to the state rather than to individual interests. Central to the civic republicanism notion of citizenship is a conception of individuals as not being logically prior to society.²²⁷ Communitarians object to the social concept of the self in liberalism as the liberal self is seen as both socially constructed and embedded in a cultural context.²²⁸ Civic republicanism, like communitarianism has focused on the need to create a political community and a common bond between citizens, which closes the differences of class, religion, and culture.²²⁹

There has been a revival of republican notions in response to the rights based notions found in liberalism.²³⁰ These discourses view citizenship as an activity or as practice, not just a status. It is in the civic republican tradition that we find the source of today's duties discourse. The market-oriented conceptualisation of social citizenship rights exemplified by the Citizen's Charter²³¹ is nicely complemented by the Right's growing emphasis on citizenship obligation and in particular the obligation to undertake paid employment.²³²

It is the right of those who have deliberately challenged the existing rights discourse and who have done most to shift the fulcrum of the citizenship paradigm. Most of the key texts contributing to this shift originate in the US, including influential works by Mead²³³ and Novak²³⁴ which identify engagement in paid work as the prime obligation by welfare recipients to support their families. Few would dispute that responsibilities as well as rights enter into the citizenship equation. The question is: *what is the appropriate balance and relationship between the two and how does that balance reflect power relations?* One helpful formulation, which attempts to encapsulate a reciprocal relationship between rights and obligations (although it does not really capture the dimension of environmental obligation), is that put forward by Geraint Parry of a mutual society based on the familiar principle from each according to his or her ability; to each according to his or her need for the conditions of agency.²³⁵

²²⁷ See (Oldfield 1994:191) *Citizenship in a Global World*, 2 Park Square, Milton Park, Abingdon, Oxfordshire, simultaneously published in the USA and Canada, first published 2005,

²²⁸ (Delanty 2002:163). *Citizenship in a Global Age: society, culture, politics*. Open University press.

²²⁹ (Siim 2000:25). Siim, B. (2000) *Gender and Citizenship: Politics and Agency in France, Britain and Denmark* (Cambridge: Cambridge University Press).

²³⁰ Nuyen, A.T. 'On the Confucian Idea of Citizenship.' In *Challenging Citizenship: Group Membership and Cultural Identity in a Global Age*. Ed. Sor-hoon Tan. Aldershot: Ashgate, 2005, 169-81.

²³¹ Jacobs, Francis, *The European Convention on Human Rights, The Charter of Fundamental Rights and the European Court of Justice*,

²³² Barnes, M. 1999. 'Users as Citizens: Collective action and the local governance of welfare', *Social Policy and Administration*, 33, pp.73-90.

²³³ Nozick, R. (1974) *Anarchy, State and Utopia* (New York: Basic Books).

²³⁴ et al (1987)

²³⁵ Yuval-Davis, N. (1999) *Ethnicity, gender relations and multiculturalism*, in: *Race, Identity and Citizenship: A Reader* (Oxford: Blackwell).

Liberty within civic republican citizenship models is understood in terms of freedom to participate in the political and social institutions of society as an equal member.²³⁶ However, participation is defined in a narrow sense through a normative stance where participation in only certain types of activities is considered to be citizenry. In contemporary times, these activities have come to be known as the three M's: participation in the institutions of marriage, military and the marketplace.²³⁷ Those who cannot participate are not considered full citizens.

Such a definition of participation reflects a gendered abilist norm as it reflects activities in the military and to an extent in the marketplace that are likely to be more representatives of able-bodied male activities. It also reflects a heterosexist norm as couples in same-sex relationships are not always free to participate in the institution of marriage.²³⁸ Many disabled people, who in most cases are not free to participate in any of these activities, would therefore be constructed as second-class citizens within this ablest view of participation.

The freedom to participate is also conceived within a normative stance as including only those citizens who possess certain 'virtues' own the freedom to participate. These virtues were historically defined as those of 'disinterestedness in making decisions for the public good,' 'independence,' and 'rational mindedness.' Thus, women were excluded as citizens through a construction of women as 'emotional' and 'dependent,' as were black people for being 'incapable of reasoning.' To varying degrees, women and black people have fought against these exclusions, while some disabled people continue to be constructed as 'second class-citizens' and excluded through the use of a similar type of rationale.

The self that emerges in this model of citizenship is both relational as well as active. One's membership in society depends on an acknowledgment of other members belonging to that society; it is not simply an individuated exercise.²³⁹ However, due to its normative stance, the 'active' self is limited within normative constructions of what it means to be active.²⁴⁰

This represents an impoverished version of citizenship in which individual citizens are reduced to atomised, passive bearers of rights whose freedom consists in being able to pursue their individual interests and citizenship becomes less a collective, political activity

(1991, p186)

²³⁶ (Lister, 1997). Lister, R. (1997) *Citizenship: Feminist Perspectives* (New York: Macmillan), Lister, R., *Citizenship Towards a feminist synthesis*, in *Feminist Review*, No. 57, Autumn 1997.

²³⁷ (Lister, 1997; Siim, 2000,) Lister, R. (1997) *Citizenship: Feminist Perspectives* (New York: Macmillan), Lister, R., *Citizenship Towards a feminist synthesis*, in *Feminist Review*, No. 57, Autumn 1997. Siim, B. (2000) *Gender and Citizenship: Politics and Agency in France, Britain and Denmark* (Cambridge: Cambridge University Press).

²³⁸ (Phelan, 2001). Phelan, S. (2001) *Sexual Strangers: Gays, Lesbians and Dilemmas of Citizenship* (Philadelphia: Temple University Press).

²³⁹ (Phelan, 2001). Phelan, S. (2001) *Sexual Strangers: Gays, Lesbians and Dilemmas of Citizenship* (Philadelphia: Temple University Press).

²⁴⁰ (Stastilius, 2002). Stastilius, D. (2002) *The active child citizen: lessons from Canadian policy and the children's movement*, *Citizenship Studies*, pp. 507–538, 6(4).

than an individual, economic activity.²⁴¹ Others have been attracted by the portrayal of citizenship as active political participation, while remaining critical of some of its other key tenets.²⁴²

Limitations of Contemporary Civic Republican Discourse for Disabled People

Notions of active citizenship require people to take their responsibilities seriously as well as claiming their rights. This poses problems for people who are different or in competing communities, such as people with disabilities. Modern states are not socially and culturally homogenous, so that ideas of civic responsibility vary according to each state and culture.²⁴³ Civic republicanism is not a rights-based manner of thinking and its discourse tends to assume that citizens possess the knowledge and skills, the level of wellbeing, amount of time, and the freedoms of speech and association that are all necessary for the practice of citizenship which is reflective of how a person with a disability would find it difficult to achieve citizen subjectivity as the tenets within this discourse are founded upon the unproblematised highly rationalised and able subject. This is further highlighted through the way in which civic republicanism stresses a rough economic equality among citizens.²⁴⁴

As people with disabilities experience a range of injustices at both the socio-cultural and political-economic levels, this discourse of citizenship will find it difficult to create a space for disability or a person with a disability, as the genesis of the 'citizen' is an undifferentiated individual. Using the example of current labour market structures, it would be questionable whether alleged common employment history or common bonds experienced within the workplace are similar for both a person with a disability.

Contemporary Liberal Citizenship Model of Citizenship

Liberty for Rawls is understood in the negative sense, as freedom from interference by the state as citizens pursue their self-interest. Human beings are constructed as self-made and self-making individuals, whose deepest impulse is the free pursuit of individual self-interest.²⁴⁵ This vision of freedom is a deeply individualist one, where liberty is understood in terms of autonomy, which literally translated means 'governed by one's own law.'²⁴⁶ The fact

²⁴¹ (Dietz, 1987, p6). Dietz, M. (1987) Context is all: feminism and theories of citizenship, *Daedalus*, 116(4), pp. 1–24.

²⁴² (see, for instance, Young, 1989, 1990; Phillips, 1991, 1993). Young 1989 in the citizenship, identity and immigration in the European Union; Between past and future. Published by Manchester University Press

²⁴³ (Oliver and Heater 1994: 129). *What is citizenship?* The foundations & citizenship. Hemel Hempstead: Harvester Wheatsheaf

²⁴⁴ (Oldfield 1990:156), Turner, Bryan S. (1992) 'Outline of a Theory of Citizenship', pp. 33–62 in Chantal Mouffe (ed.) *Dimensions of Radical Democracy*. London: Verso.

²⁴⁵ (Rawls, 1971; Nedelsky, 1990). Rawls, J. (1971). *A Theory of Justice*. Cambridge: Cambridge University Press., Rawls, J. (1971). *A Theory of Justice*. Cambridge: Cambridge University Press., Rawls, J. (1971). A theory of justice. ---. Cambridge, Mass: Belknap Press of Harvard University Press., Nedelsky, J. (1990) Law, boundaries and the bounded self, *Representations*, 30, pp. 131–158.

²⁴⁶ (Nedelsky, 1989, p.) Nedelsky, J. (1989) Reconceiving autonomy, *Yale Journal of Law and Feminism*, 1, pp. 7–36.

that historical relationships that also make of us what we are, are overlooked within this theory which can be problematic for disabled people.

Problems of Liberal Citizenship in Application to Disability

A tension exists in the contractual, liberal model. This friction occurs between the individual and the collective, as freedom is understood, through a narrative of self-determination against the perceived tyranny of the collective or community.²⁴⁷ The citizen's gender, race, age, psychological and emotional characteristics amongst others are either ignored or, as in the case with Rawls, are considered irrelevant to an articulation of the rights of freedom. By not recognizing race as a marker for differential experiences of citizenship, it overlooks the experiences of people who are racially different. Black people, for example, may not in fact experience freedom in this individualist sense unless it is through a collective expression of freedom as reflected in the case of black people engaged in the civil rights movement.²⁴⁸ I would add that it also reflects an abilist norm where some disabled people who are more likely to live interdependent lives are also not reflected in this interpretation of liberty.

Finally, although Rawls argues for citizenship activities and for liberty which is understood in a negative sense, the self that emerges within the classical and social justice model of citizenship rights is a passive one.²⁴⁹ The rights of liberty and equality that this self owns are innate or inherent in nature. The citizen does not have to do something in order to merit these rights, nor is the ownership of rights dependent on the activities in which a citizen may or may not engage.²⁵⁰

Contemporary Liberal Conception Of Citizenship Marshall's Formulation

Thomas H. Marshall is the first who focused on the conflict inherent in modern industrial societies: the tension between *equality*, as an assumption of the notion of citizenship, and *inequality*, as a consequence of class structure of capitalist system. Marshall's point of departure in analyzing the relation between citizenship and social class, in his 1949 essay *Citizenship and Social Class*, is the possible conflict of citizenship (as a system of equality) with capitalism (as a system of inequality).²⁵¹

Marshall raises three questions related to the problems of post-war English context. Firstly

²¹² (ibid)

²¹³ (Lister, 1997). Lister, R. (1997) *Citizenship: Feminist Perspectives* (New York: Macmillan)

Lister, R., *Citizenship Towards a feminist synthesis*, in *Feminist Review*, No. 57, Autumn 1997.

²⁴⁶ (Raphael, 1967; Winston, 1989). Raphael, D. D. (1967) *Human rights, old and new*, in: D. D. Raphael (Ed.) *Political Theory and the Rights of Man* (Bloomington, IN: University Press)., Winston, M. (1989) *Introduction: understanding human rights*, in: M. Winston (Ed.) *The Philosophy of Human Rights* (Belmont: Wadsworth).

²⁵¹ Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge University Press. 54

he asks whether the basic equality, represented in the formal rights of citizenship, is consistent with the inequalities of social class. He suggests that the two are compatible. The second question he raises is that whether it is true that basic equality can be created and preserved without invading the freedom of the competitive market? His answer is obviously it is not true.' Thirdly, he asks what are the consequences of the shift of emphasis from duties to rights?²⁵²

Marshall believes that the modern drive towards social inequality is the latest phase of an evolution of citizenship that has been in continuing progress for some 250 years. In order to prepare a ground for his analysis he goes back to the historical development of citizenship in British society. He divides citizenship into three parts or elements: *civil*, *political* and *social*. The civil element is composed of the rights necessary for individual freedom: liberty of person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. The institutions most directly associated with civil rights are courts of justice. The political element is the right to participate in the exercise of political power. The corresponding institutions are parliament and councils of local government. By the social element he means the whole range from the right to economic welfare and security to the right to live the life of a civilized being according to the standards prevailing in the society. The related institutions are the educational system and the social services.²⁵³

He mentions that these three elements of citizenship were developed separately, because they depended on distinct institutions. He assigns formative periods to each element: civil rights to the eighteenth century; political rights to nineteenth century; and social rights to twentieth century with an overlap between last two.²⁵⁴ Marshall's historical analysis reveals that: civil rights were held to belong to all adult members of a community in the eighteenth century in England. At first, the terms *freedom* and *citizenship* were interchangeable in the towns. Then, when freedom became universal, citizenship transformed from a local into a national institution. Although, freedom and citizenship gave legal powers, class prejudice and lack of unity were obstacles to their use. In the early nineteenth century, the formative period of political rights began, when civil rights (attached to the status of freedom) had already associated with a general status of citizenship. The nineteenth century was a period in which the foundation of social rights were laid (in the case of education and factory legislation) but the principle of social rights as an integral part of the citizenship status was either denied or not clearly admitted.²⁵⁵

Marshall argues that the right to education is a genuine social right of citizenship, because

²⁵² Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge University Press, 77

²⁵³ Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge University Press, 78.

²⁵⁴ Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge University Press.81

²⁵⁵ Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge University Press.81

the aim is to shape the future adult. For him, it should be regarded not as the right of child to go to school, but as the right of the adult citizen to have been educated.²⁵⁶ The growth of public elementary education during the nineteenth century was the first attempt for the reestablishment of the social rights of citizenship in the twentieth century. Civil rights, which were intensely individual in origin, harmonized within the individualist phase of capitalism. However, unlike civil rights, the political rights of citizenship have posed a threat to the capitalist system. One of the important achievements of political power in the nineteenth century was to enable the workers to use their civil rights collectively by means of trade unionism. Marshall comments that: This was an anomaly, because hitherto it was political rights that were used for collective action, through parliament and local councils, whereas civil rights were intensely individual, and had therefore harmonized with the individualism of early capitalism.²⁵⁷ Therefore, trade unionism created a set of secondary industrial citizenship. By the twentieth century, citizenship and the capitalist class system have been in an obvious conflict.

The demand for diminishing economic inequality between social classes has been met by incorporating social rights in the status of citizenship. The aim of social rights was class abatement by creating a universal right to real income which is not proportionate to the market value of claimant.²⁵⁸ Apart from equalizing incomes, social services aimed at an equalization between the more and the less fortunate (between the healthy and the sick, the employed and the unemployed, the old and the active) as individuals.²⁵⁹ Marshall stresses that there are limits inherent in the egalitarian movement. For him, the movement is a double one: it operates together with citizenship and the economic system. The purpose in both cases is to eliminate the illegitimate inequalities, but the standard of legitimacy is not the same: In the former it is the standard of social justice, in the latter it is social justice combined with economic necessity.²⁶⁰ Thus, Marshall conceptualized capitalism as a dynamic system in which social and political life determined by the tension between egalitarian citizenship and unequal economic relations.

Brain Turner criticizes the work of Marshall in certain respects. First of all, he argues Marshall's theory was undeveloped in the sense of a state theory (Turner claims that a theory of citizenship must also produce a theory of the state). Secondly, for Turner, Marshall failed to explain how the resources which are necessary for welfare are to be generated and redistributed by the state to claimants. Thirdly, in defining the state as a stabilizer, Marshall

²⁵⁶ Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge University Press, 89.

²⁵⁷ Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge University Press, 122.

²⁵⁸ Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge University Press. 106.

²⁵⁹ Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge University Press. 113.

²⁶⁰ Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge University Press. 129.

did not emphasize the role of violence or threats of violence in the growth of citizenship.²⁶¹

Turner underlies the fact that Marshall's theory is no longer relevant to a period of disorganized capitalism. He associates the decline of the welfare system with the decline of organized working class communities which also makes the articulation of interests more problematic.²⁶² It is obvious that Marshall's analysis was based on the economic relations of a specific phase of capitalism. On the other hand, he developed his theory with reference to a nation-state immune from global pressures. His account of citizenship is a typical *passive* or *private* citizenship²⁶³ guaranteed by a liberal democratic welfare system.

Problems with Marshall's Contemporary Liberal Model of Citizenship

Contemporary models of liberal citizenship often begin with an analysis of T.H. Marshall's post-war conception of citizenship which focuses on a number of citizenship rights. These models concern the rights of disabled people in post-1950s society. His influential theory will be briefly outlined and discussed in relation to its strengths and weaknesses vis-a-vis minority groups and to disabled people. The concept of liberty is fundamental in defining both citizenship claims as well as notions of the citizen's self in contesting theories.

Marshall holds that citizenship is a matter of ensuring that everyone is treated as a full and equal member of society.²⁶⁴ He offers a tripartite view of citizenship, dividing it along the lines of civil, political and social, and is concerned with notions of liberty and equality, achievable through civil and political rights which grant full and equal membership. Marshall observes: "Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed."²⁶⁵

Marshall's argument in the statement—citizenship is a status bestowed on those who are full members of a community²⁶⁶—evokes a level of duty and responsibility necessary to receive the benefits of citizenship. What is the criterion that defines full membership? Full members of society are individuals who are employed, who are involved in their community, and as Marshall states: all who possess the status are equal with respect to the rights and

²⁶¹ Turner, Bryan S. (1992) 'Outline of a Theory of Citizenship', pp. 33–62 in Chantal Mouffe (ed.) *Dimensions of Radical Democracy*. London: Verso.

²⁶² Turner, Bryan S. (1992) 'Outline of a Theory of Citizenship', pp. 39 in Chantal Mouffe (ed.) *Dimensions of Radical Democracy*. London: Verso.

²⁶³ (Kymlicka and Norman, 1994: 354), Kymlicka, Will (1995) *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Clarendon Press.

²⁶⁴ Marshall (1950,), Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge University Press. McRuer, Robert. 2006. *Crip theory : Cultural signs of queerness and disability*. Cultural front; cultural front

²⁶⁵ (Kymlicka and Norman 1994: 354), Kymlicka, Will (1995) *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Clarendon Press.

²⁶⁶ Marshall (1950,), Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge

duties with which the status is endowed.²⁶⁷ What is fundamental about this societal membership is that members must participate at a level in society that is deemed acceptable by other members prior to having their societal rights of citizenship confirmed. Marshall assumes that individuals automatically possess the ability and the means to join their community and to be accepted which is not the case for many disabled people.

For Marshall, the fullest expression of citizenship requires a liberal-democratic welfare state so civil, political and social rights can be guaranteed to all. The welfare state in Marshall's view ensures that every member of society operates like a full member and is able to participate in and enjoy common life.²⁶⁸ When any of these rights are withheld or violated, people will be marginalised and unable to participate.

While Marshall did not specifically engage with disability, he believed that social rights enabled what he termed the disadvantaged to enter mainstream society and effectively to exercise their civil and political rights. Social rights for Marshall range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society.²⁶⁹

The key elements are membership of a community (itself an increasingly contested concept); the rights and obligations which flow from that membership and equality. In each case, we are talking not simply about a set of legal rules governing the relationship between individuals and the state in which they live but also a set of sociological relationships between individuals and the state and between individual citizens.

There are both classical liberals who would confine citizenship to the formal (negative) civil and political rights necessary to protect individual freedom; and, those who, following Marshall, would also include social rights as necessary to the promotion of a more positive notion of freedom.

Limitations of Marshall's Citizenship for Disabled people;

Marshall's liberal view of the citizen is inherently problematic for people with disabilities on a number of complex levels.

First, the key site of rendering the disabled subject invisible is that the universal notion of citizenship as a status and as a set of rights confers the subject as equal outside of

²⁶⁷ Marshall (1950, pp28-9); Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge University Press. McRuer, Robert. 2006. *Crip theory : Cultural signs of queerness and disability*. Cultural front; cultural front

²⁶⁸ (Kymlicka and Norman 1994:354), Kymlicka, Will (1996) Three Forms of Group-Differentiated Citizenship in Canada, pp. 153–70 in Seyla Benhabib (ed.) *Democracy and Difference: Contesting the Boundaries of the Political*. Princeton: Princeton University Press.

²⁶⁹ (Marshall 1963:74) Marshall, T. H. ([1963] 1998). *Citizenship and social class*. In: G. Shafir (Ed.) *The Citizenship Debates. A Reader*. London: University of Minnesota Press.

societal structures. This poses a series of problems for people with disabilities, as it is often the societal structures, which render them oppressed. An individual cannot achieve full participation if the means to achieve participation are contributing to the very exclusion they wish to overcome.

In other words, if we use Marshall's notion that to *withhold* rights renders the individual unequal and unable to participate as a citizen (therefore no longer possessing the necessary full status), this assumes that equality *precedes* the rights universally granted, and only by removing such given rights does a person become marginalised.

Once such rights are granted, the status itself is free of both socio-cultural, political-economic inequalities. This is problematic for the individual who is unable to participate in any citizenship realm due to their citizen status' being inherently bound in socio-cultural and political-economic injustices. What of the individual who is further marginalised by attempts to grant them full participation?

To enable a person to be granted full and equal rights, whatever is being granted must be value free. People with disabilities within a liberal framework cannot achieve such value free justice, nor full equality, nor can they ever achieve the status of citizen,²⁷⁰ for the reference point remains an unproblematised abled bodied individual with capacities assumed to be equal. Within such a framework, the implication of granting social rights (thereby assuming ability to equally participate in civil and political rights) is in itself problematic and requires further deconstruction: such rights overlook the fact that it is societal and economic structures themselves, which are a site for injustices. In the example of social security—which is a social right according to Marshall and a means for achieving access to the political and civil realms—the ability to access and obtain social security benefits does not remove the multiple and complex barriers which a person with a disability faces. Social rights therefore do not in themselves enable the disabled subject to compete equally in civil and political society. Marshall's theory of social citizenship does not allow us to picture a society such as this, as his very definition of citizenship entails a citizen who is employed.

Furthermore, central to Marshall's argument is the statement, citizenship is a status bestowed on those who are full members of a community.²⁷⁰ This evokes a level of duty and responsibility necessary to receive the benefits of citizenship. But what is the criterion that defines full membership? A full member of society is an individual who is employed, who is involved in their community and as Marshall states all who possess the status are equal with respect to the rights and duties with which the status is endowed.²⁷¹ What is fundamental about this societal membership is that one must participate at a level in society that is deemed acceptable by other members prior to having their societal rights of citizenship confirmed. Marshall assumes that individuals automatically possess the ability and the

²⁷⁰ Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge 87.

²⁷¹ Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge 87.

means to join their community and to be accepted. This idea of community has held different meanings throughout history and, during the time period that Marshall was writing, communities were smaller and there were often common links, such as farming or religion that tied individuals to one another. Currently, with the shrinking of the world's economy and joining of political forces, it could be argued that maintaining a sense of community has become difficult, yet the idea of community still exists today as evidenced by the numerous religious, ethnic, racial and social justice communities that have all reached the same conclusion: that building an identity through a community is a fundamental step towards gaining full social rights from the remainder of society. As Jenson argues: it is only by naming themselves that groups and individuals can identify themselves and their interest and hope to gain recognition from others.²⁷² By building strong communities that share fundamental aspirations for recognition, groups are able to present a united and strong presence to the rest of society and will hopefully begin to influence society and gain social rights as a result.

The relationship between citizenship and social class has been the focus of much of Marshall's writing and in comparing these two elements, Marshall has stated that citizenship is a system of burgeoning equality, whereas the basis of social class is inequality.²⁷³ Combining these two elements within the spectrum of capitalism, Marshall recognizes that although they work as opposing forces, they still co-exist and operate as a basis for the capitalist system. To benefit from Marshall's work, we must remember the context in which Marshall was writing (the end of the 1940s) and researching (the beginnings of capitalism in the nineteenth century). Marshall argues that there were various intersecting forces that made the co-existence of citizenship rights and social class inequality possible, namely the focus on developing civil rights and the attempt by the state to lessen the poverty experienced by the lower class. As Marshall argues, the development of civil rights was indispensable to a competitive market economy.²⁷⁴ Furthermore, civil rights gave to each man the power to engage as an independent unit in the economic struggle and made it possible to deny to him social protection on the ground that he was equipped with the means to protect himself.²⁷⁵ Therefore, employment was the force that determined one's ability to care for their own social needs and the wage became the tool that was the prerequisite to societal participation. Furthermore, it was the underdevelopment of social rights that supported this system in which employment was the only option to improve one's social class position. Unfortunately, these circumstances remain the force that determines one's ability to improve their social class standing and their ability to practice the social rights that did eventually sprout.

²⁷² Jenson, 632. Jenson, Jane. *Fated to Live in Interesting Times: Canada's Changing Citizenship*

Jenson, Jane., and Susan Phillips, *Regime Shift: New Citizenship Practices in*

²⁷³ Marshall (1950,), Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge 87.

²⁷⁴ Marshall (1950,), Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge 90.

²⁷⁵ Marshall (1950,), Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge 90.

Placing Marshall's theory in a contemporary setting, it is obvious that it is blind to the position of persons with disabilities in our society as he refuses to highlight any barriers, aside from social class, that may hinder an individual from actively participating in their own community. Marshall's silence on these individuals has contributed to the long-standing acceptance in our society that certain people are incapable of actively contributing to our society. Further to this, there have been widespread efforts to forcefully erect barriers that ensure that attempts by persons with disabilities, women and other minority groups to participate are defeated. For Marshall, social rights included the right to live the life of a civilized being according to the standards prevailing in society.²⁷⁶ However, his definition of societal standards needs to be expanded to specify what these standards are. For example, are life opportunities and choices such as marriage, owning a home, having personal savings and cohabitation included as social rights? The idea of societal standards implies that members of our society should have the same opportunity to pursue and experience the life choices that are defined by the standards of our society. However, Marshall's theory does not explicitly detail the barriers that have perpetually prevented a large segment of our society from actively pursuing the societal standards that are recognized by our society.

Writing at the end of World War Two, when minority groups were excluded from theoretical questions, Marshall focused solely upon working white men. At the foundation of Marshall's citizenship lies his conception of the ideal citizen: a white able-bodied male, who is capable and willing to sell his labour on the capitalist market. Furthermore, this ideal citizen needs to expend a level of duty and obligation that is reflective of the standards set by his society. This is one of the fundamental problems faced when considering the relevance of Marshall's work for contemporary theorists, as Fraser and Gordon argue that Marshall theorized only a minority of the population.²⁷⁷ Therefore his theory needs to be expanded to consider how people who do not meet this criterion can be in receipt of the three elements of citizenship. In tracing the historical development of the idea of citizenship, Marshall states that citizenship has been a developing institution in England since at least since the latter part of the seventeenth century, then it is clear that its growth coincides with the rise of capitalism, which is a system not of equality, but of inequality.²⁷⁸ Aside from Marshall's recognition that inequality is inherent in capitalism, participating in the capitalist market has nevertheless been the ideal approach for completing the duty of citizenship. As Marshall states, quite simply in "Citizenship and Social Rights" and with apparently little regard for individuals who are unable to compete in the environment created by capitalism that to have and hold a job is quite simple.²⁷⁹ The assumption that citizens can participate equally in an unequal

²⁷⁶ Marshall, 74. Marshall, T. H. ([1963] 1998). Citizenship and social class. In: G. Shafir (Ed.) *The Citizenship Debates. A Reader*. London: University of Minnesota Press.

²⁷⁷ Nancy Fraser and Linda Gordon, "Contract vs. Charity: Why is there no Social Citizenship in the United States?" ed. Gershon Shafir *The Citizenship Debates: A Reader* (Minneapolis, Minn.: University of Minneapolis Press, 1998) 116.

²⁷⁸ Marshall, 18. Marshall, T. H. ([1963] 1998). Citizenship and social class. In: G. Shafir (Ed.) *The Citizenship Debates. A Reader*. London: University of Minnesota Press.

²⁷⁹ Marshall, 46. Marshall, T. H. ([1963] 1998). Citizenship and social class. In: G. Shafir (Ed.) *The Citizenship Debates. A Reader*. London: University of Minnesota Press.

environment has perpetuated the belief that paid work is the only tool that can measure one's ability to expend the duties of citizenship in return for the rights of citizenship. Moreover, Marshall assumes that employment is not only a viable option for all, but that gaining employment is an easy path for all citizens to navigate. Marshall has argued that equality of status is more important than equality of income,²⁸⁰ however in our society, our status is dictated by income; the two are indivisible.

The basis for Marshall's development of degrees of citizenship is embedded in the belief that relying upon government assistance removes the individual or family from the rights and benefits associated with his initial conception of citizenship. These degrees of citizenship are indicative of the intensive focus and pressure that Marshall's theory places upon being socially and economically responsible for oneself and one's family through paid employment, rather than relying upon social assistance schemes. Dwyer identifies a contemporary growth in the conception of the active citizen,' as an individual who recognizes that (s)he must accept, first and foremost, responsibility for their own (and their family's) welfare. Recourse to limited state provision is viewed as a last resort.²⁸¹ For those unable to join the ranks of the active citizenry and who as a result rely upon social assistance schemes, an identity of second-class citizenship is attached. This moniker stems from the insistence of government and society that if one receives social income assistance that they must in return accept some level of limitation placed upon how they can live. As Marshall illustrated, with historical reference to the Poor Laws, the stigma which clung to poor relief expressed the deep feelings of a people who understood that those who accepted relief must cross the road that separated the community of citizens from the outcast company of the destitute.²⁸²

Marshall's only attempt to recognize difference among citizens stems from his interpretation of the social class system. He makes the argument that the inequality of the social class system may be acceptable provided the equality of citizenship is recognized.²⁸³ This statement only holds true for Marshall's ideal citizen, as equality of citizenship has rarely been applicable to, a result of the differentiation set by our society that persons with disabilities are a group that needs to be segregated from the rest of society. However, rather than acknowledge that inequalities greatly impede one's ability to be an active citizen, Marshall argues that inequalities among citizens are justifiable if they provoke the individual to better themselves.²⁸⁴

²⁸⁰ Marshall, 33. Marshall, T. H. ([1963] 1998). Citizenship and social class. In: G. Shafir (Ed.) *The Citizenship Debates. A Reader*. London: University of Minnesota Press.

²⁸¹ Paul Dwyer, 'Conditional Citizens? Welfare Rights and Responsibilities in the Late 1990s' *Critical Social Policy* 57 (1998) 497.

²⁸² Marshall, 83. Marshall, T. H. ([1963] 1998). Citizenship and social class. In: G. Shafir (Ed.) *The Citizenship Debates. A Reader*. London: University of Minnesota Press.

²⁸³ Marshall, 72. Marshall, T. H. ([1963] 1998). Citizenship and social class. In: G. Shafir (Ed.) *The Citizenship Debates. A Reader*. London: University of Minnesota Press.

²⁸⁴ Marshall, 44. Marshall, T. H. ([1963] 1998). Citizenship and social class. In: G. Shafir (Ed.) *The Citizenship Debates. A Reader*. London: University of Minnesota Press.

Marshall roots the problem of inequality with the individual and their inability to adapt themselves to the standards set by society, rather than faulting society for not adapting to the demands of its citizens. Much like the biomedical definition of disability, citizens are unable to challenge the inequalities that they face because they have been stripped of the power needed to force societal change. It is therefore necessary to begin to seriously work towards a redefinition of citizenship that embraces difference, empowers citizens and is representative of the diversified abilities of citizens.

Marshall's theory does not allow much space for disabled people. He appears to be saying that the existence of rights, and of equality in respect of them modifies the nature of the relationship between people, and determines the fundamental character of society. Equality of rights and recognition of common belonging to society conversely stimulates the feeling of such belonging. If true this is directly relevant in the analysis of a possible reformulation of citizenship. In the case of many persons with disabilities, they are viewed as unemployable, where employment and productivity are seen as prerequisites for citizenship membership; therefore, the category of non-citizen has been attached to them. They are largely suspended from social obligations, but in turn, must dedicate themselves to improve their health by following medical advice. They are viewed as an economic cost that must be factored into society-wide economic policy decisions.²⁸⁵

The goal of social policy is to counteract the lost productivity, created as a result of disability, in the most efficient manner possible. Social policies try to develop vocational training programmes to create employment opportunities for disabled persons to increase their productivity, and to lessen their dependence upon social welfare programmes. It is assumed that disabled people are incapable of working as productive employees in our traditional understanding of the labour market. Economic experts use a cost-benefit rationale to determine the most cost-efficient scenario: Disablement entitlements are entirely derivative from and conditional upon some level of macro- economic analysis founded ultimately in considerations of efficiency.²⁸⁶ Therefore, these entitlements are not the result of any right to use the social welfare system, but rather are the result of desire for the efficiency of the state.

However, all members of society act on different levels and this interaction cannot be measured solely in terms of productivity and labour market participation. There are members of our society who will never be able to be employed in the traditional labour market, but they are still able to make positive contributions and to participate socially through volunteering, social activities, going to a community centre or to a park.

²⁸⁵ (Bickenbach, 1993). Physical Disability and Social Policy by Jerome E. Bickenbach. Toronto, University of Toronto Press, 1993.

²⁸⁶ (Bickenbach, 1993) Physical Disability and Social Policy by Jerome E. Bickenbach. Toronto, University of Toronto Press, 1993.

Despite advances in opportunities for persons with disabilities, their citizenship membership continues to be at best vague. The idea of second-class citizenship prevails. As the understanding of disability has been confined to the body and UK economic policy strives towards ever increasing efficiency, some people have been able to ignore the social conditions that aggravate the inability of a person with a disability to function in the normal' world.²⁸⁷

Locke, Rawls and Rousseau, Hume and Kant and Marshall all present concepts which disregard the intellectually disabled and severely physically disabled and paves the way for more expansive exclusions and limited citizenship.

Citizenship Based on Rawls's Concept of Liberal Justice

John Rawls wants to make liberal democracy more responsive to difference. His point of departure is deep disagreement on the arrangement of a constitutional democracy in such a way that the basic rights and liberties of citizens (as *free* and *equal* persons) are secured. He conceives of this disagreement as a conflict within the tradition of democratic thought, between the liberties of the moderns' (the tradition derived from Locke) and the liberties of ancient' (the tradition derived from Rousseau).²⁸⁸ Justice as fairness' tries to adjudicate between these traditions.

Given the wide range of diversity in conceptions of the good among citizens of liberal societies, to find a basis of political agreement is a crucial need for liberal democracies. Rawls's attempt in *A Theory of Justice* (1971) is a response to this need. He introduces the concept of justice as a means of narrowing the range of public disagreement and maintaining social co-operation. He tries to do this by deriving principles of justice in a way that it does not suppose any particular conception of the good. His aim is to work out a theory of justice as an alternative to the classical utilitarian and intuitionist conceptions of justice.

He presents the main idea of *justice as fairness* as a theory of justice that generalizes and carries the traditional conception of the social contract (as found in Hobbes, Locke, Rousseau and Kant) to a higher level of abstraction. However, he does not think of the original contract as one to enter a particular society or to set up a particular form of government. He designs an initial situation that incorporates certain procedural constraints on arguments constructed to lead to an original agreement on principles of justice. The

²⁸⁷Disability scholar Lennard Davis describes how the rise of statistical "norms" in the nineteenth century inevitably constructs disability as deviance: "The norm pins down that majority of the population that fall under the arch of the standard bell-shaped curve . . . any bell curve will always have at its extremities those characteristics that deviate from the norm. So, with the concept of the norm comes the concept of deviations or extremes. When we think of bodies, in a society where the concept of the norm is operative, then people with disabilities will be thought of as deviants." Lennard J. Davis, "Constructing Normalcy: The Bell Curve, the Novel, and the Invention of the Disabled Body in the Nineteenth Century," in *The Disability Studies Reader*, ed. Lennard J. Davis (New York: Routledge, 1997), 9-28, 10.

²⁸⁸(Rawls, 2001: 2)

principles of justice would be accepted in an initial position of equality by free and rational persons who are concerned to promote their own interests. These principles of justice are to regulate all further agreements. Rawls calls this way of regarding the principles of justice as justice as fairness. His study not only returned political theory to the ground level study of the desirable, but also original in neglecting established disciplinary boundaries and developing an argument for the feasibility of the particular proposals put forward: that is, the feasibility of the two principles of justice.²⁸⁹ The central organizing notion of Rawls's justice concept is the idea of society as a fair system of social cooperation. Two fundamental ideas follow this central idea. First, the idea of citizens (those involved in cooperation) as free and equal persons.²⁹⁰ Second, the idea of a well-ordered society that is designed to advance the good of its members when it is also effectively regulated by a public conception of justice. It is a society in which (1) everyone accepts and knows that the others accept the same principles of justice, and (2) the basic social institutions generally satisfy these principles.²⁹¹ In this situation, men acknowledge a common point from which their claims may be adjudicated, while they may put forth excessive demands on one another. Because, the general desire for justice limits the pursuit of other ends, Those who hold different conceptions of justice can, then, still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties...²⁹²

By justice Rawls refers to social justice, the primary subject of which is the *basic structure of the society* that is the way in which the major social institutions distribute fundamental rights and duties, and determine the division of advantages from social cooperation. For instance, the legal protection of freedom of thought and liberty of conscience, competitive market, private property in the means of production, and the monogamous family are the major social institutions concerned by him. The major institutions are important in the sense that they define men's rights and duties and influence their life prospects. In other words, justice as fairness is framed to apply to what he calls the basic structure of a modern constitutional democracy (or democratic regime). Rawls does not consider whether justice as fairness can be developed to a general political conception for different kinds of societies other than Western democracies.²⁹³

Rawls's Contractarian Strategy

For Rawls, a conception of social justice is to be regarded as providing a standard whereby the distributive aspects of the basic structure of society are to be assessed. He characterizes justice as one part of social ideal, although he argues that the theory he proposed extends its everyday sense. The first assumption of Rawls's contractarian strategy is that when asked what we would choose, we should be concerned with what we choose under a veil

²⁸⁹ (Kukathas and Pettit, 1990: 8), (Rawls, J. 1971 (revised edition 1999). *A Theory of Justice*, Oxford: Oxford University Press. P.7

²⁹⁰ (Rawls, J. 1971 (revised edition 1999). *A Theory of Justice*, Oxford: Oxford University Press. P.7

²⁹¹ (Rawls, J. 1971 (revised edition 1999). *A Theory of Justice*, Oxford: Oxford University Press. P.6

²⁹² (Rawls, J. 1971 (revised edition 1999). *A Theory of Justice*, Oxford: Oxford University Press. P.5

²⁹³ (Rawls, J. 1971 (revised edition 1999). *A Theory of Justice*, Oxford: Oxford University Press. P.5

of ignorance' that screens out self-interest.²⁹⁴ That is, the persons in the original position are unaware of what their position is in the society. They decide on the principles of justice without any knowledge of their own situation: whether they are female or male, black or white, rich or poor, theist or atheist. This is the original position of contract. On the other hand, the persons in the original position have a picture of all the general truths about human beings and social organization in their minds. That is, they are aware of the economic and social inequalities, prejudices and power relations in the society.

The choice that they make would be feasible in the light of that general information. The people in the original position are individuals rather than institutional persons. All parties in the original position can be expected to vote in the same way, since each is assumed to be equally ignorant (of their situation in the society) and rational (since they would not want to be harmed in any case). Thus a randomly selected individual in the original position would choose the basic structure of the society.

As Rawls intends to define a fair agreement between free and equal persons, he wants to find some point of view which is not distorted by the particular circumstances of the background framework. The original position with the feature of 'veil of ignorance' serves this aim. By this way he tries to overcome the handicaps of social contract doctrines: 'The idea is to use the original position to model both freedom and equality and restrictions on reason in such a way that it becomes perfectly evident which agreement would be made by the parties as citizen's representatives.'²⁹⁵

It is not easy to understand how a person is able to choose among alternatives who is independent of his or her conception of good that give meaning and value to life. Rawls insists that the original position is to be seen as a 'device of representation' and hence any agreement reached by the parties must be regarded as both hypothetical and nonhistorical. Here the difficulty he faces is: since hypothetical agreements cannot bind, what is the significance of the original position? His answer is by the role of the various features of the original position. For him, the fact that we occupy a particular social position is not a good reason for us to accept a conception of justice that may favor those in that position. Rawls claims that the idea of original position serves as a means of public reflection and self-clarification. However, he does not fully explain why the participants in the original position would choose two principles of justice. Furthermore, why the social contract takes the particular form he defines? Even under the veil of ignorance, people might choose other options such as to have no society at all; or removal or withdrawal from the circumstances; or they may choose to accept injustice or risk of injustice.²⁹⁶

²⁹⁴ (Rawls, J. 1971 (revised edition 1999). *A Theory of Justice*, Oxford: Oxford University Press. P.18.

²⁹⁵ (Rawls, J. 1971 (revised edition 1999). *A Theory of Justice*, Oxford: Oxford University Press. P. 9

²⁹⁶ (Treanor, 2003).

Two Principles of Justice

First, each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty of others. Second, social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.²⁹⁷ He calls this second principle the difference principle.²⁹⁷ These are to govern the assignment of rights and duties, and to regulate the distribution of social and economic advantages. They presuppose that the social structure can be divided into two distinct parts, the first principle applying to the one, the second to the other. They distinguish respectively those aspects of social system that define and secure the equal liberties of citizenship and those that determine and establish social and economic inequalities. As citizens of a just society are to have the same basic rights, liberties of citizenship are all required to be equal by the first principle. The second principle, on the other hand, arranges social and economic inequalities in a way that everyone benefits. Rawls asserts that these principles are to be arranged in a serial order with the first principle prior to the second. This is a very important point in his understanding of liberalism since the aim is to prevent the compensation of the social and economic advantages for equal liberty of citizens. This is the impact of Kant who argued that the empirical principles, such as utility, were unfit to serve as basis for the moral law. An instrumental defence of freedom and rights leaves rights vulnerable, and also fails to respect the inherent dignity of persons.

Like most of the contemporary liberals, Rawls believes that certain fundamental rights cannot be sacrificed for the general welfare. He claims that all values (liberty and opportunity, income and wealth, and the bases of self-respect) are to be distributed equally unless an unequal distribution of any of these is to everyone's advantage. Then he defines injustice as the inequalities that are not to benefit of all.

Justice as a Political Concept

During the decades following *A Theory of Justice*, Rawls has changed his views on a number of points. He tried to avoid the certain metaphysical and philosophical claims such as claims to universal truth, or claims about the nature and identity of persons. Rawls asserts that he failed to stress justice as fairness as a political concept. His idea is that a public conception of justice in a constitutional democracy should be independent of controversial philosophical doctrines.²⁹⁸ The main point is that no general moral conception can provide a publicly recognized basis for a conception of justice in a modern democratic state. Political justice must allow the plurality of conflicting doctrines.

For Rawls, the basis of public agreement is to be a new way of organizing familiar ideal and

²⁹⁷ (Rawls, J. 1971 (revised edition 1999). *A Theory of Justice*, Oxford: Oxford University Press. P.60.

²⁹⁸ Rawls, J. (1996). Priority of the rights and ideas of the good. In: *Political Liberalism*. New York: Columbia University Press.

principles into a conception of political justice so that the claims on conflict are seen in another light.²⁹⁹ Thus, justice as fairness serves a practical need of a liberal society. In this sense it is a practical political conception not metaphysical or epistemological. Justice as fairness, as such, aims to found a political agreement that supports the goods of all citizens as free and equal persons. Rawls appeals to this practical conception since he believes that philosophy (or morality or religion) cannot provide a workable and shared basis. His aim of avoiding disputed philosophical questions is not for the sake of neutrality (as most of the liberals do) but he thinks that there is no way to resolve them politically. By this method of avoidance he hopes that existing differences between contending political views can at least be moderated, even if not entirely removed, so that social cooperation on the basis of mutual respect can be maintained.³⁰⁰

In his 1993 book *Political Liberalism*, Rawls reevaluates some of his ideas from *A Theory of Justice* concerning justice as fairness as a form of political liberalism. He takes for granted following the missing pieces: (1) the idea of justice as fairness as a free standing view and that of an overlapping consensus as belonging to its account of stability; (2) the distinction between simple pluralism and reasonable pluralism, together with the idea of a reasonable comprehensive doctrine; and (3) a fuller account of the reasonable and the rational worked into the conception of political (as opposed to moral) constructivism, so as to bring out the bases of the principles of rights and justice in practical reason.³⁰¹

Reasonable Citizen as an Alternative to Rational citizen

The most important contribution of *Political Liberalism* is the introduction of concept of *reasonableness*. Rawls derives the distinction between reasonable and rational from W. M. Sibley's basic distinction: knowing that people are rational we do not know the ends they will pursue, only that they will pursue them intelligently. Knowing that people are reasonable where others are concerned, we know that they are willing to govern their conduct by a principle from which they and others can reason in common; and reasonable people take into account the consequences of their actions on others' well being.' To be reasonable is neither derived from nor opposed to the rational but it is incompatible with egoism.³⁰²

For Rawls the reasonable is an element of the idea of society as a system of fair cooperation. Reasonable persons are supposed to be not moved by the general good as such but desire, for its own sake, a social world in which they, as free and equal, can cooperate with others.

²⁹⁹ Rawls, J. (1996). Priority of the rights and ideas of the good. In: *Political Liberalism*. New York: Columbia University Press.p.229.

³⁰⁰ Rawls, J. (1996). Priority of the rights and ideas of the good. In: *Political Liberalism*. New York: Columbia University Press. 231

³⁰¹ Rawls, J. (1996). Priority of the rights and ideas of the good. In: *Political Liberalism*. New York: Columbia University Press. 49

³⁰² Rawls, J. (1996). Priority of the rights and ideas of the good. In: *Political Liberalism*. New York: Columbia University Press. P.49.

They insist that reciprocity should hold within that world so that each benefits along with others. However, the rational applies to a single unified agent (individual or corporate person) with the powers of judgement and deliberation in seeking ends and interests of its own. Rationality is a capacity to define and act in accordance with a set of priorities governed by a conception of the good. Rational agents lack a kind of moral sensibility that underlies the desire to engage in fair cooperation. Another difference between them is that the reasonable is public in a way the rational is not. On the other hand, the reasonable and rational are complementary ideas, they cannot stand without the other. In a reasonable society, Rawls claims, all have their own rational ends they hope to advance, and all propose fair terms that others may reasonably be expected to accept.

A reasonable doctrine is, first of all, an exercise of theoretical reason: it covers the major religious, philosophical, and moral aspects of human life. Secondly, it is an exercise of practical reason: it singles out which values to count as significant and how to balance them when they conflict. Thirdly, it belongs or draws upon a tradition of thought and doctrine. Although stable over time, it evolves slowly in the light of what it sees as good and sufficient reasons.

Rawls asserts that being reasonable is part of a political ideal of democratic citizenship that includes the idea of public reason. This ideal encompasses what free and equal citizens (as reasonable) can require of each other with respect to their reasonable comprehensive views. Contrary to the rational, the reasonable addresses the public world of others. Throughout *Political Liberalism* reasonableness and rationality are simply attributed to citizens. Rawls does not give a reason how they got there. He does not ask how they can be produced or maintained.³⁰³

Political liberalism, proposed by Rawls, does not question the correctness or truth of comprehensive doctrines because a constitutional regime does not require an agreement on a comprehensive doctrine. However, by questioning their reasonableness, it actually implies the suppression of 'irrational' and 'unreasonable' world views. This is a necessary condition for Rawlsian liberalism, to maintain the stability of the system what he calls 'well ordered society.' Rawls admits comprehensive doctrines as far as they do not threaten the democratic regime.

Citizen as the Political Conception of the Person

Rawls identifies citizens in the original position as free persons in three respects. First, citizens are free in that they conceive of themselves and one another as having the moral power to have a conception of the good. They have both political and nonpolitical aims and commitments. They affirm the values of political justice and want to see them embodied in

³⁰³ (Bridges, 2003), (Rawls, J. 1971 (revised edition 1999). *A Theory of Justice*, Oxford: Oxford University Press. P.60.

political institutions and social policies. These two kinds of commitments and attachments—political and nonpolitical—specify moral identity and give shape to a person's way of life.

Rawls claims that in a well-ordered society supported by an overlapping consensus, citizens' political values and commitments, as part of their non institutional or moral identity, are the same. Second, citizens regard themselves as self-authenticating sources of valid claims. They regard themselves as being entitled to make claims on their institutions in order to advance their conceptions of the good. Third, they are viewed as capable of taking responsibility for their ends and this affects how their various claims are assessed. He notes that citizens conceive of themselves as free in these three ways in the public political culture of a constitutional democratic regime.³⁰⁴ In this formulation, citizens are free as long as they think and act in conformity with the liberalism defined by Rawls. Citizens are capable of choosing and rationally pursuing their good, and have the right to promote their self-interests to the extent that they are aware of and respect that the others have the same right.

General Criticisms of Rawls's Theory

Rawls's theory contains both of the basic components of liberal theory namely the commitment to the freedom of the individual in terms of civil liberties, and the belief in equality of opportunity and a more egalitarian distribution of resources which supports a redistributive welfare state. For this he has been criticized by both libertarians and communitarians. For libertarians the distributive aspect of Rawls's theory shows that he does not take individuals and their freedoms seriously enough, while for communitarians he gives a priority to individuals over their community because of his stress on individual liberties.³⁰⁵ From a communitarian stand, Tom Bridges criticizes Rawls's attachment to a formalistic and monological conceptions of reason which distances his liberalism from civic values and civic culture.³⁰⁶ Michael Sandel argues that Rawls's conception of the self is an unencumbered' self that is not constituted within a community and do not permit to develop a constitutive community *na* community that would constitute the identity of the individuals.³⁰⁷ It only allows for an instrumental community' in which individuals promote their self-interests. From a leftist point of view, Paul Treenor regards Rawls as being conservative since he advocates stability and public order.³⁰⁸ Treenor argues that Rawls's theory legitimizes the nation state' through his contractarian strategy. A hidden assumption of Rawls' theory is that citizens are the members of a nation, thus nationhood is the determinant of membership to a political community.³⁰⁹

³⁰⁴ (Rawls, J. 1971 (revised edition 1999). *A Theory of Justice*, Oxford: Oxford University Press. P.63

³⁰⁵ (Mulhall and Swift, 1996: xvi).

³⁰⁶ Bridges 2003

³⁰⁷ Rawls, J. (1996). Priority of the rights and ideas of the good. In: *Political Liberalism*. New York: Columbia University Press. Also see Rawls, J. (1971). *A Theory of Justice*. Cambridge: Cambridge University Press.

³⁰⁸ see Miller, P., Parker, S. & Gillinson, S. (2004). *Disablism: how to tackle the last prejudice*. London: Demos.p.46

³⁰⁹ (Rawls, J. 1971 (revised edition 1999). *A Theory of Justice*, Oxford: Oxford University Press. P.63

Problems with John Rawls's Modern Conflation of Civic Republican and Liberal models of Citizenship for Disabled People

John Rawls makes use of both the classic and contemporary models of citizenship. He weaves the two major threads of modern political thought (liberal and republican) together in his monumental *A Theory of Justice*.³¹⁰ Rawls builds upon Kant's moral insights regarding the dignity of human beings but replaces Kantian metaphysics with Lockean contract and Humean 'rough equality' as the basis for his own theory of justice. However, whether these two major models are separate or conflated, neither work when addressing full citizenship for disabled people. Rawls once again, defines disabled people by their 'incapacity.' They are seen as objects of 'pity' and ultimately excluded from the principles of justice, governed instead by charity.³¹¹ Methodologically, Rawls begins, as did Locke and Kant, with a society made up of free and equal individuals where freedom is inextricably linked to reason and equality with cooperation. He concludes that since one needs to be a 'fully' cooperating member of political, disabled people are excluded from the original position.

Rawls starts from the idea of society as a fair system of cooperation, and assumes that persons as citizens have all the capacities that enable them to be normal and fully cooperating members of society.³¹² This does not imply that no one ever suffers from illness or accident; such misfortunes are to be expected in the ordinary course of human life: 'For our purposes here I leave aside permanent physical disabilities and mental disorders so severe as to prevent persons from being normal and fully cooperating members of society in the usual sense.'³¹³ Given the centrality of the original position to Rawls's theory of justice, excluding the disabled (including physically disabled) from the principles of justice is deeply problematic.

Rawls's argument suffers from his Kantian conception of person which limits the meaning of 'normal' to those deemed 'rational.' Also because he relies on Hume's theory of cooperation to define cooperation, and adds on a Lockean social contract as the basis for his original position, which further requires that those who make the rules, must be exactly the same people as those governed by them. The omission of disabled people from the initial choice of basic political principle has large consequences for their equal citizenship. This lack of equality means that the use of the social contract theory is flawed.

Today, when the issue of justice for people with disabilities is prominent on the agenda in many societies, their lack of participation in the situation of basic political choice looks problematic. It is not only the omission from participation that is problematic but the negative conceptualization of disability—that is, the negative self-images upon which it rests—that need to be recognized and excised. Peter Handley comments on these negative images in

³¹⁰ John Rawls. *Theory of Justice* (Cambridge, MA: Harvard University Press, 1999), 256, 264.

³¹¹ John Rawls. *Theory of Justice* (Cambridge, MA: Harvard University Press, 1999), 233

³¹² John Rawls. *Theory of Justice* (Cambridge, MA: Harvard University Press, 1999)

³¹³ John Rawls. *Theory of Justice* (Cambridge, MA: Harvard University Press, 1999), 234

Rawls's understanding of disability, arguing that Rawls's equation of disability with abnormality, loss and the diminution of one's quality of life reveal the extent to which he assumes that models of disability and corresponding policy responses to disability do not address wider structural and attitudinal factors regarding disability.³¹⁴

Rawls's reference to disabled people as not being normal' requires examination in relation to the historical origins of normalcy.' Rawls recognizes that the exclusion of disabled persons from the original position is problematic. His solution, that disability can be dealt with at the legislative stage, is also flawed, as it suggests that the principles of justice' are not really applicable to the disabled but principles of charity' may be applied in how goods will be distributed. Rawls similarly uses the original distinction drawn by Locke and Hume between the principles of justice to govern rational citizens' and that of charity' to govern the disabled.

The idea of charity,' defined in opposition to justice' for Locke is important for two reasons. First, unlike the later nineteenth century scientific images of the disabled as fundamentally different or abnormal' degenerates who need to be separated out from normal' people, institutionalized, and/or sterilized, Locke argues that the disabled are part of humanity but, like all human beings, fall short of the ideal image of God. They remain part of the community and ought to be treated (in accordance with Christian principles) with kindness by others rather than excluded. But the principle of charity also constructs the disabled as objects of pity and outside the remit of justice, an image that will last well into the twenty first century in both theory and practice as the disabled become represented, through the vehicle of numerous charitable campaigns, as dependent, tragic, and pitiable.

Hume's conflation of physical and mental disabilities is critically important, not only because Rawls incorporates it into his own theory but also because it suggests that there is *something about disability itself* and not simply the principle of irrationality' that leads some liberal theorists to exclude *all* disabled people from their principles of justice.

Problems with Rawls Theory, Disability and Normalcy

For those who are abnormal and fully co-operating members of society,' Rawls urges a moderate redistribution of resources to ameliorate such disadvantage' in the name of social justice and equality.³¹⁵ Over and above this, though, it seems that Rawls considers a more active role for disabled people as neither possible nor perhaps even appropriate. Rawls's equation of disability with abnormality, loss and the diminution of one's quality of life reflect the extent to which both presume an individual medical model of disability and the correlative

³¹⁴ Peter Handley, "Theorising Disability: Beyond 'Common Sense,'" *Politics* 23, no. 2 (2001): 109-18, 111.

³¹⁵ (Rawls, J. 1971 (revised edition 1999). *A Theory of Justice*, Oxford: Oxford University Press. P.63

policy responses to disability that this generates. However by reducing disability to biology and 'personal tragedy' wider structural and attitudinal factors that relate to disability are unquestioned.

Rawls' language which he uses to describe the disabled, is not only shaped by the broad historical language described earlier, but also by his decision to use a Kantian framework. The meaning of *normal* or *potential* only makes sense in relation to Kant's specific moral claims. Because Kant defines personhood by the capacity for reason, Rawls is forced to define those incapable of 'rationality' as outside the 'normal' meaning of personhood. They only have the *potential* to be human and are thus 'postulated' persons, who are incapable of realizing their potential in the 'normal way.'" Rawls use of Kant to anchor his moral theory in relation to disability is problematic for a number of reasons.

The use of the word *normal* requires enormous critical reflection,³¹⁶ as disability scholar Lennard Davis has argued, if the implicit moniker of 'abnormal' and the depreciating self-images implied for disabled persons are to be recognized and 'purged' from contemporary political thought.³¹⁷ The language of 'normalcy,' only begins in the nineteenth century, with the rise of eugenics,³¹⁸ statistical science,³¹⁹ and evolutionary theory,³²⁰ as disabled human

³¹⁶ Henri Jacques Stiker in his celebrated *The History of Disability* argues in the early modern era (seventeenth and eighteenth centuries) in Europe, disability is generally seen as an "affliction" to be borne by the individual as part of God's will. Disabled people are seen abnormal and as lacking in relation to the ideal image of God (as all human beings are but only more so) and to be treated, in accordance with Christian principles, with charity by the family and community. By the nineteenth century, the language shifts to that of human "deficit," with terms such as "firm, feeble-minded, invalid, cripple or being incapable." Under the influence of social evolutionary theory and statistical science, disability becomes a product of "nature" rather than God, and disabled people are increasingly seen as "abnormal" and "deviant" (in opposition to a "normal" human being). Thus, human beings are no longer seen as lacking in different degrees in relation to God but are bifurcated into two categories of humanity: normal and abnormal.

³¹⁷ Disability scholar Lennard Davis describes how the rise of statistical "norms" in the nineteenth century inevitably constructs disability as deviance: "The norm pins down that majority of the population that fall under the arch of the standard bell-shaped curve . . . any bell curve will always have at its extremities those characteristics that deviate from the norm. So, with the concept of the norm comes the concept of deviations or extremes. When we think of bodies, in a society where the concept of the norm is operative, then people with disabilities will be thought of as deviants." Lennard J. Davis, "Constructing Normalcy: The Bell Curve, the Novel, and the Invention of the Disabled Body in the Nineteenth Century," in *The Disability Studies Reader*, ed. Lennard J. Davis (New York: Routledge, 1997), 9-28, 10.

³¹⁸ In the last part of the 19th century, a growing number of scientists, writers and politicians began to interpret Darwin's theories of evolution and natural selection. The Social Darwinist idea of "survival of the fittest" and "natural selection" considered many poor and disabled people to be worthless REF. It was believed that even without government interference; survival of the fittest would emerge and level out the unfit through the struggle for existence see (Paul 1998 p. 95).

³¹⁹ The insertion into the language of the developing concept of normality was furthered by the emerging field of statistics. Statistics was to provide a system of measurement to link the inculcation of values with the supposedly objective, value-neutral mechanisms of the evolving human sciences see (Hacking 1991). The ability to quantify the division between what was desirable and what was not, proved to be a potent tool in the administration of populations. The French statistician Adolphe Quetelet (1796-1847) situated the norm by linking it to the bell curve, the graph which shows the "normal distribution", the majority and its margins, of any population. When Baynton (2001) discusses the nature of this majority, he points out that "although normality ostensibly denoted the average, the usual, and the ordinary, in actual usage it functioned as an ideal and excluded only those defined as *below* average. It was in this way that the rising arch of the curve seemed to, paradoxically, denote the superiority of the unexceptional.

³²⁰ For thousands of years many philosophers had argued that life must have been created by a supernatural being / creator / God due to the incredible complexity of Nature (in particular, we humans and our minds). Thus it is remarkable that Charles Darwin (and others) tried to explain our existence by means of Evolution from Natural Selection. Darwin's theory of evolution is based on five key observations and inferences drawn from them. These observations and inferences have been summarized by the great biologist Ernst Mayr as follows: 1) Species have great fertility. They make more offspring than can grow to adulthood. 2) Populations remain roughly the same size,

beings are measured against the normal; curve and found to be abnormal, deviant,³²¹ or even degenerates in relation to human evolution.

Second, Rawls continues Locke's use of "rationality" as the defining feature of personhood. Accepting this understanding of persons, by definition, excludes the mentally disabled from what is meant by being human. Third, even if one accepts that reason defines personhood, why should *physically* disabled people be deemed incapable of realizing their potential, as Rawls implies in his use of the generic word *handicapped*? Some might argue that he did not mean to include the physically disabled in his description, and the problem would be solved if one simply amended the sentence to refer to mentally handicapped only. But the conflation of physical and mental disability in political theory is not so simply explained or dismissed. The tendency to conflate both kinds of disability is critically important, for if the *physically* disabled are systematically excluded from political theories ostensibly rooted in *rational* agency, it suggests there is *something* about disability itself (beyond a simple categorical antonym to "reason," as we have been suggesting thus far) that explains the long-standing exclusion and discrimination of the *physically* disabled.

Whether these two major classic or contemporary models of civic republican and liberal citizenship are separate or conflated, neither allows for disabled people's full citizenship rights.

Problems of Liberal Citizenship in Application to Disability

Liberty for Rawls is understood in the negative sense, as freedom from interference by the state as citizens pursue their self-interests. Human beings are constructed as self-made and self-making individuals, whose deepest impulse is the free pursuit of individual self-interest.³²² This vision of freedom is a deeply individualist one, where liberty is understood in

with modest fluctuations. 3) Food resources are limited, but are relatively constant most of the time. From these three observations it may be inferred that in such an environment there will be a struggle for survival among individuals. 4) In sexually reproducing species, generally no two individuals are identical. Variation is rampant. 5) Much of this variation is heritable. From this it may be inferred: In a world of stable populations where each individual must struggle to survive, those with the "best" characteristics will be more likely to survive, and those desirable traits will be passed to their offspring. These advantageous characteristics are inherited by following generations, becoming dominant among the population through time. This is natural selection. It may be further inferred that natural selection, if carried far enough, makes changes in a population, eventually leading to new species.

³²¹ In addition to incompetence and dependence, eugenicists drew upon another key rationale for exclusion: deviance. Deviance had not been used extensively prior to eugenics as a reason to exclude those with intellectual disabilities. However, deviance was an established reason to deny rights and linking feeble-mindedness with deviance thereby extended this rationale to those labeled feeble-minded. Citizenship is a moral construction, defining those worthy of rights see (Mink, 1990; Brubaker, 1992; Riesenberg, 1992). Deviants and criminals in particular are seen as violators of the moral boundaries of proper citizenship and the state is believed to hold a legitimate interest in sacrificing the rights of deviants for the public good. Eugenicists argued that the feeble-minded, like criminals, had no understanding of morality, no will to avoid seduction or trouble, and ultimately could not be trusted to uphold the moral sentiment of the nation see (Bliss, 1916; Kenyon, 1914). In essence, eugenicists set about to criminalize the feeble-minded in order to parallel their exclusion from rights to that of criminals.

terms of autonomy, which literally translated means governed by one's own law.³²³ The fact that historical relationships that also "make" of us what we are, are overlooked within this theory which can be problematic for disabled people.

A tension exists in the contractual, liberal model. This friction occurs between the individual and the collective, as freedom is understood, through a narrative of self-determination against the perceived tyranny of the collective or community.³²⁴ The citizen's gender, race, age, psychological and emotional characteristics amongst others are either ignored or, as in the case with Rawls, are considered irrelevant to an articulation of the rights of freedom. By not recognizing race as a marker for differential experiences of citizenship, it overlooks the experiences of people who are racially different. Black people, for example, may not in fact experience freedom in this individualist sense unless it is through a collective expression of freedom as reflected in the case of black people engaged in the civil rights movement.³²⁵ I would add that it also reflects an abilist norm where some disabled people who are more likely to live interdependent lives are also not reflected in this interpretation of liberty.

Finally, although Rawls argues for citizenship activities and for liberty which is understood in a negative sense, the self that emerges within the classical and social justice model of citizenship rights is a passive one.³²⁶ The rights of liberty and equality that this self owns are innate or inherent in nature. The citizen does not have to do something in order to merit these rights, nor is the ownership of rights dependent on the activities in which a citizen may or may not engage.³²⁷

Criticisms of Rawls, Locke, Rousseau, Hume and Kant's Treatment of Disability

The rational' citizen or person' at the heart of these political theories is repeatedly constituted in direct opposition to the disabled other,' who is defined as less than normal,' outside the usual' way of being, only potentially' human, and governed by the principle of charity rather than justice. Since equality is a background commitment that underlies many different policy positions,' shouldn't understanding the relationship between theories of equality and policy consequences heighten our sense of alarm when we realize that Locke's, Kant's and Rawls' concepts disregards the cognitively disabled and paves the way for more expansive exclusions? What are the consequences on policies for the disabled? Does a theory of equality that is complicit with the exclusion of the cognitively disabled render policy

³²³ (Nedelsky, 1989, p.) Nedelsky, J. (1989) Reconceiving autonomy, *Yale Journal of Law and Feminism*, 1, pp. 7–36.

²¹² (ibid)

²¹³ (Lister, 1997). Lister, R. (1997) *Citizenship: Feminist Perspectives* (New York: Macmillan)

Lister, R., *Citizenship Towards a feminist synthesis*, in *Feminist Review*, No. 57, Autumn 1997.

³²³ (Raphael, 1967; Winston, 1989). Raphael, D. D. (1967) Human rights, old and new, in: D. D. Raphael (Ed.) *Political Theory and the Rights of Man* (Bloomington, IN: University Press), Winston, M. (1989) Introduction: understanding human rights, in: M. Winston (Ed.) *The Philosophy of Human Rights* (Belmont: Wadsworth).

decisions in their favour dubious? Whether we are speaking of paying for personal assistants or education for disabled people, funding for the disabled will be competing with funding for medical care, public education, wilderness preservation, clean air, street repairs, and so forth. Choices will have to be made and priorities set.

Furthermore, is distributive justice, growing out of a Lockean, and also Kantian and Rawlsian, principle of charity and a Rawlsian difference principle perspective or helpful? Is the form of benefits and services for the disabled enough? Or, rather is it the manner in which such distribution takes place which determines whether disabled people are treated as dependent clients or autonomous citizens that matter. Some contemporary theorists like Ball argue: It is impossible to lead a good human life in the absence of the freedom and opportunity to exercise personal autonomy the capability to make important life decisions and choices.³²⁸

Ball is addressing the politics of self-image and wants to replace the language of charity or dependency, long associated with the disabled person as client or victim with a language of autonomy and choice normally associated with the liberal citizen.

If autonomy is defined as self-rule or self-legislation in the Kantian sense and the basis upon which to define a good life, it leads back to a definition of personhood that is limited to those with the capacity for reason. Only those capable of making important life decisions and choices can have a good human life—a conclusion that excludes those with serious cognitive or mental impairments. Autonomy may work well for many disabled people to empower them as citizens, but it continues to create negative language for the intellectually disabled in relation to their capacity to be human.

Locke, Rawls and Rousseau, Hume and Kant, all present concepts which disregard the intellectually, cognitively and severely physically disabled and pave the way for more expansive exclusions. The theories of equality that are complicit with the exclusion of the intellectually, cognitively and severely physically disabled lead to egalitarian policy decisions in their favour which can be seen as dubious. Providing education for disabled people, or including them in mainstream society, funding for the disabled will be competing with funding for NHS medical care, state education, museums and other cultural institutions, wilderness preservation, clean air, street repairs, and so forth.

Difference Model of Citizenship

Difference-centred models of citizenship are grounded in theories which have arisen from what have been called the new social movements, such as post-colonial, anti-racist, gay, lesbian, bisexual and transgendered, feminist, disabled people and other social movements.

³²⁸Kant Fundamental Principles of the Metaphysics of Morals 1788, Kant Critique of Pure and Practical Reason

Based on the insights garnered from these movements, difference-centred theorists envision citizenship in terms of a radical, democratic conception of citizenship.³²⁹ Difference-centred theorists reject the normative stance that exists in liberal models of citizenship where the citizen's self as a rights-bearer or as virtuous is understood in singular and universal terms. Nor is it understood through singular identity positions such as gender or race, as is found within singular social identity theories such as some feminist theories.³³⁰ Rather, difference-centered theorists take a more fluid and pluralist approach to citizenship that is situated in a politics of solidarity, a transversal politics³³¹ where citizens occupying multiple subject positions such as class and gender and race come together in solidarity to resist a common oppression.

Difference-centred theorists envisage citizenship in terms that are not dissimilar to civic republican citizenship models. They do so by recognizing the role of difference as it relates to citizens' experiences of belonging and participation, outside of the conceptual articulation of a universal individual with a single set of rights.

Social justice visions are rooted in a vision of social change that is transformative at heart,³³² and which includes a transformation of both the individual's sense of self, through self-empowerment, and a transformation of power relationships in society.³³³ Power relations are seen as having both a material basis, for example, in the hierarchical nature of employment opportunities that exist on the basis of gender and race and ability, as well as a non-material basis in the beliefs, norms and assumptions of social institutional practices.³³⁴

There is an overlap in literature defending the rights of many underprivileged and discriminated groups. The disabled are included in this collection of discriminated groups. This is seen as discrimination in the writings of feminist writers,³³⁵ post-colonial and anti-racist theorists,³³⁶ and gay, lesbian, bisexual and transgendered theorists.³³⁷

³²⁹ Mouffe (ed.) *Dimensions of Radical Democracy*. London: Verso. Tushnet, Mark (1984) 'An Essay on Rights', *Texas Law Review* 62: 1363–403. Walzer, Michael (1983) *Spheres of Justice*. New York: Basic Books. Walzer, Michael (1989) 'Citizenship', pp. 211–19 in Terence Ball, J. Farr and R. L., Mouffe, Chantal (1979) 'Hegemony and Ideology in Gramsci', pp. 168–204 in Chantal Mouffe (ed.) *Gramsci and Marxist Theory*. London: Routledge & Kegan Paul.

³³⁰ (Hobson & Lister, 2002) Hobson, B. & Lister, R. (2002) Citizenship, in: B. Hobson, J. Lewis & B. Siim (Eds) *Contested Concepts in Gender and Social Politics* (Cheltenham: Edward Elgar).

³³¹ (Yuval-Davies, 1999) Yuval-Davis, N. (1999) Ethnicity, gender relations and multiculturalism, in: *Race, Identity and Citizenship: A Reader* (Oxford: Blackwell).

³³² (Lister, 1997) Lister, R. (1997) *Citizenship: Feminist Perspectives* (New York: Macmillan). Lister, R., *Citizenship Towards a feminist synthesis*, in *Feminist Review*, No. 57, Autumn 1997.

³³³ (Yuval-Davies & Werbner, 1999) Yuval-Davis, N. & Werbner, P. (1999) *Women, Citizenship and Difference* (London: Zed Books). 388 M. Moosa-Mitha

³³⁴ (Lister, 1997) Lister, R. (1997) *Citizenship: Feminist Perspectives* (New York: Macmillan). Lister, R., *Citizenship Towards a feminist synthesis*, in *Feminist Review*, No. 57, Autumn 1997.

³³⁵ (Joseph, 1994; Lister, 1997; Stasiulis & Bakan, 1997; Yuval-Davies, 1997, 1999; Stasiulis, 2002) Joseph, S. (1994) *Problematizing gender and relational rights: experiences from Lebanon*, *Social Politics*, Fall pp. 217–285., Lister, R. (1997) *Citizenship: Feminist Perspectives* (New York: Macmillan).

Lister, R., *Citizenship Towards a feminist synthesis*, in *Feminist Review*, No. 57, Autumn 1997., Stasiulis, D. & Bakan, A. B. (1997) *Negotiating citizenship: the case of foreign domestic workers in Canada*, *Feminist Review*, 57, pp. 112–139., Yuval-Davis, N. (1997) *Gender and Nation* (Thousand Oaks: Sage). Yuval-Davis, N. (1999) *Ethnicity, gender relations and multiculturalism*, in: *Race, Identity and Citizenship: A Reader* (Oxford: Blackwell). Stasiulis, D.

Feminist Perspective on Citizenship

Difference-centred theorists challenge the non-participatory/participatory divide through which individualist and participatory liberal models define themselves, by challenging how participation is interpreted within both these perspectives. By situating their analysis within the lived realities of communities of difference,³³⁸ difference-centered theorists point out that the assumption of the citizen as passively inheriting the rights of liberty and equality is simply not reflective of the lived experiences of citizens who are different.³³⁹

The traditional characteristics seen as synonymous with being a citizen include being able bodied and masculine. Standard notions of citizenship see individuals as embedded within the mainstream society as participants, even disabled people.

Lister, reflects on the experiences of women arguing that women have never had the privilege of having their rights recognized as being inherent.³³⁸ Instead, they have always had to fight for their rights. Drawing on the arguments of some European and black feminist writers,³³⁹ Lister concludes that one cannot conceive of women's rights outside of the participation that people of difference have engaged in to form particular constructions of civic and political rights. Hence, in the case of communities of difference,³⁴⁰ formed through organized activism, their rights are not distinguishable from their formal and participatory aspects.

However, difference-centred theorists challenge the definition of participation as it exists within liberal theories by broadening the meaning of participation beyond the private/public split through which it is formed. The notion of participation as individuated autonomous decision-making is contested by pointing out that the law addresses all aspects of citizens' lives.³⁴¹ Anti-racists and feminists have broadened civic republican notions of participation within the public arena to include care-related duties as well as local and collective

(2002) The active child citizen: lessons from Canadian policy and the children's movement, *Citizenship Studies*, pp. 507–538, 6(4).

³³⁶ (Hall & Held, 1990; Collins, 1998; Razack, 1998; Williams, 1998; Rajan, 2003) Hall, S. & Held, D. (1990s) Citizens and citizenship, in: S. Hall & M. Jacques (Eds) *New Times: The Changing Face of Politics in the 1990s* (New York: Verso). Collins, P. H. (1998) *Fighting Words: Black Women and the Search for Justice* (Minneapolis: University of Minnesota Press). Razack, S. (1998) *Looking White People in the Eye* (Toronto: University of Toronto Press). Williams, P. (1998) *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, MA: Harvard University Press). Rajan, S. (2003) *The Scandal of the State: Women, Law and Citizenship in Post-colonial India* (London: Duke University Press).

³³⁷ (Phelan, 2001) Phelan, S. (2001) *Sexual Strangers: Gays, Lesbians and Dilemmas of Citizenship* (Philadelphia: Temple University Press).

³³⁸ Lister (1997), Lister, R. (1997) *Citizenship: Feminist Perspectives* (New York: Macmillan). Lister, R., *Citizenship Towards a feminist synthesis*, in *Feminist Review*, No. 57, Autumn 1997.

³³⁹ (Lourde, 1984; Collins, 1998; Siim, 2000) Lourde, A. (1984) Age, race, class and sex: women redefining difference, in: H. Crowley & S. Himmelwhite (Eds) *Knowing Women* (Cambridge: Polity Press). Collins, P. H. (1998) *Fighting Words: Black Women and the Search for Justice* (Minneapolis: University of Minnesota Press). Siim, B. (2000) *Gender and Citizenship: Politics and Agency in France, Britain and Denmark* (Cambridge: Cambridge University Press).

³⁴⁰ (Hobson & Lister, 2002) Hobson, B. & Lister, R. (2002) *Citizenship*, in: B. Hobson, J. Lewis & B. Siim (Eds) *Contested Concepts in Gender and Social Politics* (Cheltenham: Edward Elgar).

³⁴¹ (Nedelsky, 1990) Nedelsky, J. (1990) Law, boundaries and the bounded self, *Representations*, 30, pp. 131–158.

participation within neighborhood boards as also being another form of political participation.³⁴²

There are two ways by which difference-centred theorists re-define the citizens' sense of self. The first is to introduce the idea of the citizen as being active selves, as having agency.³⁴³ The second is to define the citizen's self as relational, as a dialogical self, that gains a sense of self through relationships with the other.³⁴⁴

Black feminist writers like Patricia Hill Collins,³⁴⁵ Patricia Williams,³⁴⁶ and Audre Lourde³⁴⁷ have theorized about the relationship which exists between the self and participation in communities of organized resistance against oppression. The relationship between an individual sense of self and collective action enables disabled people to participate against discrimination.

As Lister says:

Citizenship as participation represents an expression of human agency in the political arena, broadly defined: citizenship as rights enables people to act as agents. Moreover, citizenship rights are not fixed. They remain the objects of political struggles to defend, reinterpret and extend them. Who is involved in these struggles, where they are placed in the political hierarchy and the political power and influence they can yield will help to determine the outcomes. Citizenship thus emerges as a dynamic concept in which process and outcome stand in a dialectical relationship to each other.³⁴⁸

Lister makes two important points. First that active participation in political and welfare institutions should be redefined as a stronger notion of citizenship which incorporates ideas of diversity to better accommodate differences. Second, Lister proposes that a reconceptualization of citizenship should be formulated through synthesising the rights and participatory traditions via the notion of human agency.³⁴⁹ Lister suggests that by embracing elements of the two main historical citizenship traditions, citizenship can emerge as a dynamic concept in which process and outcome stand in a dialectical relationship to each

³⁴² (Lister, 1997) Lister, R. (1997) *Citizenship: Feminist Perspectives* (New York: Macmillan). Lister, R., *Citizenship Towards a feminist synthesis*, in *Feminist Review*, No. 57, Autumn 1997.

(Lourde, 1984) Lourde, A. (1984) *Age, race, class and sex: women redefining difference*, in: H. Crowley & S. Himmelwhite (Eds) *Knowing Women* (Cambridge: Polity Press).

³⁴³ (Lister, 1997) Lister, R. (1997) *Citizenship: Feminist Perspectives* (New York: Macmillan). Lister, R., *Citizenship Towards a feminist synthesis*, in *Feminist Review*, No. 57, Autumn 1997.

³⁴⁴ (Yuval-Davies, 1999). Yuval-Davis, N. (1999) *Ethnicity, gender relations and multiculturalism*, in: *Race, Identity and Citizenship: A Reader* (Oxford: Blackwell).

³⁴⁵ Patricia Hill Collins (1998, 2000) Collins, P. H. (1998) *Fighting Words: Black Women and the Search for Justice* (Minneapolis: University of Minnesota Press). Collins, P. H. (2000) *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment* (New York: Routledge).

³⁴⁶ Patricia Williams (1998, 2000) Williams, P. (1998) *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, MA: Harvard University Press). Williams, P. (2000) *Seeing a Color-Blind Future* (Cambridge, MA: Harvard University Press).

³⁴⁷ Audre Lourde (1984) Lourde, A. (1984) *Age, race, class and sex: women redefining difference*, in: H. Crowley & S. Himmelwhite (Eds) *Knowing Women* (Cambridge: Polity Press).

³⁴⁸ Lister 2003 (p. 35) consult editor: Jo Camping, Palgrave Macmillan; 2 edition publications

³⁴⁹ Lister (2003:14) consult editor: Jo Camping, Palgrave Macmillan; 2 edition publications

other.' Lister suggests that the idea of human agency as citizenship is conceived as both a status involving a wider range of rights, and as a practice involving political participation.³⁵⁰

This theory is certainly beneficial for people with disabilities as it begins to address how it is not just the postulation of rights that is important (as in the case of liberal and civil republican views), but also the means through which full citizenship is achieved. The disability movement is engaged in a constant struggle to obtain and to reaffirm rights and to promote means for participation, and feminist movement and is a logical explanation. These feminist arguments can be used to support the disability movement.

Contractual views of equality, consistent with their individualist and formal stance, are interpreted as the legal rights of all members of society to be treated with equal dignity and respect under law. Dworkin suggests it as:

The weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom.³⁵¹

Equal respect and concern for all human beings derive from the Kantian notion that man (Kant only used the male pronoun) of all creatures in nature is endowed with reason and a sense of morality. This makes him the master of his own destiny and of equal worth with other human beings.³⁵²

The right to the 'same respect' is thereby defined in formal terms as entitlement to an equal redistribution of rights and privileges.³⁵³ Social liberals define equality in a more substantive way by examining the social conditions that enable citizens to participate more equally in society.³⁵⁴ Yet because participation is understood in formal terms, equality is defined as 'equality of opportunity' rather than 'outcome' and is also understood as equality of status rather than in structural terms.³⁵⁵

Parallels between the Feminist Movement and Disability Movement

The parallels are spawned by similar underlying conditions, such as a history of oppression by the purported majority population; denial of civil rights; a neglect of relevant issues by

³⁵⁰ Lister 2003 (p37) consult editor: Jo Camping, Palgrave Macmillan; 2 edition publications

³⁵¹ Dworkin (1977) p.32 Dworkin, R. (1977) Taking Rights Seriously (Cambridge: Harvard University Press). Dworkin, Ronald, Taking Rights Seriously, Harvard Univ. Press, Harvard, (1977) 1978. Dworkin, Ronald, Is Democracy Possible Here?: Principles for a New Political Debate, Princeton Univ. Press, New Jersey, (2006) 2008.

³⁵² (Rawls, 1971; Taylor, 1989) Rawls, J. (1971). *A theory of justice*. --. Cambridge, Mass: Belknap Press of Harvard University Press. Rawls, J. (1971). *A Theory of Justice*. Cambridge: Cambridge University Press. Taylor, C. (1989) Sources of the Self: The Making of the Modern Identity (Cambridge: Harvard University Press).

³⁵³ (Rawls, 1971) ³⁵³ (Rawls, 1971; Taylor, 1989) Rawls, J. (1971). *A theory of justice*. --. Cambridge, Mass: Belknap Press of Harvard University Press. Rawls, J. (1971). *A Theory of Justice*. Cambridge: Cambridge University Press. Taylor, C. (1989) Sources of the Self: The Making of the Modern Identity (Cambridge: Harvard University Press).

³⁵⁴ (Marshall, 1975) Marshall, T. H. (1975) *Social Policy in the Twentieth Century* (London: Hutchinson).

³⁵⁵ (Siim, 2000; Phelan, 2001) Siim, B. (2000) *Gender and Citizenship: Politics and Agency in France, Britain and Denmark* (Cambridge: Cambridge University Press). Phelan, S. (2001) *Sexual Strangers: Gays, Lesbians and Dilemmas of Citizenship* (Philadelphia: Temple University Press).

public policymakers; portrayal of stereotypes in popular culture and disparate employment rates, wage levels, educational opportunities, and other social and economic indicators. Being members of other minority populations such as being black or gay, further increases discrimination. Perhaps not surprisingly, this similar experience has created similar issues and goals for the movements, such as civil rights' protection; respect by service providers, particularly the medical community; equal employment and educational opportunities; and autonomy in the legal system.

Feminist attitudes towards rights stretch from their embrace by liberal feminists as central to any reform program, to their dismissal by radical feminists as merely representing the expression of male values and power.³⁵⁶ Those writing in a socialist tradition are wary of the individualistic nature of rights; a number of feminist theorists have counterpoised an ethic of care against an ethic of justice or rights and feminist legal theorists tend to caution against placing too much faith in rights, whilst also counselling against outright rejection.

The extension of women's rights to other groups, which has been demanded by different social movements, represents a triumph for feminist discourses for comprehensive civil rights demands in the politics of needs interpretation.³⁵⁷ Held has made the case for such an extension to other groups, identify seven clusters of rights corresponding to seven key sites of: Power, Health, Social, Cultural, Civil, Economic, and political.³⁵⁸ He contends that these are key to the entrenchment of the principle of autonomy and to the facilitation of free and equal political participation.

Carol Gould argues that the right of participation in decision-making in social, economic, cultural and political life should be included in the nexus of basic rights.³⁵⁹

Carol Pateman's explanation of patriarchal institutions criticizes the concept of universal citizenship in classical political theory and has been widely influential in enabling spaces within citizenship discourses. The reasoning in her inclusion of women as a sexually differentiated citizenship is equally applicable to disabled persons.³⁶⁰ Pateman maintains that women should be included as citizens based upon their caring work and that women

³⁵⁶ (see Bryson, 1992)

³⁵⁷ Fraser, N. & Nicholson, L. (1990). Social criticism without philosophy: an encounter between feminism and postmodernism. In L. Nicholson (Ed.), *Feminism/Postmodernism*. London: Routledge. Goffman, E. (1968). *Stigma*. Harmondsworth: Penguin. Hahn, H. (1985). Towards a politics of disability: definitions, disciplines and policies. *Social Science Journal*, 22 (4), 87-105 Hahn, H. (1988). The politics of physical differences: disability and discrimination. *Journal of Social Issues*, 44 (1) 39-47

³⁵⁸ Held, David (1996) *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*. Stanford: Stanford University Press. (1987, 1989, 1994)

³⁵⁹ see Pateman (1992) Pateman, C. (1992) Equality, difference, subordination: the politics of motherhood and women's citizenship, p212)

³⁶⁰ Pateman (1992) Pateman, C. (1992) Equality, difference, subordination: the politics of motherhood and women's citizenship,

should be incorporated into citizenship discourses as women—rather than having a gender-neutral citizenship. Citizenship, for Pateman needs to be rethought from the viewpoint of the female citizen. Pateman argues that if both sexes are to be full citizens the meaning of sexual difference has to cease to be the difference between freedom and subordination.³⁶¹ Pateman's theory is problematic for people with disabilities—and in particular for women with disabilities—as it presumes that women are a homogenous category, firstly capable of caring' tasks, and secondly willing to do such work.³⁶²

Mary Dietz states that so long as feminists only focus on social and economic concerns around children, family, schools, work or wages, they will not articulate a truly political vision or address the problem of citizenship.³⁶³ A gendered discourse of citizenship is problematic for women, who are not mainstream, such as women with disabilities. The double oppression which disabled women face has been well noted³⁶⁴ and thus a gendered theory of citizenship contributes further to the injustices which people with disabilities face. Meekosha and Dowse argue that feminist analysis which separates the private from the public has not incorporated an examination of people with disabilities.³⁶⁵

People with disabilities often inhabit a unique space somewhere between the private and the public, while seen as remaining a burden in both. People with disabilities are conceived as having neither familial responsibility nor public presence and are not constituted in traditional masculine terms or embraced by feminist critique which equates care-giving with responsibility.

Vogel argues that citizenship has been confined to the masculine area. She argues that the exclusion of women and disabled people should be seen as an example of citizenship to excluding individuals who deviate from the masculine able-bodied male ideal of the citizen. Although Vogel sees T.H. Marshall's approach as generally advantageous in that it places social rights as its core, she argues that in outlining the theoretical construction of the post-war welfare state, Marshall condemned women and minority groups to a marginalized second-class citizenship. Central to this marginalization was the presumption that minority groups especially disabled people, would naturally take on paid employment.³⁶⁶

³⁶¹ Pateman (1992) Pateman, C. (1992) Equality, difference, subordination: the politics of motherhood and women's citizenship, Pateman 1992:28

³⁶² Pateman argues (1992:28) Pateman, C. (1992) Equality, difference, subordination: the politics of motherhood and women's citizenship,

³⁶³ Mary Dietz (1992)

³⁶⁴ (see for example Asch and Fine 1988, 1997 or Garland-Thomson 1997)

³⁶⁵ Meekosha, H. (1998) Body battles: Bodies, gender and disability. In T. Shakespeare (ed) *The Disability Reader: Social Science Perspectives*. London: Continuum, 163-180. Meekosha and Dowse (1997:56)

³⁶⁶ Vogel, see (Dwyer 2004: 95-97) Dwyer, Peter (2004) *Understanding Social Citizenship Themes and Perspectives for policy and practice* Bristol: The Policy Press

Criticisms of Feminist Literature and Disability

For people with disabilities, the ability to exercise human agency itself is at the core of the struggle for full citizenship and therefore a deconstruction of standard notions of agency is necessary *preceding* its use to attain citizenship. Furthermore, the concepts of status and participation which Lister utilises have not been sufficiently deconstructed from their original flawed roles within the liberal and civic republicanism traditions. It is questionable whether the socio-cultural and political-economic injustices which underpin such concepts can be overcome through binding them with human agency. It is also debatable as to whether the synthesis of two historically problematic theories will actually create one unproblematic theory. For people with disabilities who have been excluded from the very definitions of status and participation, and whose human agency is challenged and constrained on a range of levels, more than a synthesis of existing citizenship discourses is required to enable a space for their own subjectivity.

It is the structural conditions that contribute to rendering people with disabilities as less than full citizens. Models of citizenship which privilege female tasks such as private caring, or an unproblematised notion of human agency, exclude important group differences. The exclusion from key citizenship debates of the historical and social circumstances of individuals has been taken up by Iris Marion Young who offers a radically alternative view of citizenship. In Young's view, citizenship requires the development of a theory based not on the assumption of an undifferentiated humanity but rather on the assumption that there *are* group differences and some groups are actually or potentially disadvantaged.³⁶⁷ Young believes that the best way to realise the inclusion and participation of everyone in full citizenship is by the concept of differentiated citizenship.³⁶⁸ This approach to citizenship has been supported by other feminists as it rearticulates the inclusivity of diversity and difference in citizenship. Young's theory attempts to be inclusive not just of women, but other oppressed groups, including the disabled.³⁶⁹

Young In Relation to Disability

Young importantly raises the point that rights and rules which are universally formulated are blind to differences of race, culture, gender, age or disability and thereby perpetuate rather than help eliminate oppression. This is the evident problem in both liberal and civil republican discourses of citizenship. Young believes that the universal notions found in

³⁶⁷ Young, Iris Marion (1990) *Justice and the Politics of Difference* Princeton: Princeton University Press

³⁶⁸ Young, Iris Marion (1990) *Justice and the Politics of Difference* Princeton: Princeton University Press (1998:264)

³⁶⁹ (see for example Fraser 1997; Siim 2000; Lister 2003) Siim, B. (2000) *Gender and Citizenship: Politics and Agency in France, Britain and Denmark* (Cambridge: Cambridge University Press).

contemporary theories of citizenship are problematic as they place citizenship above particular group and individual differences.³⁷⁰

For Young universality is defined according to what citizens have in common as opposed to how they differ. Second, such groups can be denied the equal opportunities to participate in the socio-cultural and political-economic realm. Young further notes how such groups have found it necessary to affirm that there are often group-based differences which make the application of a strict principle of equal treatment, especially in competition for positions, unfair because such differences put those groups at a disadvantage.³⁷¹ Young gives the example of how there has been some success in winning special rights for people with physical and mental disabilities in the past twenty years and suggests this is a clear case of where promoting equality in participation and inclusion requires attending to the particular needs of different groups.³⁷² While Young's differentiated citizenship theory has much to offer oppressed groups and individuals—and in particular for people with disabilities it offers a substantial base for obtaining subjectivity—some key problems persist.

Nancy Fraser criticises Young for having a limiting, single conception of group membership.³⁷³ Fraser maintains a single conception which encompasses several disparate modes of collectivity (such as gender, race, ethnic groups, sexualities and social classes) may result in the loss of important conceptual distinctions. For a person with a disability, the assumption of homogeneity overlooks differences within disability.³⁷⁴ Often disability is wrongly viewed as an overarching category, however there are significant variations in the type, degree and experiences of disability and these distinctions are underpinned by difference in gender, class, race and/or sexuality.

Fraser suggests that a group differentiation perspective can lead to one of the modes of collectivity being implicitly dominant where its characteristics will be projected as the characteristics of all social groups. This latter point is crucial for a person with a disability as often it is the disability which is seen first and foremost, and other characteristics, such as

³⁷⁰ Young, I. M. (1997) *Intersecting Voices, Dilemmas of Gender, Political Philosophy, and Policy* (Princeton: Princeton University Press).

³⁷¹ Young, I. M. (1997) *Intersecting Voices, Dilemmas of Gender, Political Philosophy, and Policy* (Princeton: Princeton University Press):281

³⁷² Young (1998:284). See also Desmond King, *In the Name of Liberalism: Illiberal Social Policy in the United States and Britain* (Oxford, UK: Oxford University Press, 1999); Philip Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* (Baltimore: Johns Hopkins University Press, 1991); and Matthew Thomson, *The Problem of Mental Deficiency: Eugenics, Democracy, and Social Policy in Britain c. 1870-1959* (Oxford, UK: Clarendon, 1998).

³⁷³ Fraser, N., & Honneth, A. (2003). *Redistribution of recognition? A political-philosophical exchange [Umverteilung oder Anerkennung?]* (J. Golb, J. Ingram & C. Wilke Trans.). London, New York: Verso.

³⁷⁴ Fraser, N., & Honneth, A. (2003). *Redistribution of recognition? A political-philosophical exchange [Umverteilung oder Anerkennung?]* (J. Golb, J. Ingram & C. Wilke Trans.). London, New York: Verso.

gender, sexuality or class are subsumed, and finally an inclusive theory of citizenship for people with disabilities cannot reside upon simply group differentiation.³⁷⁵

Problems and Limitations of a Difference Model of Citizenship

There are many divisions in society based on gender, race, religion, class, ethnicity, sexuality, disability, urban/rural etc. these are sometimes called political cleavages.⁴ There are many ways in which we are different from each other and these differences usually find some group expression. Furthermore, these differences all have the potential to express themselves politically, even if their political expression can come in many different forms. As individuals in society we belong to *many* groups at the same time—a woman, a racial minority, a Muslim, an urban dweller, a mother of three children, a mother of a disabled child and a holder of certain values or ideology. One has multiple identities and loyalties.

Feminists, disabled people, and other minority groups must not forget that they have multiple identities and other issues going on in their life that are as important and possibly more important than being a feminist or a disabled person. There are other important issues that cannot be achieved by assuming a feminist or disabled identity, and they should feel free to switch back and forth according to the issues at stake and their relevance to them personally. Minority groups can be empowered and can be equally represented at some point in time. It is something most minority groups would like to see but not at the cost of other life shaping decisions. Disability is just one of many identities which operate in the person.

Said notes, No one today is purely one thing. Labels like Indian, or woman, or Muslim, or American are no more than starting-points, which if followed into actual experience for only a moment are quickly left behind.³⁷⁶

Disability politics, by its nature, often rests on a fairly unreflexive acceptance of the distinction disabled/non-disabled distinction. Leadership among the disabled is vital.

But Liggett argues:

From an interpretative point of view the minority group approach is double edged because it means enlarging the discursive practices which participate in the constitution of disability. [...] In order to participate in their own management disabled people have had to participate as disabled. Even among the politically

³⁷⁵ Fraser, N., & Honneth, A. (2003). Redistribution of recognition? A political-philosophical exchange [Umverteilung oder Anerkennung?] (J. Golb, J. Ingram & C. Wilke Trans.). London, New York: Verso.

³⁷⁶ (Said, 1994, 407) in Barbara Arneil, "Disability, Self Image, and Modern Political Thought," *Political Theory* 20 (April 2009):1-25, 24. Said, E (1986) Foucault and the imagination of power in D Hoy (Ed) *Foucault: acritical reader*. Oxford: Basil Blackwell.

active, the price of being heard is understanding that it is the disabled who are speaking.³⁷⁷

Liggett follows those post-structuralist authors who point out the costs of participation in identity politics. To be an activist—whether as a gay person, or a woman, or a disabled person—is to make the label into a badge, to make the ghetto into an oppositional culture. Yet what about those who wish to be ordinary, not different?³⁷⁸

Many disabled people do not want to see themselves as disabled, either in terms of the medical model or the social model. They downplay the significance of their impairments, and seek access to a mainstream identity. They do not have a political identity, because they do not see themselves as part of the disability movement either. This refusal to define oneself by impairment or disability has sometimes been seen as internalised oppression or false consciousness by radicals in the disability movement. Yet this attitude can itself be patronising and oppressive. People have a choice as to how they identify, within obvious limitations. What is wrong with seeing yourself as a person with a disability, rather than a disabled person, or even identifying simply as a human being, or a citizen, rather than as a member of a minority community? After all, identity politics can be a prison, as well as a haven.

The unwillingness to identify as disabled—either in a political sense, or in a medical sense—is very evident in a research with children with impairments (the Life as a disabled child project, funded by the UK Economic and Social Research Council). They started with the intention of imposing the social model perspective on the lives of the children. Yet, because the researchers were also following the precepts of the new sociology of childhood, and treating children as agents, and their testimony as reliable, they were forced to rethink their adult-oriented social model assumptions. The children easily identified the social barriers which they experienced, and were often vociferous in complaining about the treatment which they received. But most of them wanted to be seen as normal, though different, and actively resisted definition as disabled.³⁷⁹ It has been argued that many people with learning difficulties resist being defined as disabled or different.³⁸⁰ A similar hypothesis is that the same might apply to older people with impairments or chronic illnesses who make up the majority of disabled people in Britain.

³⁷⁷ Barbara Arneil, "Disability, Self Image, and Modern Political Thought," *Political Theory* 20 (April 2009):1-25, 24.

³⁷⁸ Liggett Liggett, H (1988) Stars are not born: an interpretive approach to the politics of disability. *Disability, Handicap and Society* 3 (3) pp263-275. Charles Taylor, "Politics of Recognition," in *Multiculturalism*, ed. Amy Gutmann (Princeton, NJ, Princeton University Press, 1995), 64-65.

³⁷⁹ (Priestley et al, 1999) Priestley, M. (1998) Childhood disability and disabled childhoods, *Childhood—A Global Journal of Child Research*, 5(2), 207–223.

³⁸⁰ Finlay & Lyons, 1998

There is also the issue of multiple identities. While some people with impairment resist identification as disabled, because they want to see themselves as normal, others are more likely to identify in terms of alternative parts of their experience. For example, gender may be more salient, or perhaps ethnicity, or sexuality, or class, or marital status. Research on disabled sexuality has found gay people, for example, who prioritise their sexual identity, and ignore their experience of impairment.³⁸¹ Social model perspectives have not proved very effective in reconciling the dimensions of gender, race and sexuality within or alongside disability.³⁸² Most people are simultaneously situated in a range of subject positions. To assume that disability will always be the key to their identity is to recapitulate the error made by those from the medical model perspective who define people by their impairment. Any individual disabled person may strategically identify, at different times, as a person with a particular impairment, as a disabled person, or by their particular gender, ethnicity, sexuality, occupation, religion, or football team. Identity is no longer straightforward, but has become a matter of choice.

Conclusion: An Alternative Framework of Citizenship?

The idea of a universal citizenship was significant for the institutionalization of the liberal claim that individuals are free and equal. However, in the course of time, citizenship was reduced to a legal status. Moreover, liberalism insistence on the principles of individual freedom and equality led to a lack of a common concern and civic activity. In liberal politics, values conceived of belonging to a private realm and to ethical considerations are excluded from the political realm, thus, politics is reduced to interests. Republicans criticized liberalism because of the absence of a substantive common good and the separation of politics and morality. Contrary to the liberal priority of rights over goods, republicans favor the priority of common good over the rights. Because the sense of a common good, gained through the political participation, is the source of a sense of right and justice.

This chapter critiqued the normative stance of mainstream citizenship theories of rights and the interpretations of liberty and equality that emerge from citizenship models. Both classical and recent civic republican and liberal models of citizenship by their medical 'irrational' clause (whether articulated directly or implied as in the case of Marshall) limit the full citizenship of many disabled people. Furthermore they all argue that work and participation in the community in some productive way is a prerequisite for full citizenship. The inability of some disabled people to participate in society in those acceptable social norms renders them as second-class citizens.

³⁸¹ (Shakespeare et al, 1996) Shakespeare, T. (1996). Disability, identity and difference. In C. Barnes, & G. Mercer (Eds.), *Exploring the divide : Illness and disability* (pp. 94-113). Leeds: Disability Press.

³⁸² (Morris, 1991, Vernon, 1996) Morris, J. (1991). *Pride Against Prejudice*. London: The Women's Press. Morris, J. (1991). *Pride against prejudice: Transforming attitudes to disability*. Philadelphia: New Society.

Similarly, the classical liberal notion of citizenship and its 'rational' clause formulated by Locke excludes many people with cognitive disability and it remains unclear in the writings by Locke, Kant, Rawls and Marshall that the other forms of disability qualify for full citizenship. Both classical and contemporary models of civic republican and liberal notions of citizenship are limiting for disabled people. As Lister observes, because they are not able fully to participate in the key criteria in mainstream society, which defines able and participatory citizens, they remain on the periphery.³⁸³

The equal but different model of citizenship is also problematic because liberal societies do not differentiate between citizens. The citizen is universal, to incorporate difference is arguing with the core liberal notion of the universal citizen, which can be problematic.

In conclusion, the theories of citizenship should not be treated as mutually exclusive alternatives. An alternative framework could be offered by which to reconsider disabled people's citizenship rights through an application of UN human rights, particularly the 2006 UN CRPD. This alternative is not seen as being definitive; rather, it comprises a starting point in a discussion which hopefully will be generative in re-visioning disabled people's citizenship rights.

³⁸³ Lister, R. 1997. *Citizenship: Feminist perspectives*, Basingstoke: Macmillan.

Chapter Four

UN Human Rights Instruments

The previous two chapters have examined how models of disability and models of citizenship deal with the way disability poses the challenge of difference and to what extent we can respect radical difference while also promoting equality. The challenge is one of uniting people while also providing for their distinct needs. As discussed, the models of disability and citizenship both aim to respect difference while promoting forms of equality. But they both fall because they did not achieve the objectives of addressing the disabled's needs. This chapter argues that UN human rights legislation has been more successful than historical models of citizenship in addressing the issues of disability, citizenship and full inclusivity. However, even UN human rights legislation prior to 2006 was inadequate in meeting the needs of disabled people. In the next chapter it is argued that the 2006 CRPD legislation has the potential to resolve issues in catering for disability and education.

This chapter has two purposes. In Section 1 the relationship between UN human rights legislation and notions of citizenship is examined. Although UN human rights are an extension of citizenship theories of rights,³⁸⁴ they cannot logically be a theoretical underpinning for citizenship, regardless of how citizenship may be conceptualized. This is because UN human rights discourses are located within a universalist frame of reference, in contrast to that of citizenship discourses, which are located within a more particularist frame. Human rights are conceptually distinct from citizenship, and the conflation of human rights with citizenship theories is not only conceptually incoherent, but may actually obstruct the empowerment of disabled people. Disabled people need to be guaranteed full rights based on their humanity. They are failed by citizenship theories which grant rights only to the autonomous' and rational.'

The purpose of Section 2 is to look at to what extent UN human rights legislation solves the limits and problems of disabled peoples' citizenship. I examine how prior to December 2006

³⁸⁴ Despite the lack of a bill of rights and any formal recognition of human rights, the United Kingdom has a long tradition of civil liberties, dating back to the Magna Carta 1215, which recognized the right of access to the courts and the right to a fair trial. The terms 'human rights' and 'civil liberties' are often used by scholars to distinguish between positive and negative rights. The basis of civil liberties is entrenched in the idea of the liberty of the individual and protection from the acts of arbitrary government. Each state should recognize and protect the individual citizen's right to life, liberty, and property, as contained in a variety of domestic bills of rights throughout the world as well as in international treaties. Although such notions were articulated by philosophers such as Plato and Aristotle, the idea of specific protection of liberty from state interference came to prominence in the so-called 'Age of Enlightenment', in order to control the act: of arbitrary and oppressive governments. During this time, philosophers such as John Locke devised the 'social contract', which has since formed the basic justification for the protection of civil rights. This involves the state agreeing to respect the individual's choice on matters such as religion, private life, and speech, and is based on the inalienable and fundamental character of such liberty. The modern concept of human rights has its formulation in the Universal Declaration of Human Rights, (1948) adopted by the UN in the aftermath of WWII. But the principles behind human rights have been present throughout history in many different societies and civilizations. Human rights have evolved out of a wide range of ideas, laws, movements and events. It is an inexorable logic that this evolution and application of human rights with increasing government apparatus would eventually be applied by states to the protection of disabled people within their respective societies.

and the Introduction of the CRDP no specific human rights treaty expressly fully protected disabled people.³⁸⁵ Prior to 2006, to claim protection under a United Nations convention a disabled person must either invoke a universal provision or embody a separately protected characteristic. The universal provision was in the form of seven core UN treaties.³⁸⁶ Each of the seven core United Nations treaties theoretically applies to disabled persons in varying degrees, but was rarely applied in practice.³⁸⁷ Compounding this problem, General Assembly emollient laws explicitly referencing disability are legally unenforceable.

This changed when an international convention specifically protecting the human rights of disabled persons was considered by the General Assembly in 2006 and ratified in the UK in 2009. I see the CRPD as a development of contemporary citizenship in that it spells out the requirements of inclusion in communities and builds on the classic liberal regime of natural/human rights and is more specific in spelling out the needs of the disabled who have been left out of the picture. Hence the UN liberal human rights can contribute to a focused way of theorizing what is required for the disabled. What drawbacks there are will be considered in the next chapter.

Section 1

A Theoretical Understanding of Human Rights

Contemporary conceptions of human rights have their philosophical roots in eighteenth century western European philosophical theory framed in terms of the rights of the individual

³⁸⁵ Prior to 2006 disabled people's human rights were enshrined in the 1948 Universal Declaration of Human Rights. It wasn't until a new disability rights convention was agreed at the UN in December 2006. The UK signed the convention on 30 March 2007 and ratified it on 8 June 2009. See www.un.org/disabilities/convention/facts.shtml Although it does not specifically refer to disability many subsequent conventions at the UN and much legislation passed by member states as a result of the significant influence of this 1948 declaration and later UN conventions do. In an introductory document on disability and human rights, the office of the UN High commissioner for Human Rights states the four core values of human rights law that are of particular importance to disability. The four core values of human rights law are: 1. the dignity of each individual, who is deemed to be of inestimable value because of his/her inherent self-worth, and not because s/he is economically or otherwise "useful" 2 the concept of autonomy or self-determination, which is based on the presumption of a capacity for self-directed action and behaviour, (and requires that the person be placed at the centre of all decisions affecting him/her) 3 the inherent equality of all regardless of difference; 4 and the ethic of solidarity, which requires society to sustain the freedom of the person with appropriate social supports. By emphasizing that the disabled are equally entitled to rights as others, this human rights model builds upon the spirit of the Universal Declaration of Human Rights, 1948, according to which, "all human beings are born free and equal in rights and dignity". This model emphasis on viewing persons with disabilities as subjects and not as objects thus locating the problem outside the disabled persons and addresses the manners in which the economic and social processes accommodate the differences of disability or not, as the case may be.

³⁸⁶ Equality and freedom from discrimination lie at the heart of all international treaties on Human rights. Most constitutions will contain a declaration to the effect that all people are born equal and should receive equal protection under the law and this principle is projected in the preamble of the United Nations Charter 1945, which "reaffirms faith in the equal rights of men and women . . ." Every person, therefore, has a moral right to be treated equally and in particular to enjoy their human rights free from discrimination on grounds such as race, sex, or social status; consequently, discriminatory treatment is viewed as an affront to human dignity and worth. See

³⁸⁷ Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), are universal in scope. The same is true for the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). Although disability is not specifically mentioned in any of these treaties, they technically include all human beings within their respective provinces.

against the state.³⁸⁸ It has been argued that the source of human rights is the individual's moral nature, where human rights are a consequence of the inherent dignity of the human person.³⁸⁹ Whilst international human rights' instruments clearly have been developed in response to, and indeed reflect, particular contemporary socio-political concerns and events, they nevertheless reflect a particular philosophical understanding of what it means to be a human being. For example, the 1948 Universal Declaration of Human Rights refers to the human rights of all human beings, linking it to the idea of the dignity of the human person. Article 1 states that All human beings are born free and equal in dignity and rights,' implying that such rights are natural in virtue of being human. In addition, Article 2 explicitly states that everyone is accorded such rights, regardless of nationality.³⁹⁰ Hence human rights are conceptualized in terms of a particular understanding of what it means to be a human being: that is, to be a human being is essentially a moral experience.

The Origins of Human Rights

The theory of natural rights based on reason (rational rights) developed by Kant and others, was used for the philosophical justification of the French Revolution and of the other bourgeois revolutions of the eighteenth and nineteenth centuries, becoming an important instrument of the bourgeoisie in their fight against the feudal system and of the absolutist state and for the state law. Later on, natural rights have found their materialization in the fundamental rights of man and citizen on which the modern state law is based.³⁹¹ It should also be noted that Rawls acknowledges the importance of human rights' as well. He writes: A just world order is perhaps best seen as a society of peoples, each people maintaining a well-ordered and decent political (domestic) regime, not necessarily democratic but fully respecting basic human rights.³⁹²

The protection of human rights through legal instruments which transpose those rights as legal provisions, has become a necessity of the postwar international community—a consequence of the atrocities committed by the Nazis, and later, also as a consequence of the continuous practice of violating human rights in states with totalitarian regimes. Regulations with a universal or regional character soon followed the signing of the UN Charter on the 26 June 1945.³⁹³ The most fundamental of these was the Universal Declaration of Human Rights, proclaimed and adopted by the UN General Assembly on the 10 December 1948. It is the first document with universal vocation in this field and establishes a unitary conception of the international community about the rights and freedoms of man, opening the way towards a system of international protection of the human

³⁸⁸ (Leary, 1990).

³⁸⁹ (Freeman, 1994, p. 30). Freeman, M. (1992) The limits of children's rights, in: F. Freeman & P. Veerman (Eds) *The Ideologies of Children's Rights* (Netherlands: Martin Nijhoff).

³⁹⁰ (United Nations, 1948)

³⁹¹ Suresh, H., *All rights are Fundamental Rights*, Universal Law Publishing Company, 2010.

³⁹² Rawls, J. (1971). *A theory of justice*. --. Cambridge, Mass: Belknap Press of Harvard University Press.

³⁹³ Suresh, H., *All rights are Fundamental Rights*, Universal Law Publishing Company, 2010.

rights.³⁹⁴

After the adoption of this document, the UN General Assembly has adopted in this field over sixty conventions and declarations through which it has also taken into consideration the establishment of some specific mechanisms for the protection of those rights.³⁹⁵

The philosophy of the natural law also inspires the modern doctrine of human rights, this way transforming the philosophical idea of the universality of the natural law inherent to the human nature, into a public institution.³⁹⁶ Montesquieu and others have approached in a different manner the idea of the human rights considering that they remain valid whatever the historical, social and political circumstances. The theories of the 'social contract' (Rousseau), and of the separation of powers in state (Montesquieu and Locke), are expressions of the ideas of cohabitation in a society, of democratic organization of the moral life.³⁹⁷

People who are marginalized from the economic and political processes, will eventually be removed also from the process of spreading their conceptions concerning human rights. Despite Kant's efforts of defending common universal responsibility, of defending the needy ones from the economic difficulties, he entrusted, in the revolutionary spirit of his times, only active citizens—property owners, men—with the right to vote, exactly the opposite of the passive citizens, meaning men and women without properties. The question about who would fit as active citizen has produced debate and social rollover during and after the Enlightenment. Indigenous people from the European colonies, slaves from Africa, the people without properties, women, Hebrews and their defenders have also asked full rights under the dome of universalism.³⁹⁸

The relations between a philosophy of natural rights and their legality has been addressed by Locke, Montesquieu, as well as Rousseau; they were convinced that the life of people, in its natural state, is peaceful, violence and war being the products of the social life.

Man, gifted with intelligence and with free will, systematically violates the natural order which is established for him, because he is exposed to the ignorance and error, as well as all finite intelligences' and that he is exposed to a thousand passions: Once people are in the society, they lose the feeling of their weakness; the equality between them stops and the state of war begins. Each particular society comes to feel its force, which produces a state of war from one nation to another. Individuals, in each society, begin to feel their force; they try to turn in their advantage the main advantages of this society; which determine, between them, a state of war. These two ways of the state of war determine the establishment of laws among

³⁹⁴ Suresh, H., *All rights are Fundamental Rights*, Universal Law Publishing Company, 2010.

³⁹⁵ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, Univ. of Pennsylvania Press, Pennsylvania, 1999.

³⁹⁶ Ezell, Margaret, "John Locke's Images of Childhood: Early Eighteenth-Century Responses to 'Some Thoughts Concerning Childhood'", *Eighteenth-Century Studies* 17, 2 (1983-84), 139-155.

³⁹⁷ Id.

³⁹⁸ Charles Taylor, "Politics of Recognition," in *Multiculturalism*, ed. Amy Gutmann (Princeton, NJ, Princeton University Press, 1995), 41.

people.³⁹⁹

This idea is supported, on the basis of some different arguments, in modern writings, from Grotius to Kant.

The quintessence of the political lightening from the modern age was the unity between human rights, the separation of powers and democracy. The real efficiency of human rights manifests itself in justice, and then in the principle of the separation of powers. Because only then the sovereign is related to a law, he also can be related to human rights. But he is related only to the laws from the system of the separation of powers, there where the executive is imposed rules by the constitutional bodies and by the legislative ones and where the independent judges watch to the respect of the rights. (...) The development of human rights means the existence of a democratic system, the freedom of the people to elaborate its laws and to control the three powers of the state. The circle closes: the separation of powers and democracy result from the idea of human rights and end with it. These three elements: human rights, separation of powers and democracy represent an institutional unity of law. Their political reality is the condition of the respect of the unity and justice, of freedom and of human dignity. If one of these three elements is detached from the others, none of them could no longer exist.⁴⁰⁰

Therefore, we can affirm that fundamental rights are at the basis of democracy, and the democratic system promotes, in turn, fundamental rights. It is clear that the problem of human rights has become a subject of modern philosophy which is debated from different perspectives, but which is considered central for the understanding of what man is in the world that he creates for himself.

Whatever the philosophical debates, universal human rights legislation is a reality and can be seen as having transcended past and recent models of citizenship. This is not to say notions of human rights have not in part been inspired by such models, but is important to untangle the two and appreciate the distinction.

Arguments for the Distinction between Human Rights and Citizenship

It is important to draw the distinction between human rights as, on the one hand, a necessary component of citizenship and, on the other, the theoretical underpinning of citizenship. There is an important distinction between a more universalist approach and an approach where citizenship is defined in political terms. It is important to note that these terms of reference do not make the theoretical mistake of conflating universalist ethical understandings of the individual with political understandings of the individual.

I will consider the proposition that human rights should be a theoretical underpinning for citizenship for each of the categories of citizenship. I argue that it is logically incoherent to propose that human rights should be a theoretical underpinning for citizenship. This is the case regardless of how citizenship is conceptualised—whether morally, legally, in terms of

³⁹⁹ David Ingram, *Law: Key Concepts in Philosophy*, Continuum International Publishing Group, London, 2006, p. 47 and the following.

⁴⁰⁰ Martin Kriele, *Befreiung und politische Aufklärung, Plädoyer für die Würde des Menschen*, Freiburg 1980, p. 42.

identity or participation, or indeed even when conceptualised more universally as cosmopolitan citizenship. This is because, fundamentally, citizenship is always defined in terms of membership within a political community, in contrast to human rights, which are based on membership of common humanity, or in other words, an ethical community.

Furthermore, where citizenship is constructed as active and participatory, the conflation of human rights and citizenship may actually obstruct the empowerment and active participation of individual citizens. This is because human rights stress legal definitions of the individual in universal terms and do not substantively address or include issues relating to identity. As such, neglecting identity is hugely problematic in the context of active participatory citizenship, given that such forms of citizenship necessarily depend on its citizens being able to identify with the larger political community if they are to participate.

In the first category of conceptions of citizenship, where citizenship is constructed primarily in moral terms, it could be argued that a values approach to citizenship could be underpinned by human rights given the shared moral aspect. However, it must be remembered that a values approach to citizenship deals nevertheless with shared values within a political rather than an ethical community. Moreover, reaching shared values requires the notion of identification with the community, whereas human rights are based on universal membership of common humanity.

With regard to the second category of conceptions of citizenship, formulation of citizenship would suggest that human rights derive from the state, or that having human rights are a characteristic of belonging to a certain political community. This notion of human rights deriving from possessing nationality, however, is contradictory to the idea that human rights are accorded to all human beings based on their universal membership of common humanity. As such, the idea of universal human rights as a theoretical underpinning of citizenship is incoherent.

Citizenship conceptualized as active and participative requires an identification of individual citizens with their community. This focus on identity and culture is necessarily particularist as opposed to universalist, as in theories of liberalism and legal conceptions of citizenship. Furthermore, conceptions of citizenship that focus on participation and active involvement cannot, therefore, be underpinned by human rights, which are universalist, based on the notion of all human beings belonging to an ethical rather than a political community. The relationship is a complex one, however, as the converse could be argued: that active participation within a community may be important in promoting the practice of human rights.

Lastly, with regard to cosmopolitan conceptions of citizenship, whilst national identification is weakened, there is nevertheless identification with a political community as opposed to a universal community of all humanity, although this political community may not be at the national level. As such, I would argue that even in the case of more universally constructed

conceptions of citizenship, such as global citizenship, discourses on human rights and discourses on citizenship should not be treated as synonymous.

Section 2

Section 1 argued that human rights though a development of citizenship models are distinctively different from citizenship and should not be treated as synonymous. This section will describe how UN legislation has the potential to resolve issues in addressing disability and education. This legislation noticeably fills in the gap where the citizenship models have failed. Where notions of citizenship are influenced by medical models and are criticized for restrictively categorizing disabled people, which dismisses individuality and dignity, and which has rendered them second-class citizens based on their perceived irrationality, lack of mental capacity or physical disabilities.

This section, on the other hand, examines how UN human rights legislation accords all human beings equal rights and freedoms, implying that such rights are natural in virtue of being human. It goes on to examine the practical limitations of pre-2006 UN legislation in addressing the rights of disabled people, and finally introduces the CRPD and suggests it may be a positive step forward in the provision of human rights for the disabled. (Discussion of the CRPD is then taken up in more detail in the next chapter.)

Who can Possess Human Rights?

Even if there were agreement upon a foundation for human rights, there remains another fundamental question: who can possess human rights? One may simply assert that all humans hold all human rights; after all, human rights are said to be those benefits to which we are entitled simply by being human. But what is meant by being 'human' is vague since the life cycle of homo sapiens ranges from conception to death and decay. There is profound controversy over how and when a human acquires and then loses human rights between those two periods. Even before conception, sperm and eggs exist that contain human genetic material. One may decide easily that these are human cells but not 'human beings', because they contain incomplete sets of human genes. After conception, however, controversies arise about the status of the developing foetus. From a mass of undifferentiated cells, the embryo quickly grows into a recognizably human entity. Many distinguish foetuses from babies that have emerged from their mothers and say that separate human life only begins with birth'. This can be an arbitrary distinction since a very premature baby is at much the same stage of development whether inside or outside the womb; the differences center on how a baby receives nutrition and oxygen. One can specify an arbitrary point for the acquisition of rights, such as conception, neural development, viability, or emergence from the womb. But this approach is bound to erupt in controversy, because not everyone will agree on a given point. Abortion is such a divisive issue precisely because various groups hold different beliefs about when human life starts.

Alternatively, one can argue that there is some special quality of human life that provides a basis for possessing rights; when that quality is acquired, so are rights. This approach is favoured by many, since it allows for the distinction between humans and other animals. Human rights are rights particular to human beings, thus the basis of the claim to rights should be something that differentiates humans from other animals. With a sharing of an enormous proportion of genetic material between humans and primates, the distinction is usually drawn on the basis of some quality of human life not shared by other animals rather than physiological characteristics. Specifically human qualities are usually identified from the capacity for intellectual, moral, or spiritual development.

The difficulty with trying to assign rights on the basis of some quality of human life is that not all human beings may possess such an attribute for example some people with intellectual disabilities. Locke, Kant, Hume and Rawls⁴⁰¹ have articulated this argument, Douglas Husak has also written a poignant critique of the notion of *human* rights based on his objection that some human beings merely exist.⁴⁰² Some mentally disabled lack any basis for purposive agency; they are seemingly unaware of their surroundings, incapable of rationale thought, or unable to distinguish right from wrong. But, his most telling arguments arise from comatose patients, notably those with no known chance for recovery. Husak distinguishes between humans and persons, and he points out that some humans, such as the comatose, are non-persons. Persons are human beings with capacities beyond mere existence that produce a quality of life. Non-persons simply lack the qualities of life that one wishes either to protect or use as the key to acquiring rights. The distinction between humans and persons is often used to justify aborting foetuses, because the human foetus is not considered by many to be a person. In the end, Husak argues that the phenomena called human rights are really rights of persons: There are no *human* rights.⁴⁰³

This debate over the qualification of a human creature to possess human rights is fundamental to a number of topics particularly for disability. The rights of the mentally disabled may depend greatly upon what foundation one adopts for the possession of rights. Similarly, the existence of rights to life in abortion, infanticide, and euthanasia are directly related to what status one accords to undeveloped foetuses, mutant newborns, or terminally comatose adults.

If human rights are justified on some characteristics of the human species, can those rights be held by individual humans who lack these species traits? To answer this question we should start by distinguishing between possessing rights and exercising them. Thus a

⁴⁰¹ see chapter three of this thesis

⁴⁰² Douglas Husak, "Why There Are No Human Rights", (1984) 10 *Social Theory and Practice*, 125-141.

⁴⁰³ Husak, p.125.

disabled person may possess the full range of human rights, but be unable to exercise them, particularly rights of an intellectual nature. Others may find this distinction too convenient an answer and contest the very existence of rights that cannot be exercised by their holders.

Lack of United Nations Core Disability Treaties prior to 2006 for Disabled People

Since its formation after the Second World War,⁴⁰⁴ the United Nations has promulgated seven core legally enforceable human rights treaties.⁴⁰⁵ Each of these core laws implicitly protects persons with disabilities, but to varying degrees. To invoke these protections, disabled persons must either fall under a universal provision or possess a separately protected characteristic in addition to his or her disability. Up until one year after the second Warnock Report of 2005,⁴⁰⁶ no United Nations human rights treaty expressly applied to individuals on the basis of a disability-related characteristic.⁴⁰⁷ Similarly, disabled persons are not explicitly included in non-treaty United Nations instruments. For example, both the Charter of the United Nations and the Universal Declaration of Human Rights promote human rights, but neither expressly references disability.⁴⁰⁸

Two components of the International Bill of Human Rights,⁴⁰⁹ the International Covenant on Civil and Political Rights (ICCPR)⁴¹⁰ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR),⁴¹¹ are universal in scope.⁴¹² The same is true for the

⁴⁰⁴ Since the end of the Second World War there has been a movement to provide international recognition of human rights and effective protection against human rights violations. Such a movement gives human rights a global significance and provides a mechanism by which all states can agree universal standards on human rights so as to judge the legitimacy of each state's record in protecting such rights. This movement proceeds on the basis that domestic law cannot adequately safeguard an individual's basic rights, and that a general standard of rights needs to be agreed internationally and to be subject to some form of international policing. see

⁴⁰⁵ 13. Whether treaties are actually enforced, as well as the broader question of whether international law is "law," has long been the subject of academic debate, the resolution of which goes far beyond this Article. For now it bears noting that perhaps the most significant objection to the notion of enforceability is the observation that under international law States parties retain the ability to opt out of treaties, in whole or in part, as well as to reserve independent understandings of their application.

⁴⁰⁶ see table 1 on page 8 below

⁴⁰⁷ Similarly, disabled persons are not explicitly included in non-treaty United Nations instruments. For example, both the Charter of the United Nations and the Universal Declaration of Human Rights promote human rights, but neither expressly references disability. See, e.g., U.N. Charter art. 55, para C. (expressing an aspiration to promote "universal respect for, and observance of, 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 "all 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.") [hereinafter Universal Declaration].

⁴⁰⁸ See, e.g., U.N. Charter art. 55, para C. (expressing an aspiration to promote "universal respect for, and observance of, 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 "all 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.") [hereinafter Universal Declaration].

⁴⁰⁹ 15. See Office of the High Comm'r for Human Rights, *Fact Sheet No. 2 (Rev. 1): International Bill of Human Rights*, <http://www.unhcr.ch/html/menu6/2/fs2.htm> (the International Bill of Human Rights is a collection of international instruments, including the Universal Declaration, ICCPR, ICESCR, and two Optional Protocols).

⁴¹⁰ ICCPR, *supra* note 8.

⁴¹¹ ICESCR, *supra* note 9.

⁴¹² See, e.g., ICCPR, *supra* note 8, at pmb1. (averring that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"); ICESCR *supra* note 9, at art. 2, para. 2 (the rights enumerated in the ICESCR "will be exercised without discrimination of any kind as to race, colour . . . or other status").

Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).⁴¹³ Although disability is not specifically mentioned in any of these treaties, they technically include all human beings within their respective provinces.⁴¹⁴

In addition to these three universal treaties, the General Assembly has enacted four core law treaties protecting people based on specific identity characteristics unrelated to disability.⁴¹⁵ In chronological order, these are: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);⁴¹⁶ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);⁴¹⁷ the Convention on the Rights of the Child (CRC);⁴¹⁸ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW).⁴¹⁹ The CRC alone among these treaties contains a specific disability-related article; it requires that States parties recognize the rights of children with disabilities to enjoy full and decent lives and participate in their communities.⁴²⁰ However, the relative financial constraints of States parties tempers the obligation⁴²¹.

Moreover, the CRC does not mandate children with disabilities be treated or considered equal to children without disabilities.⁴²² Hence, except for the CRC's limited concern for

⁴¹³ . Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at 197, U.N. GAOR, 39th Sess., Annex, Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT].

⁴¹⁴ See generally Gerard Quinn, *The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework*, in Human Rights and Disabled Persons 69 (Theresia Degener & Yolán Koster-Dreese eds., 1995) [hereinafter Human Rights and Disabled Persons]; Philip Alston, *Disability and the International Covenant on Economic, Social, and Cultural Rights*, in Human Rights and Disabled Persons, *supra*, at 94; Manfred Nowak & Walter Suntinger, *The Right of Disabled People Not to be Subjected to Torture, Inhuman and Degrading Treatment or Punishment*, in Human Rights and Disabled Persons, *supra*, at 117.

⁴¹⁵ These provisions are a mixed blessing. On the positive side, they provide an additional avenue of protection for disabled persons experiencing "double discrimination" based on more than one identity characteristic. For example, a person may suffer prejudice as a result of being disabled and of Inuit heritage. On the negative side, they only protect individuals who encounter discrimination serially. Because disability is almost uniformly relegated to "other" status, disabled people's rights are frequently overlooked. One example of such disregard is the Declaration that proceeded from the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance that was convened in Durban, South Africa. See World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance, Aug. 31-Sept. 8, 2001, *Durban Declaration and Programme of Action*, U.N. Doc. No. A/CONF.189/12, available at <http://www.unhcr.ch/pdf/Durban.pdf>. Although the Declaration encourages the General Assembly to enact disability specific human rights protection, it does not include disability among the otherwise inclusive catalog of identity statuses it deemed to suffer discrimination. See *id.* at para. 180. More trenchantly, individuals whose rights are violated "solely" due to their disability identity receive no added protection.

⁴¹⁶ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), at 47, U.N. GAOR, Supp. No. 14, U.N. Doc. A/6014 (Dec. 12, 1965) [hereinafter ICERD]; see generally Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 Am. J. Int'l L. 283 (1985).

⁴¹⁷ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at 193, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 17, 1979) [hereinafter CEDAW].

⁴¹⁸ Convention on the Rights of the Child, G.A. Res. 44/25, at 166, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC].

⁴¹⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, at 261, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Dec. 18, 1990) [hereinafter ICPMW].

⁴²⁰ CRC, *supra* note 24, at art. 23, para. 1.

⁴²² See CRC, *supra* note 24, at art. 23, paras. 1-3 ("[T]he disabled child has effective access to and receives education, training . . . preparataion for employment and recreational opportunities in a manner conducive to the child's receiving the fullest possible social integration and individual development."). The equality of disabled children has, however, been emphasized by the United

disabled children, persons with disabilities were not yet a group with specific protection. In a 1993 report, a Special Rapporteur cautioned that in the absence of specific treaty protection, human rights abuses against the disabled would likely continue without redress.⁴²³ Unfortunately, this prediction has largely been borne out. In the decade following the report, seventeen disability related complaints have been asserted under core United Nations instruments. Of these claims, thirteen were declared inadmissible by their respective monitoring committees.⁴²⁴ The larger implication is that before 2006 six hundred million persons with disabilities worldwide had implied but not actual human rights protection. The Salamanca Statement on disability and education is an example of how this started to change.

UN Salamanca Statement and Framework for Action 1994 and Education for the Disabled

The Salamanca Statement was the first international document to cite the direct connection between education for children with special needs and human rights.⁴²⁵ It is a significant international framework on disability, education and development, and arose from the 1994 United Nations Education Science & Culture Organisation (UNESCO) World Conference on Special Needs Education: Access and Quality, held in Salamanca (henceforth known as the Salamanca Statement). At the time of its formation, less than one percent of the global population of children and young people with disability attended school in developing countries and the international community recognised the need to redress this inequality, particularly given the climate of the Education For All movement.⁴²⁶ The Salamanca Statement signified a change in the direction of international thinking about education for children with special educational needs. It affirmed the need for government commitment to provide education for people with special educational needs and advocated that the best way to do this is within existing regular education systems.⁴²⁷

The Salamanca Statement encouraged creative problem solving about educational

Nations Commission on Human Rights. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Rights of the Child*, para. 22, U.N. Doc. E/CN.4/RES/2001/75 (Apr. 25, 2001); U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Rights of the Child*, para. 29, U.N. Doc. E/CN.4/RES/2000/85 (Apr. 27, 2000); see generally Thomas Hammarberg, *The Rights of Disabled Children—The UN Convention on the Rights of the Child*, in Human Rights and Disabled Persons, *supra* note 20, at 147.

⁴²³ See Leandro Despouy, Report on Human Rights and Disabled Persons paras. 280-81(1993), available at <http://www.un.org/esa/socdev/enable/dispaperdes0.htm> (noting that “persons with disabilities are going to find themselves in a legal disadvantage in relation to other vulnerable groups” because “unlike the other vulnerable groups, they do not have an international control body to provide them with particular and specific protection”).

⁴²⁴ The ICESCR, the CRC, and the ICPRAMW do not allow the assertion of individual complaints. Individual complaints can be brought under the ICCPR, the CAT, the CEDAW, or the ICERD. The website maintained by the office of the High Commissioner for Human Rights contains detailed information on the operation of the United Nations human rights treaty bodies. See Office of the U.N. High Comm'r for Human Rights, <http://www.unhchr.ch> (last visited Sept. 26, 2006). The decisions of the three relevant monitoring committees can be accessed through the Netherlands Institute of Human Rights web page. See Neth. Inst. of Human Rights, *Welcome to the Sim Documentation Site*, <http://sim.law.uu.nl/sim/Dochohome.nsf> (under case law) (last visited Oct. 6, 2006).

⁴²⁵ (Eklindh & Brule-Balescut, 2005) Price et al., 1999; UNESCO, 1994).

⁴²⁶ (Price et al., 1999).

⁴²⁷ (Eklindh & Brule-Balescut, 2005; Price et al., 1999; UNESCO, 1994)

difficulties and anticipated that the creative solutions could ultimately benefit all of the students in the form of a richer learning environment based on child-centered learning.⁴²⁸ It put respect for differences and diversity at the center of debates about education, society and culture and proposed that schools implement philosophical, practical and strategic changes.⁴²⁹ The practices and philosophies recommended by the Salamanca Statement are known as an Inclusive Education philosophy.⁴³⁰

The Salamanca Statement also called on the international funding agencies including the World Bank and UN agencies like UNICEF, UNESCO and the United Nations Development Program to endorse the approach of inclusive schooling and to support the development of special needs education as an integral part of all education programmes.' It called for the international community to promote, plan, finance and monitor progress on inclusive education within their mandates for education.

Yet this call to action is nowhere to be found in the global agenda for education that did get established a few years later with the Dakar Framework for Education for All and the Millennium Development Goal for universal primary education.

Problems with the Salamanca Statement

Since the Salamanca Statement education has come to be seen as a global human right that states must provide, and most now support the norm of universal educational access and equal opportunity, even given individual variations in ability.⁴³¹ Responding to these principles, in the last decade of the twentieth century, many states and nongovernmental organizations around the world have committed themselves to education for all' and to inclusive education.⁴³² In 1994, the UK Government signed up to the Salamanca Statement, drawn up by UNESCO, which called upon all governments to:

adopt as a matter of law or policy the principle of inclusive education, enrolling all children in regular schools, unless there are compelling reasons for doing otherwise.⁴³³

In the 1997 Green Paper *Excellence For All Children Meeting Special Educational Needs*, the New Labour Government gave public support to the UN statement on Special Needs Education 1994 which calls on governments to adopt the principle of inclusive education' and implies a progressive extension of the capacity of mainstream schools to provide for

⁴²⁸ (Eklinth & Brule-Balescut, 2005 Price et al., 1999; UNESCO, 1994))

⁴²⁹ (Eklinth & Brule-Balescut, 2005 Price et al., 1999; UNESCO, 1994)).

⁴³⁰ United Nations Educational, Scientific and Cultural Organization (UNESCO), *The Salamanca Statement and Framework for Action on Special Needs Education*(Paris: UNESCO, 1994),

⁴³¹ (Meyer 2001).

⁴³² (e.g., UNESCO 1994).

⁴³³ (UNESCO, 1994, cited in DfES, 2001, p. 1)

children with a wide range of needs.⁴³⁴ By doing so, it aligned the English education system for the first time with the international movement towards inclusive education.

In the context of children and adolescents with special needs, *The Salamanca Statement*, produced under the leadership of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1994, remains a cornerstone document in the discourse of inclusion. The first section of the *Statement* is an expression of identity: a definition of the text's speaking position, of collective expertise, global scope, commitments to education, and wishes for the future life of its recommendations: authority, consensus, commitment, and hope are embedded in the text as operational identities, as the speaking subject of the text. The second section outlines what the signatories believe and proclaim,⁴³⁵ namely that

1. Every child has a fundamental right to education, and must be given the opportunity to achieve and maintain an acceptable level of learning;
2. Every child has unique characteristics, interests, abilities and learning needs;
3. Education systems should be designed and educational programmes implemented to take into account the wide diversity of those characteristics and needs;
4. Those with special educational needs must have access to regular schools which should accommodate them within a child-centred pedagogy capable of meeting these needs;
5. Regular schools with this inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all; moreover, they provide an effective education to the majority of children and improve the efficiency and ultimately the cost-effectiveness of the entire education system.⁴³⁵

This section of *The Salamanca Statement* is particularly of interest because it is self-conscious of itself *as discourse*: that the signatories believe and proclaim suggests that they both harbour a consensus-based knowledge and publicly put this knowledge forward as truth. Their position is authoritative; their beliefs and proclamations set the terms of the discursive formation of inclusive special needs education. These beliefs and proclamations take their initial premise from the first point, that every child has a fundamental right to education.⁴³⁶ Each of the points that follow does so based on this initial invocation of rights: if every child possesses such rights, they *must* be met appropriately.

⁴³⁴ GREEN PAPER

⁴³⁵ ⁴³⁵ United Nations Educational, Scientific and Cultural Organization (UNESCO), *The Salamanca Statement and Framework for Action on Special Needs Education*(Paris: UNESCO, 1994),

⁴³⁶ ⁴³⁶ United Nations Educational, Scientific and Cultural Organization (UNESCO), *The Salamanca Statement and Framework for Action on Special Needs Education*(Paris: UNESCO, 1994),

Children are figured not just as those who possess rights, but as unique.⁴³⁷ Education systems are understood as requiring design, program implementation, and an understanding of diversity. Within the multiplicity suggested by wide diversity⁴³⁸ are children with special educational needs. These children must have their needs met both through access⁴³⁹ to a particular setting (regular schools) and accommodation⁴⁴⁰ via a capable pedagogy⁴⁴¹ that is child-centred.⁴⁴² Finally, the *Statement* makes a series of statements about inclusive education: it will produce social justice, provide appropriate education for all, and be cost-effective. The discourse of inclusive special needs education can be summarized thusly: it is grounded in rights; characterized by diversity; demanding of systemic change, access, and accommodation; and will create fiscal efficiency and justice.

The impact and import of the *Salamanca Statement* should not be lessened by the discussion that comes next—the *Statement* itself set a global standard, changed the terms of debate, and provided cogent ways forward for special needs education, while simultaneously highlighting its starring role in social justice and fiscal responsibility. But the *Statement* itself can only provide so much discursive accommodation. What, for example, exactly is an inclusive orientation?⁴⁴³ And what is an inclusive society?⁴⁴⁴ The first is relatively easy to answer. The *Statement*'s companion document, the *Framework for Action on Special Needs Education* states that an inclusive school necessarily focuses on the following: curriculum, buildings, school organization, pedagogy, assessment, staffing, school ethos and extra-curricular activities.⁴⁴⁵ But the term inclusive society⁴⁴⁶ remains undefined in the document—it is used twice, and, on both occasions, special needs education is figured as *producing an inclusive society*.⁴⁴⁷ And it is on exactly these grounds that inclusive education has been robustly critiqued: as a discourse, with attendant policies, legislation, funding models, and practices, it is seen to fail in adequately addressing the social basis of inequality.

The *Salamanca Statement* suggests that inclusive education represents the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all.⁴⁴⁸ First of all, this seems to be a rather heavy load for the education system to carry, a weighty responsibility. And although the *Statement* makes provisions for national-based programs to eradicate discriminatory attitudes, this is figured as a small piece of the puzzle (falling under the rubric of School

⁴³⁷ 17 UNESCO, 21.

⁴³⁸ UNESCO, ix, 6-7.

⁴³⁹ UNESCO, ix.

⁴⁴⁰ UNESCO, 21.

⁴⁴¹ Qtd. in Derrick Armstrong, "Reinventing Inclusion": New Labour and the cultural politics of special education," *Oxford Review of Education* 31.1 (2005), 136. See Roger Slee, "Inclusion in Practice": does

⁴³⁸ ⁴³⁸ United Nations Educational, Scientific and Cultural Organization (UNESCO), *The Salamanca Statement and Framework for Action on Special Needs Education* (Paris: UNESCO, 1994),

⁴³⁹ ⁴³⁹ United Nations Educational, Scientific and Cultural Organization (UNESCO), *The Salamanca Statement and Framework for Action on Special Needs Education* (Paris: UNESCO, 1994),

Factors'),⁴⁴⁰ and, in any case, locates discrimination in attitudes' rather than social forces. In the view of Derrick Armstrong, inclusive education for children and adolescents with special needs continues to participate in a humanitarian discourse that has what Roger Slee calls a deep epistemological attachment to the view that special educational needs are produced by the impaired pathology of the child.^{441 442}

Inclusive education is a philosophy which requires commitment and deliberate action to meet its goals.⁴⁴³ Two critiques of the movement are given here. The first is that although the international community acknowledges inclusive education as the way to achieving the fullest educational objectives for children with disability, educational practice frequently belies the rhetoric of equality of opportunity it purports to support.⁴⁴⁴ Legislature, policies, conceptual changes and practical educational changes are all needed to move towards inclusive education and there are often gaps between policy and practice.⁴⁴⁵ In response to this critique, Wong et al reminds that anti-discrimination law tends to precede public attitudinal change rather than respond to it.⁴⁴⁶

The second critique discussed here is the fear that this will place further strain on the workload of teachers, thereby weakening the education system, and holding back the potential academic success of some students. Broadening teacher training in catering for diverse populations is an important consideration when looking at educational reforms.⁴⁴⁷ However, like Vygotsky,⁴⁴⁸ Florian believes that teachers need not learn any new inclusive pedagogy, but rather can learn how to include all children into existing education pedagogies.⁴⁴⁹ Furthermore, there is strong anecdotal evidence that the benefits of inclusive education practices (such as flexible teaching styles, and the ability to individualise learning where appropriate to meet the students' level of ability) are accessed by the wider school population.⁴⁵⁰

^{440 440} United Nations Educational, Scientific and Cultural Organization (UNESCO), *The Salamanca Statement and Framework for Action on Special Needs Education*(Paris: UNESCO, 1994),

⁴⁴¹ 22 Armstrong, 140, 143. 23 Armstrong, 136. 24 Armstrong, 144.25 Rosemarie Garland, *Extraordinary Bodies: Figuring Disability in American Culture* (New York: Columbia University Press, 1997), 6.

⁴⁴² Slee 'In practice make perfect?' *Educational Review* 53.2 (2001).

⁴⁴³ (UNESCO, 2009).

⁴⁴⁴ (Smith, 2004; Wong et. al, 1999).

⁴⁴⁵ (Eklindh & Brule-Balescut, 2005 Price et al., 1999; UNESCO, 1994)

⁴⁴⁶ see Wertheimer, A. (1997) *Inclusive education: a framework for change. National and international perspectives*. Leicester: Centre for Studies on Inclusive Education.

⁴⁴⁷ Hardman & Nagle, 2004, Tomlinson, S (1982) *A sociology of special education*. London: Routledge and Kegan Paul.

⁴⁴⁸ Read, J. (2004) Fit for what? Special education in London, *History of education*, 33(3) 283–298.

⁴⁴⁹ 1999

⁴⁵⁰ AusAID, 2008; UNESCO, n.d.

Additional Problems: Lack of Legal Enforcement of United Nations Declarations and Resolutions „Emollient Laws“ Referencing Disability

In contrast to UN core law treaties which do not enumerate specific disability protections, a number of emollient laws expressly provide for disabled individuals.⁴⁵¹ These include General Assembly designations of the International Year of the Disabled in 1981,⁴⁵² and the International Decade of Disabled Persons from 1982-1991.⁴⁵³ The United Nations has also passed resolutions such as the Declaration on the Rights of Mentally Retarded Persons,⁴⁵⁴ and the Declaration on the Rights of Disabled Persons.⁴⁵⁵ Additionally, the General Assembly adopted a World Programme of Action Concerning Disabled Persons (WPA) to encourage the development of national programs directed at achieving equality for people with disabilities.⁴⁵⁶

Most significant among the emollient laws are the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules),⁴⁵⁷ which are monitored by a Special Rapporteur.⁴⁵⁸ In education the Salamanca statement was the most notable⁴⁵⁹. As previously discussed, one of the most significant frameworks with regard to disability and education is the Salamanca Statement. At the time of its formation, less than one percent of

⁴⁵¹ An overview of the basic documentation is maintained by a special unit of the Division for Social Policy and Development from the United Nations Department of Economic and Social Affairs. See United Nations Enable Webpage, www.un.org/esa/socdev/enable.

⁴⁵² 31. International Year of Disabled Persons, G.A. Res. 36/77, at 176, U.N. GAOR, 36th Sess., Supp. No. 77, U.N. Doc. A/RES/36/77 (Dec. 8, 1981).

⁴⁵³ Implementation of the World Programme of Action Concerning Disabled Persons, G.A. Res. 37/53, at 186-87, para. 11, U.N. GAOR, 37th Sess., Supp. No. 53, U.N. Doc. A/RES/37/53 (Dec. 3, 1982).

⁴⁵⁴ Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856 (XXVI), at 93, U.N. GAOR, Supp. No. 29, U.N. Doc. A/8429 (Dec. 20, 1971).

⁴⁵⁵ 34. Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), at 88, U.N. GAOR, Supp. No. 34, U.N. Doc. A/10034 (Dec. 9, 1975).

⁴⁵⁶ World Programme of Action Concerning Disabled Persons, G.A. Res. 37/52, at 185, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/RES/37/52 (Dec. 3, 1982) [hereinafter World Programme].

⁴⁵⁷ Standard Rules on the Equalization of Opportunities for Persons With Disabilities, G.A. Res. 48/96, at 202, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/RES/48/96 (Dec. 20, 1993) [hereinafter Standard Rules].

⁴⁵⁸ The first Special Rapporteur for Disability, Bengt Lindqvist of Sweden, was appointed in 1994, and had his commission renewed in 1997 and in 2000. See United Nations Enable, *The Special Rapporteur on Disability of the Commission for Social Development*, <http://www.un.org/esa/socdev/enable/rapporteur.htm> (last visited Oct. 6, 2006). The Special Rapporteur for Disability is Sheikha Hissa Al Thani of Qatar. *Id.* For an insider's perspective on the role of the Special Rapporteur, see Bengt Lindqvist, *Standard Rules in the Disability Field—A New United Nations Instrument*, in *Human Rights and Disabled Persons*, *supra* note 20, at 63.

⁴⁵⁹ One of the most significant frameworks with regard to disability and education is the Salamanca Statement. The Salamanca Statement and Framework for Action 1994 is a significant international framework on disability, education and development arose from the 1994 United Nations Education Science & Culture Organisation (UNESCO) World Conference on Special Needs Education: Access and Quality, held in Salamanca (henceforth known as the Salamanca Statement). The Salamanca Statement was the first international document to cite the direct connection between education for children with special needs and human rights (Eklindh & Brule-Balescut, 2005). At the time of its formation, less than one per cent of the global population of children and young people with disability attended school in developing countries and the international community recognised the need to redress this inequality, particularly given the climate of the Education For All movement see Price et al., 1999. The Salamanca Statement signified a change in the direction of international thinking about education for children with special educational needs. It affirmed the need for government commitment to provide education for people with special educational needs and advocated that the best way to do this is within existing regular education systems, see also Eklindh & Brule-Balescut, 2005; Price et al., 1999; UNESCO, 1994. The Salamanca Statement encouraged creative problem solving about educational difficulties and anticipated that the creative solutions could ultimately benefit all of the students in the form of a richer learning environment based on child-centred learning (Eklindh & Brule-Balescut, 2005). It put respect for differences and diversity at the centre of debates about education, society and culture and proposed that schools implement philosophical, practical and strategic changes see Eklindh & Brule-Balescut, 2005. The practices and philosophies recommended by the Salamanca Statement are known as an Inclusive Education philosophy.

the global population of children and young people with disability attended school in developing countries and the international community recognised the need to redress this inequality.⁴⁶⁰ Although the Salamanca Statement signified a change in the direction of international thinking about education for children with special educational needs and affirmed the need for government commitment to provide education for people with special educational needs and advocated that the best way to do this is within existing regular education systems,⁴⁶¹ it was not legally binding. The drawback to all these emollient laws is that, as resolutions, they lack legally binding power.⁴⁶²

New Hope? The CRPD

Due to the difficulties in drafting suitable legislation and in enforcement, the Ad Hoc Committee for what became known as the CRPD realized that specific legislation addressing disabled people's needs worldwide was required. They rightly saw that international human rights legislation prior to 2006 contains numerous limitations which do not adequately address the needs of disabled people. The drafting of the 2006 UN CRPD for full inclusion of all kinds of disabled people as citizens, including the intellectually disabled, brought hope that this objective full and equal inclusivity was now gaining international momentum.

How the 2006 CRPD Enhances The Preceding UN Conventions

Acting on previous proposals to address the lack of specific human rights protection for disabled persons,⁴⁶³ in December 2001 the General Assembly established an Ad Hoc Committee to consider enacting a disability-based human rights instrument.⁴⁶⁴ The Ad Hoc Committee in turn authorized a working group to draw up a human rights treaty proposal.⁴⁶⁵ On January 16, 2004, the working group issued 'Draft Articles'; on August 25, 2006, the last day of its eighth session negotiating and amending the proposed treaty, the Ad Hoc

⁴⁶⁰ see Price et al., 1999.

⁴⁶¹ see also Eklindh & Brule-Balescut, 2005; Price et al., 1999; UNESCO, 1994.

⁴⁶² See, e.g., The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS), U.N.C.H.R. Res. 1997/33, U.N. ESCOR, 53rd Sess., U.N. Doc.

E/CN.4/1997/150 (Apr. 11, 1997); The Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care, G.A. Res. 46/119, at 188, U.N. GAOR, 46th Sess., Supp. No. 49, U.N. Doc. A/46/49 (Dec. 17, 1991).

⁴⁶³ Notably, in 1987, Italy proffered a convention draft during the forty-second session of the General Assembly. See U.N. GAOR, 42d Sess., 16th mtg., U.N. Doc. A/C.3/42/SR.16 (Oct. 19, 1987). Sweden did the same two years later at the General Assembly's forty-fourth session. See U.N. GAOR, 44th Sess., 16th mtg., U.N. Doc. A/C.3/44/SR.16 (Oct. 24, 1989).

⁴⁶⁴ Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, G.A. Res. 56/168, U.N. GAOR, 56th Sess., Supp. No. 168, U.N. Doc. A/RES/56/168 (Dec. 19, 2001). A detailed description of the political process behind the United Nations decision to go forward with a disability human rights convention is set forth in the (United States) National Council on Disability (NCD), Newsroom, *UN Disability Convention—Topics at a Glance: History of the Process*, http://www.ncd.gov/newsroom/publications/2003/history_process.htm.

⁴⁶⁵ Ad Hoc Comm. on a Comprehensive and Integral International Convention on the Prot. & Promotion of the Rights & Dignity of Pers. with Disabilities, *Report of the Working Group to the Ad Hoc Committee*, para. 1, U.N. Doc. A/AC.265/2004/WG.1 (Jan. 27, 2004). The working group included twelve nongovernmental organizations (-NGOs"). See *id.* at para. 2. The inclusion of NGOs at this stage was unprecedented in the normal course of treaty development at the United Nations, and can be interpreted as acquiescence to NGOs' assertion of "nothing about us without us." Nonetheless, a countersignal was also sent to the disability community by locating the working group in New York—the location of United Nations expertise on soft laws—rather than in Geneva, where core human rights treaties are deliberated.

Committee adopted the revised Draft Articles.⁴⁶⁶ The Draft Articles reaffirm the seven core treaties⁴⁶⁷ and operationalize their content. In the pertinent part, the Articles state their purpose as being to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities,⁴⁶⁸ and enunciate essential principles guaranteeing disabled individuals individual autonomy and independence,⁴⁶⁹ full participation,⁴⁷⁰ and inherent dignity and worth.⁴⁶⁹ Thus the Draft Articles include both first- and second-generation rights,⁴⁷⁰ and expressly call attention to their indivisibility.⁴⁷¹ By way of enforcement, the proposed instrument mandates collecting statistics and submitting reports to domestic monitoring bodies,⁴⁷² developing national policies for disabled citizens,⁴⁷³ generally promoting positive attitudes toward persons with disabilities,⁴⁷⁴ and establishing a treaty body similar to those of the existing seven core conventions.⁴⁷⁵ Unfortunately, the Draft Articles left several central terms, including disability⁴⁷⁶ and accessibility,⁴⁷⁷ conspicuously undefined⁴⁷⁶ because of political motivations.⁴⁷⁷

However, the Draft Articles do expansively define discrimination⁴⁷⁸ as any distinction, exclusion or restriction⁴⁷⁸ that affects the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms.⁴⁷⁸ The Draft Articles, and the definitions included therein, indicate a significant shift in how the international community

⁴⁶⁶ See Ad Hoc Comm. on a Comprehensive and Integral International Convention on the Prot. & Promotion of the Rights & Dignity of Pers. with Disabilities, *Draft Convention on the Rights of Persons with Disabilities and Draft Optional Protocol* (2006), available at <http://www.un.org/esa/socdev/enable/rights/ahc8adart.htm> [hereinafter *Draft Articles*].

⁴⁶⁷ *Id.* at pmb., para. d.

⁴⁶⁸ *Id.* at Article 1. The Draft Articles state this goal is to be brought about through the use of “international cooperation.” *Id.* at para. j; see also CRC, *supra* note 24, at annex, pmb. (“[r]ecognizing the importance of international co-operation”); CEDAW, *supra* note 23, at 194 (“[a]ffirming that the strengthening of . . . mutual cooperation among all States” is necessary for effectuation).

⁴⁶⁹ *Draft Articles*, *supra* note 42, at pmb. (l), (k), (a).

⁴⁷⁰ Among the first- and second-generation rights enumerated are: rights to life, equality, expression, privacy, education, employment, health, habilitation and rehabilitation, social benefits, political and social participation, access to public venues, mobility independence, recreation, as well as freedom from discrimination, torture and abuse. *Id.* at arts. 10, 12, 21, 22, 24, 27, 25, 26, 28, 29, 30, 9, 18, 30, 15-16. For a discussion of how these rights intersect and are harmonious with the capabilities approach, see *infra* Part III.B

⁴⁷¹ 47. *Draft Articles*, *supra* note 42, at pmb., para. c (“Reaffirming the universality, indivisibility and interdependence of all human rights and fundamental freedoms . . .”) (emphasis omitted).

⁴⁷² See *id.* at art. 31 (“States parties undertake to collect appropriate information, including statistical and research data.”); *id.* at art. 33 (States parties are responsible for establishing systems for monitoring implementation).

⁴⁷³ See *id.* at art. 4, para. B; art. 33.

⁴⁷⁴ See *id.* at art. 8. These measures include instigating “public awareness campaigns,” mainstreaming public education, and “encouraging” positive images of the disabled in the mass media. *Id.* at art. 8, para. 2 (a)-(c).

⁴⁷⁵ *Draft Articles*, *supra* note 42, at art. 34.

⁴⁷⁶ See *id.* at art. 2 (definitions).

⁴⁷⁷ Specifically, to secure broad support in the General Assembly, several of the Working Group members believed these definitions should be purposely left vague so that States parties could interpret them according to their own legal and social cultures. Put another way, there was strong feeling among the participating government bodies that human rights enforcement is chiefly a local issue. As related in the NCD newsroom, the United States took an even more removed position, asserting that the matter of disability-related rights, in any form, was a “largely domestic mission” that individual states ought to pursue on their own initiatives. See Nat’l Council on Disability (NCD) Newsroom, *supra* note 40 (quoting Ralph Boyd, former U.S. Assistant Attorney General for Civil Rights). For that reason, the United States rarely participated in the convention process and does not intend to ratify any resultant instrument. See *id.* (U.S. would “participate in order to share our experiences . . . [but] not with the expectation that we [the U.S.] will become party to any resulting legal instrument.”).

⁴⁷⁸ See *Draft Articles*, *supra* note 42, at art. 2.

views human rights, suggesting a willingness to rethink the sparse human rights protections specifically provided to persons with disabilities.⁴⁷⁹

The Convention was drafted by an international committee with differing approaches to disability, so the language does not reflect the model the UK government would prefer. The full title of the convention is the UN Convention on the Rights of Persons with Disabilities, but within the UK it is often called the UN Convention on the Rights of Disabled People thus reflecting a social model rather than a medical model of disability.

The Convention of the Rights of Persons with Disability (CRPD) is the first convention which explicitly accords all human rights to people with disability. The CRPD is the most recent United Nations convention; its development started in 2001, it was adopted in 2006 and came into force on 3rd May 2008.⁴⁸⁰ It is a stronger document legally than the Universal Declaration of Human Rights, in that governments have a duty to ratify the CRPD. The CRPD has been signed by 137 countries and ratified by 80⁴⁸¹ and in doing so governments are signed up to implementing it in law and practice. The purpose of the convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disability and to promote respect for their inherent dignity' (Article 1).

The main aims of the CPRD are to ensure that:

Persons with disability and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disability⁴⁸²

And

To make a significant contribution to redress the profound social disadvantage of persons with disability and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries.⁴⁸³

The obligations of the State outlined in the Convention include: developing appropriate legislation to address disability issues as human rights issues; raising public awareness; providing access to the physical public environment; not excluding its citizens from the general education system or highest standard of health care; providing adequate living standards; providing social protection; and allowing persons with disability to participate in

⁴⁷⁹ I return to this in more detail in chapter eight of this thesis.

⁴⁸⁰ (UN, 2008). Woodhouse, Barbara Bennett, Johnson, Kathryn A., *The United Nations Convention on The Rights of the Child: Empowering Parents to Protect Their Children's Rights*, in vol. Martha Fineman, Karen Worthington (edit.), *What Is Right for Children?: The Competing Paradigms of Religion and Human Rights*, Ashgate Publishing, Burlington, 2009.

⁴⁸¹ Turner, Bryan S., *Vulnerability And Human Rights*, The Pennsylvania State Univ. Press, Pennsylvania, 2006.

⁴⁸² (Preamble, section x.)

⁴⁸³ (Preamble, section y.)

political, public, cultural, and recreational life.⁴⁸⁴

Through becoming signatories to the CRPD, states acknowledge the right to education that people with disability have and their own obligation in providing an inclusive education system. The provision of education to children with disability alongside their peers is necessary in order to fully realise their abilities, talents, creativity and personality, out of respect for diversity, and for the greater recognition of human rights. Article 7 of the CRPD focuses on children with disability and states that they must be supported to enjoy their full human rights and fundamental freedoms on an even basis with other children. It upholds acting only in the best interests of the child and advocates for child participation in its support of giving children with disability (as with all children) the right and means to express their views freely on all matters concerning them bearing in mind the child's age and maturity, and to have those views considered.

There are no new rights in the CRPD, but the idea of redressing the social disadvantage faced by people with disability introduces the idea of providing extra support (positive discrimination) in enabling people with disability to access the same rights as everyone else. The CRPD is the first convention in the international human rights framework which includes reference to international cooperation (Article 32) thereby obligating duty bearers at a trans-national level.⁴⁸⁵

This again supports the notion that disabled people's human rights are natural, rather than being derived from the state. In terms of practice, however, as opposed to theory, clearly the possession and exercise of human rights cannot occur outside of a political community. Yet the state is obliged to provide, protect and promote participation for all, regardless of formal citizenship status.

Notwithstanding the thorny issue of whether disabled people are citizens or citizens-in-waiting there is a theoretical confusion regarding whether these CRPD rights refer only to human rights to be accorded to all individuals regardless of citizenship status. This confusion arises because of the inclusion of participation or civic rights. Participation or civic rights are a theoretically different kind of right to other rights documented in the CRPD, such as the right to life (Article 6), the right to freedom of religion (Article 14) or the right to education (Article 28).⁴⁸⁶ Civic rights, in contrast to human rights, are based on membership of a political community rather than membership of common humanity. Due to the relevance of the UN CRPD to the central argument of this thesis, the next chapter analyses the CRPD in more detail.

⁴⁸⁴ (UN, 2006). United Nations. (2006). Convention on the Rights of Persons with Disabilities. Retrieved May 16, 2009, from <http://www2.ohchr.org/english/law/disabilities-convention.htm>

⁴⁸⁵ (Katsui, 2008). Katz, 1(1981) *Stigma: a social-psychological analysis*. New Jersey: Erlbaum.p.30

⁴⁸⁶ (United Nations, 1989). **United Nations** (1989) *United Nations Convention on the Rights of the Child*. Geneva: Office of the High Commissioner for Human Rights.

Conclusion

I have proposed that human rights cannot logically be a theoretical underpinning for citizenship, regardless of how citizenship may be conceptualized. Whilst it is important to acknowledge the important role of human rights within the practice of active citizenship and to recognize that the practice of human rights occurs within a political community, it is problematic to conflate the two concepts. This is because human rights discourses are located within a universalist dialogue, in contrast to citizenship, which is located within a more specific discourse. Underpinning human rights is the notion of common humanity, based on ethical conceptualizations of the individual. In contrast, citizenship rights are underpinned by their relation to a political community, based on political conceptualizations of the individual. Human rights are conceptually distinct from citizenship rights, and the conflating of human rights with citizenship not only is conceptually incoherent but may actually obstruct the empowerment of disabled people.

Furthermore the omission of specific references to disability within key international initiatives based on the international human rights framework such as the Millennium Development Goals and Education For All has been criticized. Even where specific references have been made—most notably in the 1994 Salamanca Statement—there remained problems regarding enforceability. The development of the CRPD is one response to that concern and this thesis now turns to a detailed analysis of the Convention.

Chapter Five

The Convention on the Rights Of Persons with Disabilities (CRPD)

On 13 December 2006, the General Assembly of the United Nations adopted the Convention on the Rights of Persons with Disabilities (CRPD) and an associated Optional Protocol. The formulation of the CRPD has been hailed as a great landmark in the struggle to reframe the needs and concerns of persons with disability in terms of human rights. The CRPD is regarded as having finally empowered the world's largest minority to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection. It is argued here that the CRPD and its optional protocol offer a way forward for disabled people. The previous chapter argued that the UN 2006 CRPD could perhaps be a way forward for disabled people and that it could enhance models of citizenship and models of disability as they relate to disabled people.

This chapter interrogates the intellectual antecedents of the CRPD and its continuity and discontinuity with years of international law and its struggles with disability and human rights. It explores the text of the CRPD, critically examining its potential contribution to the realization of the rights of persons with disability. As discussed in previous chapters, models of disability, citizenship and human rights prior to the 2006 CPRD aimed to respect difference while promoting forms of equality. But they fell down precisely because they did not achieve this aim.

Introduction

On 13 December 2006, the General Assembly (GA) of the United Nations (UN) adopted the Convention on the Rights of Persons with Disabilities (CRPD) and an associated Optional Protocol (CRPD Optional Protocol).⁴⁸⁷ The UN CRPD applies human rights to a specific category of vulnerable persons, namely persons with disabilities. It reaffirms, reformulates, articulates and sometimes extends the rights of persons with disabilities.⁴⁸⁸ Along this the Convention calls for a shift of paradigm in the human rights scene setting: it demands a change from a medical and paternalistic approach to a social model of disability.

The CRPD is the first United Nations human rights treaty to be adopted in the twenty-first century⁴⁸⁹ and is reputed to be the most rapidly negotiated ever.⁴⁹⁰ The international community has also received the CRPD with unprecedented early enthusiasm. Eighty-one

⁴⁸⁷ The CRPD and the CRPD Optional Protocol were adopted during the 61st Session of the General Assembly: see GA Res. 61/611, 13 December 2006, A/61/611; 15 IHRR 255. See *Disabilities Handbook on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, (Geneva: OHCHR, 2007)

⁴⁸⁸ Mégret 2008

⁴⁸⁹ The International Convention on the Protection of All Persons from Enforced Disappearance 2006, GA Res. 61/177, 20 December 2006, A/61/488, was adopted by the GA one week later.

⁴⁹⁰ Official Statement of the UN Secretary-General, Secretary General Hails Adoption of Landmark Convention on Rights of People with Disabilities, 13 December 2006, SG/SM/ 10797, HR/4911, L/T/4400, available at: <http://www.un.org/News/Press/docs/2006/sgsm10797.doc.htm> [last accessed 13 November 2007].

states and the European Union⁴⁹¹ signed the CRPD at its opening ceremony on 30 March 2007: the highest number of opening signatures recorded for any human rights treaty.⁴⁹² Forty-four states also signed the Optional Protocol. As at the end of December 2007, 120 states had signed the CRPD and 67 states had signed its Optional Protocol.⁴⁹³ The CRPD will enter into force thirty days after the twentieth instrument of ratification is lodged with the Secretary-General, and its Optional Protocol will enter into force thirty days after its tenth is lodged, provided of course that the CRPD is already in force.⁴⁹⁴ As at the end of December 2007, fourteen instruments of ratification had been deposited in relation to the CRPD and seven instruments of ratification had been deposited in relation to its Optional Protocol.⁴⁹⁵

Although an in-depth explanation of the CRPD's background is beyond the scope of this thesis, it is important to provide a brief synopsis of the different aspects of this information to better understand how it proposes to move forward disabled peoples equal citizenship particularly with regards to the education of the disabled.

The Significance of the CRPD for Disabled People

In England disability discrimination law gives disabled people protection against most forms of discrimination. It also gives disabled people rights to reasonable adjustments, and it allows employers and service providers to treat disabled people more favorably than non-disabled people (for example reserving parking bays outside an office for disabled employees) since this is often necessary to deliver equality in practice. The Human Rights Act also provides important protection against discrimination in the enjoyment of the rights it sets out; such as not to be discriminated in the way the right to respect for family life is protected.

However the Convention is broader than current British discrimination law. The formulation of the CRPD has been hailed as a landmark in the struggle to reframe the needs and concerns of persons with disability in terms of human rights. The Secretary General of the United Nations, noting that the date of the CRPD's adoption fell, in the Western Christian calendar, on the day of St Lucy, patron saint of blindness and light, claimed that it heralded

⁴⁹¹ The CRPD and its Optional Protocol are the first UN human rights treaties to be signed by the European Union. Under Article 44 of the CRPD and Article 12 of its Optional Protocol the European Union may act on behalf of its members in relation to the treaties to the extent of its mandate, which must be the subject of a formal declaration, deposited with the Secretary-General. While the European Union may also ratify the treaties, only the direct ratifications of its member States count towards the treaties coming into force.

⁴⁹² Report of the Secretary-General as to the Status of the Convention on the Rights of Persons with Disabilities and the Optional Protocol, 14 August 2007, A/62/230, at para. 4, available at:

<http://www.ohchr.org/english/issues/disability/docs/A.62.230.en.doc> [last accessed 13 November 2007]. See also UN Press Release, Record number of countries sign UN treaty on disabilities on opening day, 30 March 2007, available at: <http://www.un.org/apps/news/story.asp?NewsID1422085&Cr14disab&Cr114> [last accessed 13 November 2007].

⁴⁹³ The United Nations maintains an up-to-date register of nations that have signed and ratified the treaties on its UN Enable website, available at: <http://www.un.org/disabilities/countries.asp?navid1412&pid14166> [last accessed 13 November 2007].

⁴⁹⁴ Article 45, CRPD and Article 13, CRPD Optional Protocol respectively.

⁴⁹⁵ Jamaica ratified the CRPD at its Signature Opening Ceremony on 30 March 2007. Since then the CRPD has been ratified by Panama, Hungary, Croatia, Gabon, Cuba and India. So far, Panama, Hungary and Croatia have ratified the Optional Protocol, see supra n. 6.

the dawn of a new eras an era in which disabled people will no longer have to endure the discriminatory practices and attitudes that have been permitted to prevail for all too long.⁴⁹⁶ The President of the European Disability Forum, speaking for the International Disability Caucus (IDC),⁴⁹⁷ returned to the metaphor of light emerging from darkness at the CRPD's Signature Opening Ceremony, quoting Bertolt Brecht:

Some there are who live in darkness While the others live in light We see those who live in daylight. Those in the darkness out of sight. This is a convention to bring those in darkness into light.⁴⁹⁸

Reiterating the claim made many times by national and non-government delegations in the course of CRPD negotiations, Ambassador MacKay, Chairman of the Ad Hoc Committee that developed the CRPD text, characterised the CRPD as embodying a paradigm shift' away from a social welfare response to disability to a rights-based approach.⁴⁹⁹ The UN High Commissioner for Human Rights has also characterised the CRPD as enshrining this paradigm shift in attitudes. She has conceptualised the CRPD as rejecting the view of persons with disabilities as objects of charity, medical treatment and social protection' and as affirming persons with disability as subjects of rights, able to claim those rights as active members of society.⁵⁰⁰

The paradigm shift also involves the perceived centrality of persons with disability and their representative organisations in the CRPD negotiation process. The CRPD negotiations are reputed to have involved the highest level of participation by representatives of civil society, overwhelmingly including persons with disability and disabled persons organizations, of any human rights convention in history.⁵⁰¹

Indeed, the formulation and future implementation of the CRPD has been framed repeatedly both by governmental and nongovernmental actors as a continuing partnership between the UN and disabled persons throughout the world, based on the principle of nothing about us

⁴⁹⁶ Statement of the UN Secretary-General, supra n. 3.

⁴⁹⁷ The International Disability Caucus was a coalition of international, regional and national non-government organisations (principally disabled peoples' organisations) accredited as observers to the GA Ad Hoc Committee responsible for the development of the CRPD. It claimed a participating membership of more than 70 such organisations.

⁴⁹⁸ UN Press Release, supra n. 5, quoting Yannis Vardakastanis for the International Disability Caucus. These words are an English translation of lines from 'The Ballad of Mack the Knife' from The Threepenny Opera, 1928.

⁴⁹⁹ Ambassador Don MacKay, Permanent Representative of New Zealand in the UN and Chair of the Ad-Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Commentary at a High-Level Dialogue held in association with the Signature Ceremony of the Convention, From Vision to Action: The Road to Implementation of the Convention on the Rights of Persons with Disabilities, New York, 30 March 2007, available at: <http://www.un.org/disabilities/default.asp?id1/4/160> [last accessed 13 November 2007].

⁵⁰⁰ Statement by Louise Arbour UN High Commissioner for Human Rights on the Ad Hoc Committee's adoption of the International Convention on the Rights of Persons with Disabilities, 5 December 2006

⁵⁰¹ Many officials made this point in addresses to the Opening for Signature Ceremony, and in the associated Press Conference. For example, Juan Manuel Gomez Robledo, Mexico's Under-Secretary for Multilateral Affairs and Human Rights, said 'the negotiating process had been unprecedented in the history of the United Nations because disability-rights activists and representatives of non-governmental organisations had participated in the talks on a nearly similar footing as Member States.' See UN Press Release, Press Conference by High Commissioner for Human Rights on Signing of Convention, 30 March 2007,

without us.⁵⁰² The CRPD is regarded as having finally empowered the world's largest minority⁵⁰³ to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection.⁵⁰⁴

Perhaps it is not unusual for new human rights treaties to be drenched in hyperbole and hopefulness. Even so, the claims made in relation to the CRPD seem extraordinary by any standard. In this chapter, we explore the text of the CRPD, critically examining its potential contribution to the realization of the rights of persons with disability and introduce a discussion by interrogating the intellectual antecedents of the CRPD and its continuity and discontinuity with years of international law and its struggles with disability and human rights. There is no reason to be pessimistic about the CRPD's prospects, the analysis in this chapter will begin to bring a level of realism and strategy to what will no doubt be an ongoing interpretive and implementation dialogue.

The Mandate for a Convention

The constituency for an international convention on the rights of persons with disability developed into a unique international political environment for a human rights treaty. In 2001, the Government of Mexico spearheaded another campaign to secure a mandate from the GA to develop a human rights convention in relation to persons with disability. This campaign was framed in terms of social development and used as its backdrop the Millennium Development Goals (MDGs)⁵⁰⁵ formulated by the UN in 2000, which aim, among other things, to halve global extreme poverty by 2015. Persons with disability were not identified as a specific target group for action in the MDGs, even though this group is significantly over-represented amongst the world's so-called poorest of the poor.⁵⁰⁶ The basic thrust of the Mexican campaign was that in light of this omission a specific human rights instrument was required to ensure that persons with disability were not left behind in global development efforts.

This framing of the human rights agenda for persons with disability in terms of social

⁵⁰² See, for example, Statement by Hon Ruth Dyson, Minister for Disability Issues, New Zealand Mission to the UN, for Formal Ceremony at the Signing of the Convention on the Rights of Persons with Disability, 30 March 2007: ‘Just as the Convention itself is the product of a remarkable partnership between governments and civil society, effective implementation will require a continuation of that partnership.’ The negotiating slogan ‘Nothing about us without us’ was adopted by the International Disability Caucus

⁵⁰³ The UN estimates that there are 650 million persons with disability in the world. This estimate is based on a population incidence of 10%. Reported population incidence varies widely from 51% (eg Yemen 0.5%) to more than 30% (eg Norway 33% in urban population and 39% in rural populations), see DISTAT, The United Nations Disability Statistics Database, Human Functioning and Disability,

⁵⁰⁴ See, for example, statements made by the High Commissioner for Human Rights, Louise Arbour, and the Permanent Representative of New Zealand and Chair of the Ad-Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Ambassador Don Mackay, at a Special Event on the Convention on Rights of Persons with Disabilities, convened by the UN Human Rights Council, 26 March 2007

⁵⁰⁵ See further Annan, UN Press Release, We the Peoples: The Role of the United Nations in the 21st Century, GA/9704, 3 April 2000,

⁵⁰⁶ The World Health Organisation (WHO) estimates that, of the 650 million persons with disability in the world, 80% live in the developing world: WHO, ‘Global Programming Note 2006- 2007: Call for Resource Mobilisation and Engagement Opportunities’, (2006) ‘Disability and Rehabilitation, available at: http://www.who.int/nmh/donorinfo/vip_promoting_access_health_care_rehabilitation_update.pdf.pdf [last accessed 13 November 2007].

development resulted in a groundswell of support from many of the world's developing and transitional economies, and even from countries that have not traditionally demonstrated a strong commitment to human rights.⁵⁰⁷ When the issue was raised for debate at the 56th Session of the GA in December 2001, a resolution to develop a human rights instrument in relation to persons with disability was adopted by consensus, without a vote being necessary.⁵⁰⁸ In the same resolution, the GA established an Ad Hoc Committee to take negotiations forward.⁵⁰⁹ The Ad Hoc Committee operated on an opt-in basis, allowing any member state with an interest to participate. The Economic and Social Council of the UN (not, interestingly, the Office of the High Commissioner for Human Rights) acted as the Committee's secretariat.⁵¹⁰ The Ad Hoc Committee met in eight two- or three-week sessions between its establishment in December 2001 and the adoption of the CRPD and its Optional Protocol in December 2006.

In its First and Second Sessions,⁵¹¹ the Ad Hoc Committee considered and resolved tensions around its mandate and programme of work. A number of delegations interpreted the mandate as limited to considering whether a convention was required. Australia argued that a convention was not required in this area, as it would lead to duplication and confusion in the application of human rights. It suggested that the issues would be better dealt with in another Optional Protocol to the ICCPR.⁵¹² The European Union also argued that it was open to the Committee to determine the type of instrument that ought to be recommended to the GA.⁵¹³ However most delegations considered this issue settled and took the view that the Ad Hoc Committee's mandate was to develop the text for a convention. This included Mexico, which provided a draft text for consideration at the opening of the First Session.⁵¹⁴

At the end of its Second Session, the Ad Hoc Committee established a Working Group to develop an initial draft text.⁵¹⁵ It met in January 2004 and developed a draft text for the substantive elements of the convention. This document is known as the Working Group Draft

⁵⁰⁷ Bolivia, Chile, Columbia, Congo, Costa Rica, Cuba, Democratic Republic of the Congo, Dominican Republic, Ecuador, El Salvador, Guatemala, Jamaica, Mexico, Morocco, Nicaragua, Panama, Philippines, Sierra Leone, South Africa and Uruguay sponsored the Resolution on a comprehensive and integral international Convention to promote and protect the rights and dignity of persons with disabilities, GA Res. 56/168, 19 December 2001, A/56/ 583/Add.2, ⁵⁰⁸ Ibid.

⁵⁰⁹ The term 'Ad Hoc' simply means a specific purpose, time-limited committee to distinguish it from the many standing committees that operate under the GA.

⁵¹⁰ This appears to be the result of the initial framing of the Convention in social development

⁵¹¹ The First Session was held in July/August 2002 and the Second Session in June 2003.

⁵¹² The Australian delegation made several interventions to this effect in the First and Second Sessions of the Ad Hoc Committee.

⁵¹³ Comprehensive and integral international Convention to promote and protect the rights and dignity of persons with disability: Position paper by the European Union, 2002, A/AC.265/ WP.2,

⁵¹⁴ Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities: Working paper by Mexico, 2002, A/AC.265/WP.1,

⁵¹⁵ Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 3 July 2003, A/58/118 and Corr. 1, Part IV (15) 1, available at: http://www.un.org/esa/socdev/enable/rights/a_58_118_e.htm [last accessed 13 November 2007]. The Working Group was made up of 27 UN member State representatives divided proportionally between each UN region, 12 representatives of disabled persons' organisations, and one representative of national human rights institutions.

Text.⁵¹⁶ Over its next six sessions the Ad Hoc Committee undertook an extensive First and Second Reading of the Working Group Draft Text.⁵¹⁷ In October 2005, following the Sixth Session, the Chair of the Committee released a text that synthesized the proposals, known as the Chair's Draft Text, along with a detailed letter of commentary. This text then became the basis for negotiations from the Seventh Session.⁵¹⁸

In the course of the Seventh Session, the Chair also released a draft proposal for the convention's international monitoring framework.⁵¹⁹ The proposed international monitoring framework was one of the most challenging areas of negotiation. Some delegations strongly opposed the proposal to establish a new treaty body and separate monitoring framework for the convention on the basis that this was inconsistent with current treaty-body reform initiatives.⁵²⁰ In an effort to resolve these tensions, the Mexican delegation led informal discussions. The result was a decision to disaggregate proposed individual complaint and inquiry procedures from the CRPD into a separate Optional Protocol.⁵²¹ At the end of the first sitting of the Eighth Session, the Ad Hoc Committee adopted the draft texts for the CRPD and Optional Protocol, subject to a technical review. In December 2006, following the technical review by the Drafting Group,⁵²² the Ad Hoc Committee held a second sitting of the Eighth Session to formally adopt the proposed text for the CRPD and Optional Protocol. It then referred these documents to the GA for adoption.

The CRPD Text

The GA mandate under which the CRPD was developed stipulated that the negotiating Committee was not to develop any new human rights, but was to apply existing human rights to the particular circumstances of persons with disability.⁵²³ Accordingly, the Chairman of the negotiating committee has conceptualised the CRPD as an implementation convention; one that sets out a detailed code [for how existing rights] should be put into practice' with respect

⁵¹⁶ Report of the Working Group to the Ad Hoc Committee, Draft Articles for a comprehensive and integral international Convention on the protection and promotion of the rights and dignity of persons with disabilities, Annex I, A/AC.265/2004/WG/1,

⁵¹⁷ The 3rd (May/June 2004), 4th (August/September 2004), 5th (January/February 2005), 6th (August 2005), 7th (January/February 2006) and 8th (August 2006).

⁵¹⁸ Letter dated 7 October 2005 from the Chairman to all members of the Ad Hoc Committee on a comprehensive and integral international Convention to promote and protect the rights and dignity of persons with disabilities, 14 October 2005, A/AC.265/2006/1,

⁵¹⁹ Revisions and amendments at the Seventh Session of the Ad Hoc Committee, Discussion Texts presented by the Chair,

⁵²⁰ Australia, China, Russia, Sudan and the USA, among others, were notable objectors to a new treaty body: see Inclusion International, 8th Daily Updates

⁵²¹ A consensus was also developed that broader treaty-body reform efforts ought not to delay the entry into force of the convention, nor should they result in an inferior implementation and enforcement regime being established under the CRPD.

⁵²² Draft Interim Report of the Ad Hoc Committee on a comprehensive and integral international Convention on the protection and promotion of the rights and dignity of persons with disabilities on its 8th Session, 1 September 2006, A/AC.265/2006/L.6. The drafting group was tasked with ensuring uniformity of terminology throughout the text of the draft Convention, harmonizing the versions in the official languages of the UN

⁵²³ This point was made repeatedly in the course of negotiations, was a feature of the rhetoric associated with its adoption and opening for signature, and now also permeates formative implementation dialogue and planning.

to persons with disability.⁵²⁴ Consistent with this view, the United Nations CRPD online information continues to assure the reader that the CRPD does not create any new rights or entitlements, [rather it] express[es] existing rights in a manner that addresses the needs and situations of persons with CPRD disabilities.⁵²⁵ Given that the raison d'être for the development of the CRPD was that existing human rights instruments have failed persons with disability, to say the very least, it is paradoxical to propose that these instruments nevertheless provide the necessary scope and content from which to derive a blueprint that will secure their rights in future. However, despite the logical incoherence of this proposition, this was the unchallenged⁵²⁶ political/administrative framework within which the CRPD was developed.⁵²⁷

The GA mandate under which the CRPD was developed called for proposals for a comprehensive and integral international convention, and indeed, these concepts featured in its working title up until the final stages of negotiation.⁵²⁸ This initial working title for the convention incorporated important meanings. The word comprehensive signified an instruction to the negotiating committee to take a holistic approach to the formulation of the convention, incorporating social development, human rights and non-discrimination elements. The word integral signified an intention for the convention to become a core constituent of international human rights law, rather than a subsidiary of existing law. The CRPD therefore has the same status as the other core human rights conventions.

In spite of its professed adherence to a social model of disability, it will be immediately apparent that the CRPD perpetuates, and perhaps now irrevocably entrenches, the contemporary conceptual confusion between impairment and disability. As we have discussed, according to the social model, disability is the limitation that results from discrimination and social oppression. Impairment is a characteristic, feature or attribute of an individual (for example, blindness, deafness, spinal cord injury). There is no deterministic relationship between persons with an impairment and disability, because a society free from discrimination and oppression can exist, at least theoretically. However, it is only persons with impairments who may be subject to disability. The CRPD typically uses the term persons with disabilities where conceptually persons with impairments is meant, and additionally, it uses the term disabilities instead of disability, including in its title, which is incorrect from both an ontological and phenomenological perspective.⁵²⁹ It is therefore

⁵²⁴ UN Press Releases, Chairman says draft convention sets out detailed code of implementation and spells out how individual rights should be put into practice, 15 August 2005, SOC/4680, available at: <http://www.un.org/News/Press/docs/2005/soc4680.doc.htm>

⁵²⁵ Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities, available at: <http://www.un.org/disabilities/default.asp?navid1422&pid14151#qg>

⁵²⁶ Although both State and non-government observer delegations advanced many text proposals that were inconsistent with this constraint, none explicitly challenged it.

⁵²⁷ In reality, this constraint was only applied to those controversial issues, like proposed extensions to the right to life that would have referred to pre-birth negative selection.

⁵²⁸ 105 Resolution 56/168, supra n. 85. The reference to a comprehensive and integral international convention is retained in para. (y), Preamble to the CRPD

⁵²⁹ Disability can only describe one form of oppression. However, persons with impairments may be subject to more than one form of oppression, for example, women may be subject to disability oppression and gender oppression.

difficult to construe the CRPD strictly in accordance with the social model.

It also logically means that the human rights protection provided by the CRPD is not triggered by impairment, but disability; that is, protection is post facto only available to those persons with impairments who are already subject to discrimination and oppression, rather than those persons who may be at risk of it. This latter group would logically include those persons with impairments who do not experience disability because of the nature of their present social environment or because appropriate adjustments are available to them. For example, Article 14 provides that disability shall in no case justify a deprivation of liberty.⁵³⁰ Presumably, the intention is to prevent deprivation of liberty on the basis of a personal characteristic, such as intellectual impairment, whether or not that person is experiencing disability. Similarly, Article 23 provides that in no case shall a child be separated from parents on the basis of disability of either the child or one or both of the parents⁵³¹ where again, presumably, the intention must be to prevent family separation merely because of a personal characteristic, such as a parent's psycho-social impairment.

In part this conceptual problem arose because the Ad Hoc Committee sought to distinguish between impairment (which they conceptualized as disability) and a characteristic of impairment (such as an inability to control impulse, mood or maintain accurate perception that poses a risk of harm to others), which they incorrectly conceptualized as external to impairment and disability. They sought to prevent interference with the individual on the basis of impairment, while preserving the right of the State to intervene, if necessary, in relation to conduct perceived to be external to impairment. However, correctly understood, such conduct is often the manifestation of impairment, or of the disability the person with impairment experiences in interacting with the social environment. For example, a person with brain injury may engage in violence towards others due to an inability to control impulse in the context of environmental factors that cause severe stress and frustration.⁵³⁰

The drafting of these and other provisions therefore appears to achieve the opposite of that which was intended, failing to effectively protect from state interference persons with impairments who are not experiencing disability, and apparently preventing any form of state intervention in relation to persons with impairment engaging in conduct manifesting disability that may actually present a risk of harm to others. This is clearest in Article 23, where the Committee clearly sought to preserve the state's capacity to intervene in a family situation where the conduct of a parent presented a risk of harm to a child. However, a literal reading of the article suggests that a parent can never be separated from a child on the basis of disability, even if the result of that disability (used in its correct sense) is harm to the child.⁵³¹ It will therefore be necessary to take a broad purposive approach to the interpretation of provisions such as this, attempting to construe what the drafters intended, rather than what

⁵³⁰ This was a principal issue in *Purvis v State of New South Wales* (2003) 217 CLR 92.

⁵³¹ One possible positive consequence of this drafting is that it places an absolute on us on States to provide the accommodations parents with disability may require to appropriately parent their children.

they wrote.

The CRPD and its Optional Protocol

The CRPD comprises of a Preamble and fifty articles and its Optional Protocol comprises eighteen articles. While its articles vary considerably in length, the CRPD is, overall, the densest exposition of human rights by the UN to date. In part as a response to this density, the CRPD is also the first United Nations human rights convention to contain titles for each article as an aid to its accessibility.⁵³²

The Preamble to the CRPD is especially detailed, comprising of twenty-five paragraphs (a to y). Unlike the other parts of the CRPD, the Preamble does not contain binding legal obligations. However, it contains many elements that will play an important role in the interpretation of the CRPD, only a few of which can be noted here.⁵³³

The questions of a definition of disability and persons with disabilities were among the most controversial that were dealt with by the Ad Hoc Committee and ultimately could not be resolved.⁵³⁴ Among state delegations, the principal reason for this was concern about the distributive impact of such definitions. Most participating non-governmental organizations and some states were determined to ensure that the convention applied to all persons with disability (by which they appeared to mean all impairment groups). A large number of states were concerned that this would open the floodgates, compelling them to recognize in domestic implementation efforts a large number of impairment groups not traditionally understood as persons with disability within their societies (such as persons with psycho-social disability and those with blood borne organisms causing disease—for example, persons with HIV/AIDS).

However, it was not only state delegations that objected to a definition of disability being incorporated into the CRPD. The IDC also objected on the basis that any definition would inevitably derive from the medical model, and would be externally imposed and disempowering (at various points in the debate, IDC spokespersons sought to assert a right to self determine identity as a disabled person.)⁵³⁵ The IDC also argued that understanding of disability as a social category is evolving over time, varied between societies, and that the incorporation of a definition of disability ran the risk of time-locking the CRPD, and of imposing a western view of disability on non-western cultural systems. In its first aspect, paragraph (e) of the Preamble accedes to the IDC's view of disability as an evolving concept.

⁵³² The Ad Hoc Committee made this decision during the first sitting of the 8th Session. The Optional Protocol does not incorporate Article titles.

⁵³³ On the use of preambles in interpreting treaties, see Article 31, Vienna Convention on the Law of Treaties 1969, 1155 UNTS 31.

⁵³⁴ The question of such definitions was discussed in the Ad Hoc Committee's 2nd, 4th, 7th and 8th Sessions, and in the Working Group.

⁵³⁵ Supran.30.

This view is affirmed by the description of persons with disability provided in Article 1 of the CRPD, or at least that appears to be its intention. Persons with disabilities (sic) are described as including those who have long-term physical, mental, intellectual or sensory impairments.’ The taxonomy of impairment types is open-ended and indicative, rather than closed. This is reinforced by the first paragraph of Article 1 which asserts that the purpose of the convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.’ Nevertheless, Article 1 does limit the application of the CRPD to persons who have long-term’ impairments, which would certainly exclude those persons with short-term impairments arising from traumatic injuries and disease, and it may also exclude persons with episodic conditions (for example, mood disorders, asthma).

Additionally, while reference to all persons with disabilities in paragraph 1 certainly has rhetorical power, it ultimately produces an element of circularity. Apart from the impairment categories listed, it is not self-evident what other impairment groups fall within the boundaries of the category. The treaty body will no doubt ultimately develop jurisprudence in this area, but, in the meantime, the boundaries of the category of persons to benefit from the CRPD will be determined domestically, potentially depriving some impairment groups of human rights protection.

One potential solution to this problem is to construe the category of persons protected by the CRPD by relying upon the International Classification of Functioning, Disability and Health (ICF).⁵³⁶ Certainly, the drafters of the ICF envisaged such a role.⁵³⁷ However, for reasons we will explain shortly, the relationship between the CRPD and the ICF is ambiguous to say the least, and any attempt to use the ICF to interpret the CRPD will inevitably be fraught with controversy.

Leaving the question of definition to one side, in its’ second aspect, paragraph (e) of the Preamble makes it clear that disability is to be understood according to the precepts of the social model. Disability’ is conceptualized as the product of the interaction of persons with impairments with environmental barriers that hinder their full and effective participation in society on an equal basis with others. This conceptualization is also affirmed by the description of persons with disability in the second paragraph of Article 1, and in the virtually absolute emphasis placed by the substantive human rights Articles on the removal of barriers and provision of accommodations that will facilitate participation and inclusion of persons with disability within society. In fact, this is one of the most notable discontinuities between the CRPD and the United Nations’ prior work in the areas of disability and human rights. With only one limited exception, the CRPD does not refer to prevention or treatment

⁵³⁶ World Health Assembly Res. 54.21, 22 May 2001.

⁵³⁷ Ibid. at 6. The introduction to the ICF states that the ICF provides an appropriate instrument for the implementation of stated international human rights mandates and national legislation’.

of impairment.⁵³⁸

Paragraph (f) of the Preamble brings into focus this issue of continuity and discontinuity of the CRPD with the United Nations previous expositions of the human rights of persons with disability and related programmatic activity. Despite its benign appearance, it is intensely politically charged. The World Programme of Action concerning Disabled Persons and the Standard Rules on the Equalization of Opportunities of Persons with Disabilities are explicitly acknowledged as antecedents to the CRPD but the 1971 Declaration, the 1975 Declaration and the Principles are not. These omissions were intensely pursued by the IDC, which sought to negate any relationship between these instruments and the CRPD, and thereby to limit any future reliance upon them for the objections were focused on these instruments' perceived derivation from the medical model and their approval or acceptance of institutionalization, substitute decision-making, and the compulsory treatment of persons with disability.

Perhaps even more significantly, paragraph (f) also fails to refer to the ICF, in spite of its contemporary prominence as a statistical, analytical and planning tool, including within United Nations and other multilateral agencies. The IDC vehemently opposed reference to the ICF on the basis that it reflected a medical model of disability. From the IDC's point of view, the ICF was part of the human rights problem faced by persons with disability that the CRPD was to overcome through its exposition of the social model of disability. Consequently, any attempt to use the ICF to interpret the boundaries of the class of persons protected by the CRPD is likely to be extremely controversial, at least within the civil society movement of disabled persons. The future relationship between the ICF and the CRPD, and indeed the future of the ICF itself, are at this stage crucial unanswered questions.

Family Members

With very limited exceptions,⁵³⁹ the CRPD does not refer to family members and other associates of persons with disability, and it does not confer any rights upon them independent of those conferred on persons with disability. Even when the CRPD does refer to the family, it implicitly positions the person with disability in an instrumental rather than dependent role,⁵⁴⁰ or alternatively it imposes obligations on states to assist families in their effort to realize the human rights of persons with disability the family member with disability is the primary beneficiary.⁵⁴¹

⁵³⁸ Article 25(b), health, requires States to provide services designed to minimize and prevent further disabilities . . .

⁵³⁹ Preamble (x), Article 16, freedom from exploitation, violence and abuse; Article 23(4), respect for home and the family; and Article 28(1), 2(c), adequate standard of living and social protection.

⁵⁴⁰ For example, in Article 23, respect for home and the family, persons with disability are accorded the instrumental role of making decisions concerning the founding a family and the number and spacing of their children.

⁵⁴¹ Article 8(1)(a), awareness-raising; Article 23(5), respect for home and the family; and Article 28(1), 2(c), adequate standard of living and social protection. Article 8(1)(a), for example, specifically requires states to raise awareness at the family level of the rights and dignity of persons with disability, and their capabilities and contributions, to combat stereotypes and prejudices that reinforce the belief that persons with disability are a burden

The question of whether the CRPD should recognize the needs and rights of family members of persons with disability, and, if so, in what manner, were issues keenly argued in the Ad Hoc Committee. Ultimately, the central question was answered in the negative, on the basis that in most societies family needs and rights tend to be privileged above those of persons with disability and, notwithstanding the enormous importance and contribution of families to the realization of the rights and dignity of persons with disability, it is sometimes family members who are principally responsible for, or collude in, human rights violations against them.⁵⁴² The CRPD privileges the rights of persons with disability over those of family members, and challenges the construction of persons with disability as passive participants in family life and as burdens on other family members.

Paragraph (x) of the Preamble delicately poses this issue. Consistent with previous instruments it affirms the family as the natural and fundamental group unit of society, and the entitlement of the family to protection by society and the state. However, it applies this principle in a way that recognizes that both persons with disability and their family members should receive protection and assistance from the state. It clearly positions persons with disability as having an active, instrumental role in family life. It also makes it clear that the protection and assistance provided to families is for the purpose of enabling them to contribute to the realization of the rights of persons with disability. Such assistance is not cast as compensation for the burden of caring for a person with disability.

Interpretive Provisions

Articles 1 and 2 of the CRPD are interpretive. Article 1 sets out the general purpose of the convention, which is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disability, and to promote respect for their dignity.⁵⁴³ It sets out three levels of obligation in relation to CRPD rights with which States must ultimately comply: to promote (foster recognition), protect (prevent interference with) and ensure (enable the realization of) the human rights and fundamental freedoms of persons with disability. Article 2 defines five key terms used repeatedly throughout the convention which have very specific meanings and implications for implementation of CRPD rights communication,⁵⁴⁴ language,⁵⁴⁵ discrimination on the ground of disability,⁵⁴⁶ reasonable accommodation⁵⁴⁷ and universal design.⁵⁴⁸

Reasonable Accommodation

Reasonable accommodation is defined as necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with

to their family and society.

⁵⁴² For example, by arranging for the sterilisation of women and girls with disability, or by institutionalising persons with disability.

others of all human rights and fundamental freedoms.’ Importantly, the definition of discrimination on the basis of disability includes the denial of reasonable accommodation.’ This is reinforced in Article 5, which also requires states to ensure that reasonable accommodation is provided.⁵⁴³

The incorporation of a state obligation to ensure that reasonable accommodations are made to facilitate the exercise by persons with disability of CPRD rights is perhaps the most fundamental instrumental element of the convention. Nevertheless, its formulation is very far from optimal. The obligation ceases at the point where the adjustment required constitutes a disproportionate or undue burden.’ The terms disproportionate’ and undue burden’ appear to have been intended by the Ad Hoc Committee as alternatives, but have been drafted as additive, effectively creating a two element test that may allow the obligation to be evaded at the lower of either threshold (which may vary according to context). Moreover, the thresholds themselves appear insufficiently challenging to penetrate to the core of exclusionary practices affecting persons requiring significant structural adjustments. They appear more likely to produce results for persons who require relatively marginal changes to the prevailing social environment. It will also be observed that the terminology undue burden’ is most unfortunate in that it activates precisely the construction of persons with disability as burdens’ on the community that the CPRD otherwise attempts to overcome.

General Obligations

Articles 3 to 9 of the CRPD are general obligations. They contain overarching or crosscutting principles and measures to be applied in all aspects of the implementation of the convention. Article 3 enunciates the general (or normative) principles upon which the CRPD is based, which include respect for the inherent dignity of persons with disability, non-discrimination, and the full and effective participation of persons with disability in society. It provides what one senior commentator has referred to as the CRPD’s moral compass.⁵⁴⁴ Article 4 sets out the general obligations states assume on ratification or accession to the CRPD. This includes, for example, the obligation to incorporate the terms of the convention into national laws, policies and programs, and to repeal national laws that are inconsistent with the convention. Article 6 (Women with Disabilities) and Article 7 (Children with Disabilities) require states to implement the CRPD in a manner that will ensure that women and children with disability are able to exercise and enjoy their human rights and fundamental freedoms on an equal basis with men and other children. These gender and age equality measures are reinforced in the CRPD’s Preamble and at a number of key points in its specific

⁵⁴³ This has very important implications for Australian disability discrimination law in light of the High Court of Australia’s decision in *Purvis v NSW (Department of Education and Training)* (2003) ALR 133 to the effect that s5(2) (direct discrimination) of the Disability Discrimination Act 1992 (Cth) imposes no positive duty to provide reasonable accommodation: per Gummow, Hayne and Heydon JJ (in the majority) at paras 217-218 and per Kirby and McHugh JJ (dissenting) at para. 104.

⁵⁴⁴ Quinn, Key Note Address to German European Union Presidency Ministerial Conference: Empowering Persons with Disabilities, The UN Convention on the Human Rights of Persons with Disabilities: A Trigger for Worldwide Law Reform, Berlin, 11 June 2007, available

obligations.

Articles 8 and 9 present what are undoubtedly two of the greatest challenges to the international community. Article 8 requires states to promote a fundamental change in societal attitudes, by fostering respect for the rights and dignity of persons with disability and by combating stereotypes and prejudice. Article 9 requires states to ensure that the environment is accessible to persons with disability so that they may live independently and participate fully in all aspects of life. It is important to observe that the environment is very broadly conceptualized, and not only includes built structures, but also transportation, information and communications (including the Internet). The Article also specifically adverts to a principle of geographic equity, requiring equivalent levels of environmental accessibility in both urban and rural areas. The principle of geographic equity also underpins a number of the CRPD's economic, social and cultural rights.

Specific Obligations

Articles 10 to 30 of the CRPD contain specific obligations. They set out, mostly in some detail, the specific human rights and fundamental freedoms recognized by the convention.

Civil and Political Rights

Broadly speaking, Articles 10 to 23 and Article 29 are based in civil and political rights. In some cases there are new or amplified applications or extensions of these rights. For example, Article 11 extends the right to life and survival to situations of emergencies. States are required to ensure the protection and safety of persons with disability in situations of risk, including armed conflict, humanitarian emergencies and natural disasters.⁵⁴⁵ Article 13 significantly extends the traditional right of equality before the law into a positive obligation to ensure access to justice.⁵⁴⁶ Article 16 extends the traditional right to freedom from torture or cruel, inhuman or degrading treatment to freedom from all forms of exploitation, violence and abuse.⁵⁴⁷

Articles 17, 19 and 20 significantly extend the traditional right of liberty and security of the person in ways that are unexpected and difficult to predict. Article 17 is particularly directed towards non-interference with both the physical body and the mind, and is the product of very vigorous advocacy against compulsory treatment by activists with psycho-social impairments. It is the first time the concept of integrity of the person has been included as a

⁵⁴⁵ The CRPD was developed against a backdrop of unprecedented challenges in the international environment, which impacted in aggravated ways on persons with disability. This included the 11 September 2001 terrorist attacks on the United States of America, wars in Iraq, Israel-Palestine and Lebanon, the Asian Tsunami, severe earthquakes in south Asia, and hurricanes Katrina and Rita.

⁵⁴⁶ This is the first time access to justice has appeared as a substantive right in a UN human rights instrument. A more traditional formulation of the right to equality before the law is found in Article 12, CRPD.

⁵⁴⁷ This article also, or alternatively, derives from Article 19, CRC.

standalone Article in a core United Nations human rights treaty.⁵⁴⁸ Article 19 equates the right to liberty with the right of persons with disability to live in and be a part of the community. It will operate as a prohibition on institutional models of supported accommodation for persons with disability, and require national investment in community based living options. Article 20 equates the right to liberty with the maximum personal mobility of persons with disability. It will also require national investment in mobility aids, assistive technologies, and forms of live assistance for persons with disability. From an implementation perspective, it is intriguing that these Articles are, despite their appearance, civil and political rights, subject to the standard of immediate realization.⁵⁴⁹

Limits Of The CRPD

These Articles contain some extraordinary innovations and applications of civil and political rights to persons with disability. However, their formulation is not without limitations. Despite considerable agitation of the issue by particular non-government observer delegations to the Ad Hoc Committee, Article 10 (Right to Life), remains silent on genetic science aimed at the elimination of impairment-related human diversity, and on pre-birth negative selection of fate with identified or imputed impairment. The failure of the CRPD to speak directly to this and some other bioethical issues may come to be regarded as its greatest failing.⁵⁵⁰

Article 17 is also very disappointing. It was perhaps the single most contentious Article negotiated by the Ad Hoc Committee, and, in large part as a consequence of this, its text is the most limited of the substantive human rights Articles. The Article is confined to a simple statement of principle with no specific application of this principle to the human right violations it purports to address. At the urging of the IDC in general, and the World Network of Users and Survivors of Psychiatry (WNUSP) in particular, the Ad Hoc Committee abandoned an earlier proposal that would have required the strict regulation of compulsory treatment. The IDC and WNUSP sought the ultimate goal of the CRPD ‘outlawing’ all forms of compulsory assistance, but, when this proved impossible to achieve, they adopted the alternative lobbying stance that there ought to be no reference to compulsory treatment in the CRPD as this would provide it with legitimacy. Ultimately, this was the outcome of the Ad Hoc Committee’s deliberations, although this appeared to be more to avoid conflict with the IDC and WNUSP, than because of any underlying commitment to the principle on which this opposition was based. The result is that one of the most critical areas of human rights violation for persons with disability the use of coercive State power for the purpose of ‘treatment’ remains without any specific regulation in the CRPD.

⁵⁴⁸ This concept does, however, appear in Article 3, Charter of Fundamental Rights of the European Union 2000, OJ (C 364) 1, 7 December 2000, available at: www.europarl.europa.eu/charter/default_en.htm

⁵⁴⁹ This means that nations have an immediate obligation to respect and ensure these rights. Economic, social and cultural rights are subject to progressive realisation. See further, below p. 30.

⁵⁵⁰ International Covenant on Economic, Social and Cultural Rights (ICESCR), art. II (1).

Economic, Social and Cultural Rights

Articles 24 to 28 and Article 30 are based in economic, social and cultural rights.⁵⁵¹ These Articles place overriding emphasis on inclusion and participation by persons with disability in the mainstream education system and labour market, supported by the accommodations and other positive measures required by persons with disability to realize these rights. The right to health is particularly directed towards ensuring that persons with disability enjoy non-discriminatory access to comprehensive general and specialist health services in the local communities in which they live. Article 26 extends the traditional rights to health, work, education and social security to the right to habilitation and rehabilitation, which features for the first time in a core United Nations human rights treaty. It is directed to ensuring that persons with disability have access to developmental learning and rehabilitation programmes that will enable them to develop (or recover) their maximum potential. Again, the emphasis is on inclusion and participation of persons with disability in the community both during the process of habilitation and rehabilitation and as an outcome of it.

Article 28 deals with the right to an adequate standard of living and social protection. The concept of social protection is arguably significantly broader than the traditional right to social security. The Article also incorporates obligations in relation to poverty reduction, the provision of specialist disability services, and assistance with the extra costs of disability. Finally, Article 30 deals with the rights of persons with disability to participation in cultural life, recreation, leisure and sport. Again, primary emphasis is placed on access by persons with disability to cultural and leisure facilities, and their participation in cultural and leisure programmes and events on an equal basis with others, supported by the accommodations and other positive measures necessary for them to effectively realize these rights. However, the Article also recognizes the specific cultural and linguistic identity of persons who are deaf, and guarantees recognition of sign language and deaf culture.

The overall thrust of these Articles, taken together, is to require states to incorporate a 'twin-track' approach to meeting the economic, social and cultural rights of persons with disability, which involves, first, incorporating disability sensitive measures into mainstream service delivery, and second, ensuring the provision of necessary specialist services and special measures in a manner that facilitates the inclusion and participation of persons with disability within the general community. The CRPD very specifically, and very comprehensively, delegitimizes segregated specialist service delivery to persons with disability.

How the CRPD Enhances International Law Protections

Generally speaking, disability has been an invisible element of international human rights

⁵⁵¹ See generally, McCorquodale and Baderin (eds), *Economic and Social Rights in Action*, (Oxford: Oxford University Press, 2007).

law. Campaign postcards distributed by non-government organizations during the first session of the Ad Hoc Committee attempted to persuade delegates that disability rights were a missing piece of the human rights framework.⁵⁵² Persons with disability have not been explicitly recognized in the binding instruments of international human rights law. None of the equality clauses of any of the three instruments comprising the International Bill of Rights (the Universal Declaration of Human Rights 1948,⁵⁵³ the International Covenant on Civil and Political Rights 1966 (ICCPR),⁵⁵⁴ and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)⁵⁵⁵) mention persons with disability as a protected category. Nor, with one exception, do the thematic conventions.⁵⁵⁶ The Convention on the Rights of the Child 1989 (CRC) does refer to mentally and physically disabled children in Article 23.⁵⁵⁷ This Article sets out a range of obligations designed to ensure that children with disability receive special care in relation to their special needs with a view to them achieving the fullest possible social integration and individual development.

The article is a significant step forward from classic and contemporary models of citizenship which look seek to prepare children for independence and participation the fullest possible social integration and individual development hold no underlying assumption or benchmark for any level of normality to be achieved. Article 23 does not define the child as a citizen in traditional views of competence.

However, there are significant difficulties in the formulation of this Article (particularly in its emphasis on special care, which ultimately derives from a medical model of disability, and its application only to mentally and physically disabled children). Article 23 has also tended to be interpreted and applied as if it circumscribed State obligations to children with disability, inhibiting the mainstreaming of disability measures.⁵⁵⁸

Up to the development of the CRPD, the United Nations system had attempted to deal with this visibility problem in two ways. First, by trying to interpret and apply existing core human rights instruments to persons with disability, and second, by developing a series of lesser policy and programmatic documents focused on the needs and rights of persons with disability.

In 1994, the Committee on Economic, Social and Cultural Rights (ESCR Committee)

⁵⁵² These postcards were produced by the Landmine Survivors Network (on file with authors).

⁵⁵³ GA Res. 217 A(III), 10 December 1948.

⁵⁵⁴ 999UNTS171.

⁵⁵⁵ 993 UNTS 3.

⁵⁵⁶ Other than the Convention on the Rights of the Child 1989 (CRC), 1577 UNTS 3, the thematic Conventions prior to the CRPD are the International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195; the International Covenant on the Elimination of All Forms of Discrimination Against Women 1979, 1249 UNTS 13; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, 2220 UNTS 93; 12 IHRR 269 (2005).

⁵⁵⁷ There is also a prohibition on discrimination on the ground of disability in Article 2, CRC.

⁵⁵⁸ In 2006, the Committee on the Rights of the Child (CRC Committee) issued General Comment No. 9: The rights of children with disabilities, HRI/GEN/1/Rev 8, Add.1 at para. 34, which attempts to address this problem by detailing recommended actions in relation to the full range of CRC obligations.

assumed responsibility for supervising disability issues within the area of its competence. In its General Comment No. 5,⁵⁵⁹ the ESCR Committee recognized that while the ICESCR does not explicitly refer to persons with disability, Article 2(2) required that the rights enunciated . . . be exercised without discrimination of any kind, whether on the basis of certain specified grounds, or other status. In the ESCR Committee's view, this clearly encompassed discrimination on the ground of disability. The ESCR Committee also noted that the Universal Declaration of Human Rights provides that all human beings are born free and equal in dignity and rights and that this obviously included persons with disability.⁵⁶⁰ General Comment No. 5 recognizes that:

both de jure and de facto discrimination against persons with disability have a long history and take various forms.' They range from invidious discrimination, such as the denial of access to educational opportunities, to more subtle forms of discrimination such as segregation and isolation achieved through the imposition of physical and social barriers.⁵⁶¹

General Comment No. 5 was also the first United Nations document to broadly define disability-based discrimination:

For the purposes of the Covenant, disability-based discrimination may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.⁵⁶²

Unlike the ESCR Committee, the Human Rights Committee has not issued a specific interpretive statement in relation to the application of the ICCPR to persons with disability. Nevertheless, in its General Comment No. 18,⁵⁶³ which deals with the right to equality and non-discrimination under the ICCPR, the Human Rights Committee rejected the concept of formal equality in the human rights context in favor of substantive equality. It recognized that equal treatment does not always mean identical treatment, and that states have a duty to take steps to eliminate conditions that perpetuate discrimination.⁵⁶⁴ For the reasons already discussed, this has important implications for achieving equality and non-discrimination in a disability context.

A Shift from the Traditional UN Human Rights use of a Medical Model to a Social Model in the CRPD

These initiatives have been important increments towards the broader recognition of the

⁵⁵⁹ HRI/GEN/1/Rev 8, Add.1.

⁵⁶⁰ Ibid. at para. 34.

⁵⁶¹ Ibid. at para. 15.

⁵⁶² Ibid.

⁵⁶³ 10 November 1989, HRI/GEN/1/Rev 8, especially at para. 10.

⁵⁶⁴ Ibid. at para. 8.

rights of persons with disability in the CRPD.⁵⁶⁵ However, in and of themselves, they achieved very little by way of improving recognition and respect of the human rights of persons with disability. One of the principal reasons why this is so is that, to a significant extent, the traditional human rights paradigm is based on an 'able-bodied' norm. In most cases it is not self-evident how traditional human rights are to be interpreted and applied in a manner that will penetrate to the specific human rights violations to which persons with disability are subject.

Disability as an issue of law, both domestically and internationally, has traditionally been addressed as an aspect of social security and welfare legislation, health law or guardianship. Persons with disability were depicted not as subjects with legal rights but as objects of welfare, health and charity programmes.⁵⁶⁶ The recognition of disability as a fundamental human rights issue has developed slowly from the early 1970s. Most developments in disability rights at the international level have been in non-binding, 'soft law,' and the early instruments still tend to reflect this medical/welfare approach. When the GA adopted the Declaration on the Rights of Mentally Retarded Persons 1971 (1971 Declaration)⁵⁶⁷ and the Declaration on the Rights of Disabled Persons 1975 (1975 Declaration),⁵⁶⁸ persons with disability may have become explicit subjects of international human rights law, but this status was heavily qualified by the individual model of disability within which they were couched. As a result, these instruments tend to be paternalistic, and legitimize segregation through specialized services and institutions.⁵⁶⁹

In 1982 the United Nations adopted the World Programme of Action concerning Disabled Persons (WPA), which established as one of its goals the equalization of opportunities for people with disability. The WPA defined 'equalization of opportunities' as:

the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities, are made accessible to all.⁵⁷⁰

This marked the beginning of a significant shift away from an individual/medical model of disability to a focus on rights and equality. In 1984, the UN followed the WPA with a comprehensive study on the relationship between human rights and disability, with the Sub-Commission on the Prevention of Discrimination and Protection of Minorities appointing a Special Rapporteur to conduct the research. In his 1993 report, the Special Rapporteur

⁵⁶⁵ For completeness, it should also be noted that in General Recommendation No. 18: Disabled Women, 10th Session, 1991, HRI/GEN/1/Rev 8 at 301, the Committee on the Elimination of Discrimination Against Women urges States to provide information on the status of disabled women in their periodic reports.

⁵⁶⁶ Degener and Quinn, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, 2002, HR/PUB/02 at 1.

⁵⁶⁷ GA Res. 2856/26, 20 December 1971, A/RES/2856.

⁵⁶⁸ GA Res. 3447/30, 9 December 1975, A/RES/3447.

⁵⁶⁹ For example, Article 4, 1971 Declaration, continues to provide qualified support for institutional accommodation for persons with disability; and Article 1, 1975 Declaration, incorporates a personal deficiency based conceptualisation of disability.

⁵⁷⁰ GA Res. 37/52, 3 December 1982, A/RES/37/51, 37th Session Supp. No. 51 at para. 12.

made it clear that disability is a human rights concern, in which the United Nations bodies should be involved.⁵⁷¹

In 1991, the GA adopted the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (Principles).⁵⁷² The Principles establish mental health care standards and procedural guarantees for the protection of persons with mental illness against human rights abuses in mental health facilities, such as excessive or prolonged use of physical restraint or involuntary seclusion, sterilization on the grounds of mental illness, psychosurgery and irreversible treatment. However, the continued focus on treatment and protection has meant the Principles have been controversial, particularly among psychosocial impairment user groups, for their perpetuation of a medical model of disability.

During the 1980s there were three unsuccessful attempts to persuade the international community to develop a human rights convention in respect of persons with disability.⁵⁷³ The reasons these initiatives failed are multifactorial, but included the belief that the rights of persons with disability were adequately dealt with in universal human rights instruments; the inability to convince the international community that persons with disability experienced specific and aggravated forms of human rights violation; and, diminishing support for civil right-based approaches to human rights (in which these initiatives were framed), particularly among developing states.

As a compensatory alternative, the GA eventually adopted the non-binding United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules) in 1993.⁵⁷⁴ The Standard Rules firmly build on the WPA, and clearly accentuate equality, stating:

The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation.⁵⁷⁵

The Standard Rules developed the work of the WPA in situating impairment as an incident of human diversity and urged states to incorporate a disability perspective into policy and planning. The Standard Rules make very clear statements about the rights of persons with

⁵⁷¹ Report by Special Rapporteur, Leandro Despouy, of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and Disabled Persons, 1993, E/CN.4/Sub.2/1991/31

⁵⁷² GA Res. 46/119, 17 December 1991.

⁵⁷³ Proposals were sponsored by Italy in 1982 and 1987 and by Sweden in 1989, see Degener and Quinn, *supra* n. 70 at 30.

⁵⁷⁴ GA Res. 48/96, 20 December 1993, A/RES/48/96, Supp No. 49, Annex at 202¹¹, available at: <http://www.un.org/documents/ga/res/48/a48r096.htm> [last accessed 13 November 2007]. See Degener, 'Disabled Persons and Human Rights: The Legal Framework', and Lindqvist, 'Standard Rules in the Disability Field: A New United Nations Instrument', in Degener and Koster¹Dreese (eds), *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments* (Dordrecht, Boston, London: Martinus Nijhoff, 1995) at 40 and 63 respectively.

⁵⁷⁵ Standard Rules, *supra* n. 79.

disability and promote an accessible environment in which these rights may be exercised. However, they still focus on medical treatment and (somewhat naively in terms of genetic testing), prevention, as preconditions for equal participation. This has been heavily criticized by disability activists for its failure to accept disability as part of human diversity, and to respect the inherent dignity of persons with disability.

In any event, irrespective of their textual strengths and weaknesses, these soft law instruments are not binding on states, and their impact has, overall, been very limited. This led disability activists to the view that a binding international instrument that set out a normative framework for the promotion and protection of the human rights of persons with disability was essential.⁵⁷⁶ It was also argued that international law had to adjust to incorporate a disability rights paradigm. Proponents emphasized that a convention on the human rights of persons with disability would give shape to the nature specific content to, human rights as they apply to persons with disability, and in turn, provide a substantive framework for the application of rights within domestic law and policy.⁵⁷⁷

How The CRPD Enhances The Social Model of Disability

This section briefly recaps from chapter two of this thesis on the medical and social models of disability. This will allow me to show how the CRPD enhances the limitations of the social model. As discussed in Chapter Two, central to contemporary concepts of disability is the notion of systemic disadvantage, according to which persons with disability are discriminated against by social structures that segregate or exclude them from participating fully in society (social model). 'Disability' is understood and experienced as oppression by social structures and practices. This oppression works both on the individual, denying or diminishing personhood,⁵⁷⁸ and systemically, on those who share the label 'disabled,' denying or diminishing citizenship and civic participation.⁵⁷⁹

In light of this, the human rights definition of persons with disabilities contained in Article 1 of the CRPD offers a holistic approach to defining disability. Article 1 provides that:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.⁵⁸⁰

The definition in Article 1 moves away from the historically dominant medical model of disability and towards the social model understanding of disability. In this understanding,

⁵⁷⁶ Many of the statements to the Ad Hoc Committee from the IDC and disabled persons organisations stressed the need for a binding instrument see, for example, Disabled Peoples International, Position Paper regarding a New International Human Rights Convention for Disabled People, 25 February 2003,

⁵⁷⁷ Degener and Quinn, supra n. 71.

⁵⁷⁸ For example, in popular culture persons with disability may be referred to as 'vegetables', 'monsters', and 'feaks'.

⁵⁷⁹ For example, in many countries persons with intellectual and psycho-social impairments have been, and may still be, denied democratic voting rights.

⁵⁸⁰ Article 1 CRPD

disabled people experience disability as a social restriction, whether those restrictions occur as a consequence of inaccessibly built environments, questionable notions of intelligence and social competence, the inability of the general population to use sign language, the lack of reading material in Braille or hostile public attitudes to people with non-visual disabilities.⁵⁸¹

A definition which is based on the individual mode, is more capable of accurately framing discussions which are relevant to disabled people, identifying hidden sources of discrimination and improving our understanding of human rights.⁵⁸² As a result of defining disability in a way that takes into consideration the impairment of the individual *and* the barriers that hinder their social participation (for example, environmental, built or human barriers), Article 1 of CRPD entitles a broad range of people.

This analysis is a different way of looking at the experiences of persons with disability to that with which most people are familiar. Historically, persons with disability have been treated as objects of pity and as burdens on their families and societies. According to this view, disability is a personal tragedy. Persons with disability are victims of great misfortune who are variously perceived as socially dead or better off dead, as passively coming to terms with a condition that will forever limit their activities, or as bravely and triumphantly overcoming these limitations by great mental or physical effort.⁵⁸³ The focus is on the affliction caused by the particular condition or impairment and the provision of cure, treatment, care and protection to change the person so that they may be assimilated to the social norm.⁵⁸⁴ This is broadly referred to as the medical model of disability, which has arguably been the most powerful influence on the conceptualization of disability in modern history.⁵⁸⁵ As one commentator has observed, the medical model ... has guided and dominated clinical practice with the resulting assumption that both problems and solutions lie within people with disabilities rather than within society.⁵⁸⁶

These images of disability (as Michael Oliver terms them) strongly reinforce the idea that it is the impairment itself that causes the limitation, without recognizing the role of the social

⁵⁸¹ R. K., "Models of Disability and the Americans with Disabilities Act", *Berkeley Journal of Employment and Labor Law*, Vol. 21(1), 2000, p. 215.

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⁵⁸³ See generally Oliver, *Understanding Disability: From Theory to Practice* (Hampshire: Macmillan, 1996); and Finkelstein, *Attitudes and Disabled People: Issues for Discussion* (New York: World Rehabilitation Fund, 1980).

⁵⁸⁴ Michael Oliver locates the origins of disability as a socially constructed category at the beginning of the Industrial Revolution. He argues that one of the most important differences between the pre- and post-industrial revolution is the replacement of the notion of impairment as something conferred by an external, often supernatural, force with rational and scientific explanations. The Industrial Revolution resulted in a classification of people according to their ability to contribute to the forces of production. The boundaries of the concept of normal were restricted by the individual's capacity to participate in economic life. Impaired persons were seen as unproductive with little social value or individual human worth and were exiled from the productive centre into institutions and an existence outside society where their only claim to social resources was in the charity of others. This resulted in an environment constructed on an able-bodied, productive norm. See Oliver, *supra* n. 20; and Finkelstein, *supra* n. 20.

⁵⁸⁵ The medical model views disability as a deficiency or deviation from the norm, located in the individual, and carries an action implication to treat or change the person so that they can conform to existing social processes and structures. This treatment is typically provided in service systems and settings isolated from the general community. The medical model is not confined to the health domain, but for many persons with disability, has pervaded all areas of life. Examples include institutional residential services, special education systems and sheltered employment.

⁵⁸⁶ French, "What is Disability?", in French (ed), *On Equal Terms - Working with Disabled People* (Oxford: Butterworth-Heinemann, 1994) at 4.

environment in disabling persons with impairments. As discussed in Chapter Two, these images have dominated policy responses to persons with impairments, resulting in a disabling culture that perpetuates negative attitudes and discriminatory practices that ultimately oppress and exclude persons with impairments.⁵⁸⁷

By contrast, the social model of disability locates the experience of disability in the social environment, rather than impairment, and carries with it the implication of action to dismantle the social and physical barriers to the participation and inclusion of persons with disability. The social model of disability is a generic term for a broad theory of disability that began to emerge from the mid 1960s principally from within the disability rights movement in the United Kingdom.⁵⁸⁸ It involved disability activist academics reinterpreting 'disability' as social oppression,⁵⁸⁹ and radically refocusing the agenda away from cure, treatment, care and protection to acceptance of impairment as a positive dimension of human diversity, and to the problematisation and rejection of a social norm that results in exclusion. Social model concepts were rapidly popularized⁵⁹⁰ and internationalized, and have become a dominant frame of reference both for disability studies and disability rights advocacy. This duality of the social model as a theory of disability and as a disability rights manifesto has important implications.

As a theory of disability, the social model is continuing to evolve, particularly under the influence of critical disability studies, which have drawn attention to the shortcomings of its classical formulation as a heuristic for explaining the total experience of disability. Its core thesis that limitations result from disability not impairment has been critiqued for its failure to recognize and address the genuine issues that individuals face due to impairment, and not disability, in terms of health, wellbeing and individual capacity.⁵⁹¹ However, this critique has been controversial within the broader disability rights movement,⁵⁹² and, consequently, it has

⁵⁸⁷ Finkelstein and Stuart, 'Developing New Services', in Hales (ed.), *Beyond Disability: Towards an Enabling Society* (London: Sage Publications, 1996) at 175-6.

⁵⁸⁸ The concept emerged in the mid 1960s through the reflections and writings of Paul Hunt, a British disability rights activist. It crystallised in 1976, when Hunt and his colleagues within the UK organisations Union of the Physically Impaired Against Segregation (UPIAS) and The Disability Alliance published *Fundamental Principles of Disability* ^ Being a Summary of the Discussion Held on 22 November 1975, November 1976, available at: <http://www.leeds.ac.uk/disability-studies/archiveuk/UPIAS/fundamental%principles.pdf> [last accessed 14 November 2007], which claimed that disability is 'the disadvantage or restriction of activity caused by a contemporary social organisation which takes little or no account of people who have physical impairments and thus excludes them from participation in the main-stream of social activities.' See also Finkelstein, *Reflections on the Social Model of Disability: The South African Connection*, 13 April 2005,

⁵⁸⁹ See Oliver, *supra* n. 20 and n. 21; Finkelstein, *supra* n. 20; Barnes, *Disabled People in Britain and Discrimination* (London: Hurst and Co, 1991); Abberley 'The Concept of Oppression and the Development of a Social Theory of Disability', (1987) 2 *Disability, Handicap and Society* 5; and Quinn, 'The Human Rights of People with Disabilities under EU Law,' in Alston, Bustelo and Heenan (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 1999) at 281.

⁵⁹⁰ The very simplicity of the idea that 'people are disabled by society' has been enormously effective in highlighting systemic discrimination and mobilising political action for social change.

⁵⁹¹ See Shakespeare and Watson, 'The Social Model of Disability: An Outdated Ideology?', (2002) 2 *Research in Social Science and Disability* 9 and Corker and Shakespeare (eds), *Disability/Postmodernity: Embodying Disability Theory* (London: Continuum, 2002).

⁵⁹² See, for example, Light, 'Social Model or Unsociable Muddle?' at Disability Awareness in Action web site, available at: www.daa.org.uk/social_model.html [last accessed on 26 October 2007], where critical disability studies are positioned as 'harmful,' 'repeated attacks' on the social-model, as offering 'no acceptable alternative' to persons with disability, and critical scholars are accused of forgetting that the 'social model originated with us [that is,

had little impact on the social model as a disability rights manifesto. Indeed, the social model as disability rights manifesto appears to have moved in an opposite direction theoretically, closer to a radical social constructionist view of disability, in which impairment has no underlying reality.⁵⁹³ As we shall discuss later, the social model has had an enormous influence in the development of the CRPD. However, it is important to understand that the primary influence has come from this populist conceptualization of the social model as a disability rights manifesto and its tendency towards a radical social constructionist view of disability, rather than from its contemporary expression as a critical theory of disability.⁵⁹⁴

The social model illuminates the limitations of traditional theories of equality in relation to persons with disability. The fundamental purpose of equality measures is to challenge the equation of difference with inferiority. Originally, this produced formal equality measures that aimed to free individuals from discrimination based on their membership of a particular social group. Formal equality measures pursued a colour blind and gender-neutral society, where merit was assessed without regard to irrelevant characteristics, and individuals could thrive free from stereotypical assumptions.⁵⁹⁵

However, by requiring that everyone be treated the same, formal equality entrenches pre-existing patterns of social disadvantage in a number of fundamental ways.⁵⁹⁶ In particular, as Fredman explains, formal equality fails to recognize that much discrimination cannot be attributed to individual acts by specific perpetrators, but flows, instead, from the institutions and structures of society. It also assumes that individual merit can be quantified in an objective way, abstracted from the social context in which it is located, when in fact, of course, merit is itself a social construct.⁵⁹⁷ In other words, formal equality assumes a benign social norm, and focuses on the elimination of perverse personal behavior. It does not seek to change the fundamental structure of the norm. The central premise of formal equality is the disregard of differences particularly problematic in a disability context for another reason. Perhaps more so than for any other disadvantaged group, treatment of persons with disability equally will often require specific recognition and accommodation of their difference; that is, different treatment.

disabled persons], and that we still have use for it.'

⁵⁹³ This was particularly evident in the Ad Hoc Committee debate concerning a definition of disability. As we shall discuss later in this paper, on a number of occasions the International Disability Caucus intervened in the debate claiming the right to self-determine a disability identity, and rejecting externally imposed definitions. The implication of this view is that there are no intrinsic, objectively ascertainable characteristics upon which to base a definition: Kicki Nordstrom, former President, World Blind Union, Intervention in debate on behalf of the International Disability Caucus with respect to Article 2: Definitions, 7th Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Rights and Dignity of Persons with Disabilities, 31 January 2006, authors' direct observation.

⁵⁹⁴ This is most evident in the outcome of the drafting of Article 12 and Article 17, CRPD which border on a complete denial of instrumental limitations associated with cognitive impairments.

⁵⁹⁵ Fredman, Disability Equality and the Existing Anti-Discrimination Paradigm - European Discrimination Law, in Lawson and Gooding (eds), Disability Rights in Europe: From Theory to Practice (Oxford: Hart Publishing, 2005) at 211.

⁵⁹⁶ Fredman, Providing Equality: Substantive Equality and the Positive Duty to Provide, (2005) 21 South African Journal of Human Rights 163.

⁵⁹⁷ Fredman, *supra* n. 32 at 204.

Substantive equality attempts to remedy these problems by compensating for historical disadvantage, and by requiring alteration of the norm to better reflect human diversity. Key substantive equality measures include the designation of quotas or institution of affirmative action policies to increase minority group participation in education or employment, and the imposition of a requirement to make structural adjustments to accommodate personal needs (for example, flexible work hours to accommodate family responsibilities). Essentially, substantive equality underpins contemporary non-discrimination law in the area of disability in the United Kingdom, Canada and the United States (as examples).⁵⁹⁸

In the disability context, the obligation to make reasonable accommodations for impairment and disability-related⁵⁹⁹ needs is a crucial substantive equality measure. Although it is individually referenced (in that the obligation operates on a bilateral basis between the person to be accommodated and the person or institution required to make the accommodation), reasonable accommodation has the potential to result in fundamental structural transformations of the norm. However, in spite of its fundamental significance as a disability equality measure, the obligation to make accommodations is typically constrained, in practice, by a 'hardship' defence or limit on the obligation,⁶⁰⁰ which may be negative or diminish its structural impact. If the threshold at which the obligation ceases is set too low or if the obligation is easily evaded, reasonable accommodation may result in little or only marginal changes to an exclusionary norm.

The approach to achieving substantive equality reflected in contemporary disability non-discrimination law is what Fredman refers to as a 'minority rights approach'.⁶⁰¹ It involves the identification of a class of persons entitled to protection from discrimination and to special measures to compensate for disadvantage. This approach also has a number of other fundamental problems. First, it assumes it is possible and desirable to identify the class of persons entitled to the benefits conferred. In fact, defining disability has proved notoriously difficult and controversial.⁶⁰² Second, a minority rights approach tends to pit the protected class against others in claims for scarce social resources, and may therefore be unable to overcome pre-existing power relationships. The individually referenced, bilateral nature of the obligation to make reasonable accommodation is particularly prone to this dynamic, and this tends to result in downward pressure on the threshold of obligation. A minority rights approach also tends to emphasize difference and deviance from the norm, rather than social

⁵⁹⁸ The Australian Disability Discrimination Act 1992 also has some substantive equality elements, but it is essentially based on a formal equality model: *Purvis v State of New South Wales* (2003) 217 CLR 92 per Gummow, Hayne and Heydon JJ (in the majority) at para. 203; see also Glesson CJ (in the majority) at para. 8, and Kirby and McHugh JJ (dissenting) at para. 104.

⁵⁹⁹ This 'difference' may either result from impairment (for example, recognising and accommodating a person with diabetes who requires facilities and work breaks to inject insulin) or disability (for example, flexible work hours to accommodate mobility restrictions arising from inflexible personal care services or unreliable parallel transport systems).

⁶⁰⁰ See 'unjustifiable hardship' section 11, Disability Discrimination Act 1992 (Cth, Aust); 'such steps as is reasonable'; section 6 and section 21, Disability Discrimination Act 1995 (UK); and 'undue hardship' section 101(10), Americans with Disabilities Act 1990 (USA).

⁶⁰¹ Fredman, *supra* n. 32 at 204ⁿ5.

⁶⁰² *Ibid.* at 206.

diversity and membership of the whole.⁶⁰³

The imposition of an obligation to take reasonable steps to accommodate impairment and disability-related needs was viewed as a critical foundation or pre-condition for the attainment of equality for persons with disability in CRPD negotiations. Indeed, the CRPD contains a web of duties to make such accommodations woven through both its general and specific obligations. However, notwithstanding the undoubted importance of the obligation to accommodate to the realization of substantive equality for persons with disability, as we shall discuss later, these efforts may ultimately have fallen victim to the central problems with minority right approaches.

The limitations of traditional approaches to equality are stimulating the development of a new disability equality paradigm. The fundamental tenet of this formative approach is universalism, that of radical modification of the social norm to reflect human diversity.⁶⁰⁴ The universalist approach is based on the concept of impairment as an infinitely various but universal feature of the human condition.⁶⁰⁵ According to this view no human has a complete repertoire of abilities, suitable for all permutations of the physical and social environment,⁶⁰⁶ or put another way, the issue of disability for individuals . . . is not whether but when, not so much which one, but how many and in what combination.⁶⁰⁷ In particular, a universalist approach does not discriminate between individuals based on their intellectual or other ability or contribution. As Rioux explains:

... all persons of distinguishable groups have the same needs for equality; . . . the capacity to exercise a right is not a distinguishing characteristic for the purpose of recognizing or denying that right; . . . equality is consequent on the equal value, benefit and rights possessed in differences from the norm, not on overcoming natural characteristics and becoming as much like the norm as possible.⁶⁰⁸

A universalist approach to equality focuses on ensuring that legislation, social policies and environments reflect the full range of repertoires that exist in society.⁶⁰⁹ Laws and policies promote full participation in society by everyone, regardless of personal characteristics or group membership, challenging common stereotypes about group characteristics that can underlie law or government action.⁶¹⁰ Equality provisions are not activated by direct knowledge of personal characteristics but on the assumption that all characteristics will be encountered. Simply put, if formal equality was essentially about ignoring difference, a

⁶⁰³ 42 Ibid. at 204^6.

⁶⁰⁴ In our view the universalist approach has enormous transformative potential for all persons who experience disadvantage and discrimination. Nevertheless, its Utopian aspirations may prove impossible to operationalise.

⁶⁰⁵ Bickenbach, 'Minority Rights or Universal Participation: The Politics of Disablement', in Jones and Bassar Marks (eds), *Disability, Diver-Ability and Legal Change* (London: Martinus Nijhoff, 1999) at 101.

⁶⁰⁶ Ibid. at 111.

⁶⁰⁷ Zola, 'Disability Statistics, What We Count and What It Tells Us: A Personal and Political Analysis', (1993) 4 *Journal of Disability Policy Studies* 9.

⁶⁰⁸ Rioux, 'Towards a Concept of Equality of Well-Being: Overcoming the Social and Legal Construction on Inequality', in Rioux and Bach (eds), *Disability is Not Measles: New Research Paradigms in Disability* (Ontario: Roeher Institute, 1994) at 90.

⁶⁰⁹ Zola, supra n. 46.

⁶¹⁰ Fredman, supra n. 33 at 163^4.

universalist approach is about expecting difference. As we shall see, this universalist approach has been particularly influential on the CRPD, especially with respect to its emphasis on the accessibility of the environment and in its mandate of universal design.

Also central to contemporary theories of disability and disability rights is the concept of citizenship.⁶¹¹ Claiming citizenship, and the dignity and equality it entails, is viewed as fundamental to overcoming dehumanization and exclusion. For persons with disability, the effective denial of citizenship is a continuing multidimensional wrong, which may include the explicit negation of democratic rights on the basis of impairment,⁶¹² as well as the denial of the opportunity,⁶¹³ or an accessible means,⁶¹⁴ to participate in public policy formulation and decision-making that affects their lives. The effective exclusion of persons with disability from public policy formulation and decision-making processes has a profound distributive impact, denying them the opportunity to argue for their needs and rights in the contest for social resources, and for the reform of oppressive laws. This 'wrong' is intensified by the exercise of overt and covert executive power over the lives of many persons with disability by means of compulsory assistance (or coercive treatment),⁶¹⁵ or, more subtly, through effective control over the social resources that sustain persons with disability.⁶¹⁶

This history of disempowerment and paternalism has produced a deep mistrust of executive power and the demand for radical participation, which is encapsulated by the credo 'nothing about us without us': now a virtually universal claim of the disability rights movement internationally and fundamental to the disability equality paradigm. It has had an enormous influence in building the constituency for a disability rights convention, and in shaping the framework, process and outcomes of its negotiation. It will play an equally important role in the implementation and monitoring of the CRPD, which is discussed later in the chapter. Next I discuss further how the CRPD enhances notions of citizenship.

How the CRPD Enhances The Models of Citizenship; Article 12 Of The CRPD

One of the main arguments in this thesis is that the United Nation CRPD is a recent development of models of citizenship and disability and can be considered to be a significant improvement in acknowledging the rights of disabled people and augments their citizenship

⁶¹¹ See Oliver, supra n. 20 at 43-77. Oliver demonstrates the ways in which persons with disability are excluded from and denied their citizenship rights in the British welfare state. See also Davis, 'Living with the Man on the Escalator: Citizenship and Disability', in Jones and Basser Marks (eds), supra n. 44 at 65-74, discussing the ways in which persons with disability are prevented from exercising their social, civil and political rights, in an Australian context; and Abberley, 'Work, Utopia and Impairment', in Barton (ed.), *Disability and Society: Emerging Issues and Insights* (London: Addison Wesley Longman, 1996) at 61, who argues that participation in economic production is used to define social integration, identity, and 'incapacity', so that persons with disability are necessarily excluded as 'valid' citizens. See Oliver, supra n. 20 at 43.

⁶¹² For example, the right to vote is frequently explicitly denied on the basis of mental illness or intellectual impairment.

⁶¹³ Persons with disability, for example, persons with intellectual impairment may be viewed as unable to contribute meaningful views on public policy questions.

⁶¹⁴ Public policy information may not be available in accessible formats and public consultation processes may not make disability related adjustments.

⁶¹⁵ For example, involuntary institutionalisation and involuntary administration of medication.

⁶¹⁶ For example, many persons with disability are compelled to live in residential institutions, not because they are legally required to do so, but because these are the only environments in which State assistance is available.

status. I argue that Article 12 of the CRPD extend citizenship rights previously denied to disabled people by classic and contemporary models of citizenship and disability (as discussed in Chapter Two and Chapter Three of this thesis) and therefore the CRPD is well equipped to supersede previous legislative and model efforts.

Article 12 is one of the most difficult but interesting and innovative aspects of the CRPD. Article 12 provides that:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. State Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.⁶¹⁷

One of the major differences between the CRPD and models of disability and citizenship is the way Article 12 of the CRPD recognizes the right of persons with disabilities to equal recognition before the law and the attendant right to legal capacity. Under Article 12 Persons with disabilities have the right to recognition everywhere as persons before the law. They enjoy legal capacity on an equal basis with others in all aspects of life. Thus, all persons have full legal capacity. They have the right to make and act on their own decisions and to have those decisions legally recognized.⁶¹⁸

Article 12 enhances the limitations of models of citizenship for disabled people with regards to the problematic way models of citizenship dealt with the issue of mental capacity and personhood. As discussed in Chapter Three, the liberal and civic republican models of citizenship both fell short of providing people with disabilities, particularly those with intellectual disabilities and mental health issues full citizenship because of their conceived lack of ability to make rational decisions. And therefore were denied personhood.⁶¹⁹

⁶¹⁷ United Nations, *Convention on the Rights of Persons with Disabilities Article 12*

⁶¹⁸ United Nations, *Convention on the Rights of Persons with Disabilities: Advocacy Toolkit*, 1 July 2008,

⁶¹⁹ see chapter three of this thesis, the analysis argues that from Locke to Marshal and from Kant to Rawls there were problems and limitations to the full citizenship status of disabled people. People who lack a certain degree of mental capacity were excluded from the full right to citizenship. And denied personhood.

In order to facilitate the understanding of the obligations under the CRPD Article 12 and how it might offer an alternative to models of citizenship it is essential to understand its legal application.

Construction of Legal Capacity in Article 12

Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) raises many questions. Some of these questions are as follows: How has legal capacity been constructed in the CRPD? Does it include both the capacity to have rights and the capacity to act? If yes, then has this legal capacity been extended to all persons with disabilities or have certain persons been excluded? If not, will it be permissible for a State to enter reservations on those parts of the Article which guarantee universal legal capacity?

Legal capacity consists of two integral components: the capacity to hold a right and the capacity to act and exercise the right, including legal capacity to sue, based on such rights. Both these elements are integral to the concept of legal capacity hence recognition to the legal capacity of any group or individual mandates recognition of both these elements. It has been found that denial of legal capacity to any individual or group has also meant negation of both the right to personhood and the capacity to act. During the study of municipal legislations, it has also been found that whenever such discriminatory laws have been challenged, they have been at first replaced by legislations which accord symbolic recognition to the rights of the excluded group, thus whilst the capacity to hold rights is recognized, the capacity to exercise those rights continues to be denied.⁶²⁰

In comparison international human rights law, which has often been adopted to counter discriminatory municipal legislations, constructs legal capacity to include both the elements of identity and agency. Article 15 of the Convention on the Elimination of Discrimination of Women (CEDAW) is a case in point.

Article 1 of the UN Convention on the Rights of Persons with Disabilities states that the purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.⁶²¹ This purpose has to be furthered by all the provisions of the CRPD including the Article on legal capacity, and the text of Article 12 would need to be informed by this objective.

By paragraph 1 of Article 12 State Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. This paragraph of Article 12 addresses the identity requirement of legal capacity and recognizes the personhood of persons with disabilities.

Paragraph 2 of article 12 provides that States Parties shall recognize that persons with

⁶²⁰ UN Convention on the Elimination of Discrimination of Women (CEDAW) Article 15

⁶²¹ United Nations, *Convention on the Rights of Persons with Disabilities: Article 1*

disabilities enjoy legal capacity on an equal basis with others in all aspects of life.⁶²² A non-disabled citizen who owns real estate, or a car, a horse or a book is entitled to sell the house, to hire the car, gift the horse or lend the book. All these and similar dispositions as an owner are a part of his or her legal capacity. Paragraph 2, by extending the same rights to persons with disabilities, fulfills the agency requirement of legal capacity. The non-negotiable nature of this commitment is evidenced by the inclusion of individual autonomy, non-discrimination and equality of opportunity in the list of General Principles which the States are under an obligation to uphold. This obligation would require that the States both refrain from actions that undermine the principles and initiate efforts which would promote them.

That paragraph 2 of article 12 provides for the agency requirement of legal capacity is further borne out by the remaining paragraphs of Article 12. Thus paragraph 3 of Article 12 requires States Parties to take appropriate measure to provide access by persons with disabilities to the support they may require in exercising their legal capacity.⁶²³ Article 12 (4) concerns itself with the need to guard against the abuse of such support and does so by making provision for appropriate and effective safeguards. Article 12 (5) explicitly mentions that persons with disabilities should be able to inherit, manage financial affairs and own property. Thus both on a purposive and a textual interpretation of Article 12 it can be concluded that legal capacity in the CRPD has been constructed like CEDAW to include both the capacity for rights and the capacity to act.

Article 12 of the CRPD has a great potential to create positive change. The fact that many states continue to deny or restrict the legal capacity of persons with intellectual difficulties through court action is very problematic.⁶²⁴ It has led to the restriction of basic rights without justification or review. For example, as the European Union Fundamental Rights Agency has reported, the majority of European Union Member States link the right to political participation to the legal capacity of the individual. In view of the impact that the restriction of legal capacity can have on a person's exercise of their human rights, two questions are of central importance to understanding the scope of Article 12.

First, does Article 12 require State Parties to grant all persons with disabilities the legal capacity to act even where they are considered to lack in capacity? If so, would this increase the risk of some persons with disabilities being vulnerable to people who would take advantage of their lack of capacity? And second, would there be a problem of persons with disabilities being vulnerable to people who would take advantage of their lack of capacity?

Paragraphs 3 and 4 of Article 12 provide guidance on these questions. Article 12(3) requires that states must put in place appropriate measures. The first thing that a political authority should look to do is to put in the supports to enable individuals to make decisions, rather

⁶²² United Nations, *Convention on the Rights of Persons with Disabilities: Article 12 paragraph 2*

⁶²³ United Nations, *Convention on the Rights of Persons with Disabilities: Article 12*

⁶²⁴ For an example on how legal capacity is denied or restricted is the Czech Republic, see Inclusion Europe, *Legal capacity and guardianship procedures, Czech Republic*.

than take away this opportunity and do the easier measures which support persons with disabilities in exercising their legal capacity; thus it is plain that Article 12 applies to all persons with disabilities regardless of the form of disability.⁶²⁵ In cases of severe mental or intellectual impairment, appropriate measures may include electing a personal representative to support the person in taking decisions and exercising their legal capacity. Further, Article 12(4) provides that in such cases safeguards must be put in place to prevent abuse occurring within the exercise of legal capacity. So Article 12 requires State Parties to engage with the legal capacity issue positively by leaning toward supportive inclusion rather than than take away this opportunity.

Therefore Article 12 confronts the perceptions that persons with incapacity should not have a right to take decisions that may have a substantial effect on their lives. This, according to Gabor Gambos:

Goes against a 2000 year old deep-rooted prejudice-based paradigm which says that there are people who are so disabled in their cognitive decision-making functions that they cannot exercise their autonomy, or their right to make their own choices, and that this right should be delegated to another person who will make decisions on their behalf.⁶²⁶

The right to recognition everywhere as persons before the law required by Article 12(1) challenges the historical legacy of models of citizenship and disability in pervasive stereotyping, prejudice and stigma which has caused discrimination against disabled people. What is more, acting in combination with other provisions of the CRPD, for example Article 29,⁶²⁷ Article 12 has the potential to play an instructive role in guiding legal reform and policy development. Article 12 offers a concrete set of standards which remolds the relationship that persons with disabilities have with society by sending a clear message that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.'

Universal Legal Capacity

On the question whether the CRPD guarantees legal capacity to all persons with disabilities it would be necessary to note that a definition of disability has not been incorporated in Article 2 of CRPD. However an inclusive definition finds place in Article 1. Such definition includes persons who have long-term physical, mental, intellectual or sensory impairments. Evidently the CRPD has employed the strategy of explicitly naming certain groups in the definition in order to highlight their higher discrimination and the greater need for strategies

⁶²⁵ See *Legal Opinion on Article 12 of the CRPD*, 21 June 2008, available at: <http://www.leeds.ac.uk/disability-stud>

⁶²⁶ The Equal Rights Trust, 'Interview: Promoting a Paradigm Shift: ERT talks with Gabor Gambos and Gerard Quinn about the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol', *The Equal Rights Review*, Vol. 2,

⁶²⁷ CRPD, Article 29 (Participation in political and public life) requires states to: '[e]nsure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others'; ensure that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use'; protect the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government'; and '[p]romote actively an environ

of empowerment. If national legislations and state practices are examined, it is found that it is these groups of persons with disabilities who are denied legal capacity. The deliberations surrounding the Convention show that the need for a separate convention for persons with disabilities was felt because the extant human rights conventions were not disability inclusive and could not provide the requisite justification to challenge exclusionary national laws. In the face of this overarching commitment to the goal of inclusion in the Convention, it is logical to conclude that Article 12 would have been drafted in consonance with this larger objective of the CRPD.

Upon examination of the preparatory papers, the adoption of the paradigm of universal legal capacity was questioned because it was feared that it did not adequately address the concerns of persons with high support needs. It was due to this apprehension that paragraph (3) placed an obligation on State Parties to make provision for support and paragraph (4) was drafted to encompass a range of safeguards against abuse of support. Persons with high support needs may have been one group of persons who could have been denied full personhood and legal capacity, if the provision for support had not been made in Article 12. However, the combined reading of the definition of disability and the duty to provide support leads to the conclusion that article 12 has been formulated to bring within its aegis all persons with disabilities. This support could be of personal assistants or peers or may even be simply a written declaration of the preferences of the person with disability. What the Convention requires is that the support should be based on trust and not against the will of the person with disabilities.

Reservations

Could states enter reservations against article 12? Article 46 of the CRPD and article 14, paragraph 1 of the Optional Protocol to the Convention, do not permit reservations that are incompatible with the object and purpose of the CRPD. Equality and non-discrimination along with respect for dignity, individual autonomy and freedom to make one's own choices have been recognized as the general principles of CRPD. The general principles were included to render the object and purpose of the Convention explicit. A reservation on Article 12 is antithetical to each of these principles and hence not permissible by Article 46 of the Convention.

Further if a reservation is entered to either circumscribe the meaning of legal capacity or to limit the persons with disabilities included under the provision the limitation will not be confined to Article 12 alone but will also extend to the other rights guaranteed under CRPD—be it the right to education or the right to work or freedom of speech and expression or political participation. Such a consequence would be destructive of both the letter and spirit of the CRPD and hence unimaginable.

The CRPD, by devising the supported decision making model of legal capacity, has made an

innovative effort to recognize the aspirations of all persons with disabilities; this makes the CRPD a better alternative for disabled people than models of disability and citizenship in achieving full and equal citizenship by moving beyond the narrow definition of 'natural rights' and 'natural law' based on individual capacity and reason.⁶²⁸

Article 12 therefore marks an important paradigm shift, as historically many societies have deprived people of their legal capacity simply on the basis of their disability. During the negotiations of the CRPD many disabled people spoke passionately about the terrible consequences faced by those deprived of their ability to exercise their legal capacity, and though some delegations expressed reservations, ultimately the AHC found the personal testimony compelling enough to warrant pursuit of a new approach.

This new approach calls for States Parties to focus not on denying people their legal capacity, but instead on the provision of supports, where necessary, to enable persons with disabilities to exercise their legal capacity. Thus, instead of a 'spectrum of legal capacity,' with those who have it at one end and those who do not at the other, there is envisioned a 'spectrum of measures to support exercise of legal capacity,' with those requiring no such support at one end and those requiring one hundred percent support at the other. Measures to protect against abuse of support provided are similarly scaled and proportionate to the amount of support required.

Whilst Article 12 does not explicitly prohibit guardianship laws, it is anticipated that many States Parties will move away from traditional guardianship approaches, and/or utilize such procedures only in rare circumstances where an individual is in need of extensive or 'one hundred percent support.' It is therefore reasonable to expect that a number of client countries will need assistance in engaging in legislative reform initiatives to effect these changes, as well as assistance in developing programmes and policies to implement the obligation to provide supports to those requiring assistance to exercise their legal capacity. In addition, the provisions of Article 12 ensuring the equal right of disabled persons 'to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit,'⁶²⁹ have potential development implications, as they may help facilitate the participation of persons with disabilities in micro-credit, small business, and other income-generating initiatives.

How the CRPD Enhances Citizenship and Disability Models; CRPD Article 24 A Right to Inclusive Education

While the Salamanca Statement was the first global instrument explicitly calling for the inclusion of children with disabilities in regular education, it no longer stands alone. In December 2006, the United Nations General Assembly adopted the CRPD, in which Article

⁶²⁸ See my discussion of Locke, Kant, Aristotle, Hume, Rawles and Marshall in Chapter Three of this thesis.

⁶²⁹ CRPD Article 12(5).

24 secures the right to an inclusive education in international law. However, the CRPD does not simply recognize the right to inclusive education as an entitlement. It presents a framework of goals for inclusive education systems. It establishes obligations for governments and international agencies to provide the supports and conditions required to make quality inclusive education successful for all children and youth with disabilities.

The prevailing trend is that children and adults with disabilities usually have much less access to education than their non-disabled peers. As noted by Stephen Lewis, the former UN Secretary General's Special Envoy to Africa on AIDS, 'universal primary education is the ultimate vector of human progress,' and as was highlighted by many delegates to the AHC, the exclusion of disabled persons from education results in life-long barriers to meaningful employment, health, and political participation. For this reason, the main focus of Article 24 is on the elimination of disability-based discrimination in educational settings, as well as the provision of inclusive education. Article 24 additionally focuses on access of persons with disabilities to the general education system, rather than separate or segregated educational settings. Although a few DPOs noted during the negotiations that flexibility should exist for those individuals still wishing to opt-out of mainstream settings.

Article 24 provides a positive move forward from the Salamanca statement.⁶³⁰ The need for a convention with clearer and broader inputs to build upon the weaknesses of the Salamanca Statement was felt and led to a legally binding instrument, the UN CRPD, which entered into force on 3 May 2008. Article 24 of the UN CRPD aims at applying the principle of non-discrimination in education with regard to every human right and to interpret it in the correct way in every context of human beings' existence. The UN CRPD is legally binding and therefore its articles will pave the way to the future political developments in the disability sector.

Article 24 exceeds the Salamanca Statement by placing an obligation on the government and relevant authorities to provide inclusive education, which means that disabled children and adults can access education with the right support. Article 24 says:

1. Governments must ensure the education system at all levels is inclusive and geared towards supporting disabled people to achieve their full potential and participate equally in society.
2. Disabled people should be able to access free, inclusive primary and secondary school education in the communities in which they live.
3. Disabled people must not be excluded from the general education system (at any level) because of their disability.

⁶³⁰ (Eklindh & Brule- Balescut, 2005). See also ,Suresh, H., All rights are Fundamental Rights, Universal Law Publishing Company, 2010.

4. Disabled people have the right to reasonable adjustments and extra support to take part in education.
5. Governments must also promote the learning of Braille, sign language and use of appropriate forms of communication for disabled learners.
6. This involves promoting the linguistic identity of Deaf people and ensuring enough teachers are trained in different communication methods.

The CRPD states that every child with a disability has the right to be able to choose an inclusive option. This means that education systems must be willing and able to welcome students, regardless of their disability, and provide them with the supports they need, with the default always a regular class with non-disabled peers. What has been missing since Salamanca are two things: first, a shared analysis of the systemic barriers that maintain exclusion (meaning generations of people with intellectual disabilities have been denied education rights and opportunity, with lifelong consequences); and second, any legal obligations for governments (that is, governments have not been accountable).

However, as has been elucidated in this chapter, the CRPD now provides both the framework and the obligations, a roadmap for completing what Salamanca began.

Article 24 guarantees all disabled learners a right to participate in every kind of mainstream education with appropriate support. When the UK Government ratified this UNCRPD in June 2009 it decided to place a number of restrictions on its UNCRPD obligations. Two of those restrictions relate to Article 24. The first was an Interpretative Declaration which clarifies the UK Government definition of a general education system.⁶³¹ The Interpretative Declaration text states that:

The United Kingdom Government is committed to continuing to develop an inclusive system where parents of disabled children have increasing access to mainstream schools and staff, which have the capacity to meet the needs of disabled children. The General Education System in the United Kingdom includes mainstream, and special schools, which the UK Government understands is allowed under the Convention.⁶³¹

The UK Government also placed a reservation against Article 24 in order to protect itself from future commitments and obligations.

Such reservations are problematic because they cut against efforts to expand inclusive citizenship rights and a concurrent commitment along with other governments to ensure greater and ultimately full inclusivity of disabled people in their societies.

⁶³¹ UK Interpretative Declaration: ~~E~~ducation – Convention Article 24 Clause 2 (a) and (b)

Limitations of Article 24: Problems with UK Reservation

Of all the states which have ratified the Convention so far only the United Kingdom has reserved on Article 24:

The United Kingdom reserves the right for disabled children to be educated outside their local community where more appropriate education provision is available elsewhere. Nevertheless, parents of disabled children have the same opportunity as other parents to state a preference for the school at which they wish their child to be educated.⁶³²

This effectively means that the Government of the UK does not agree to abide by the CRPD obligations to develop a fully inclusive education system in the UK.

The Right to Education under the UNCRPD goes beyond Article 7 (Children) and Article 24 (Education). UNCRPD does not look at each article in isolation, it reiterates at every step indivisible, interrelated and interdependence of each article. Equality and human rights is perceived in and through education. The State cannot merely provide educational services with possibilities of discrimination where there are no accessible facilities, no sign language interpretation, Braille books, and other equipment.

The UK is still the only country to place restrictions against Article 24. The Equality and Human Rights Commission and disabled people's organizations in the UK opposed these statements on grounds that they were not necessary and not compatible with the Convention's firm commitment to inclusion. Article 24 (Education) is an overarching challenge to governments to fulfill the human rights of disabled people, regardless of whether they are civil, political, social or economic. It often requires states to take steps which result in significant public expenditure. But it should be emphasized that the social and economic rights of disabled people are indivisible from all other human rights and are necessary in order to overcome the historical disadvantage of persons with disabilities. Consequently, the public expenditure argument must not be allowed to justify the failure to promote and fulfill these rights.

Implementation and Monitoring

The CRPD consists of fifty articles addressing the full array of civil and political, economic, social, and cultural rights. The Convention does not seek to create new rights for disabled persons, but rather elaborates and clarifies existing obligations for countries within the disability context. It establishes a committee of experts to monitor its implementation at the international level, and it also provides for the operation of independent national level monitoring mechanisms. The CRPD is also joined by an Optional Protocol that recognizes the competence of the Committee on the Rights of Persons with Disabilities to receive and consider communications from or on behalf of individuals or groups of individuals subject to

⁶³² UK Interpretative Declaration CRPD Article 24 Clause 2 (a) and 2 (b)

its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.’⁶³³ The CRPD is therefore comprehensive not only in terms of its substantive content, but also in the manner in which monitoring and implementation at all levels is addressed.

Articles 31 to 40 of the CRPD set out arrangements for implementation and monitoring of the convention at both the national and international levels. At the national level this includes the establishment of focal points and coordination mechanisms to facilitate cross-sector implementation measures. At the international level, it includes the establishment of a new treaty body to monitor implementation of the convention, and to receive complaints about violation of CRPD rights. Under the Optional Protocol the treaty body is also empowered to receive complaints about violations of CRPD rights from individuals and groups of individuals where they have exhausted domestic remedies.⁶³⁴ The Optional Protocol also establishes an inquiry procedure in relation to gross violations of CRPD rights.⁶³⁵

International Cooperation

Article 32 (International Cooperation) was one of the most hotly contested Articles in the development of the CRPD and its inclusion remained subject to challenge up until almost the last moment of negotiations. Essentially, this controversy related to a concern among many developed countries (particularly the European Union) that the Article would give rise to an expectation from developing and transitional states of increased aid to implement the CRPD. Consequential to this was the further concern that the Article would facilitate developing states adopting the stance that the CRPD could not be implemented domestically in the absence of additional aid. This controversy accounts for the rather tortured drafting of the chapeau of paragraph 1 of the article. In brief, Article 32 places a strong emphasis on national responsibility to realize the purpose and objectives of the CRPD, but recognizes the importance of international cooperation in support of these national efforts.

Although Article 32 was forged around the issue of ‘north-south’ wealth transfer, it would be a serious mistake to interpret the article only in those terms. There is enormous scope and need for cooperation between developed states in the harmonization of standards providing for accessibility, in the regulation of international non-state actors that impact on the lives of persons with disability, and in the elimination of structural barriers to equality that have an international dimension (for example, in civil aviation and copyright law). This is imperative in the context of increasingly globalized economic and social systems.

Does CRPD Foster New Human Rights?

Despite what might be characterized as the ‘official fiction’ that the CRPD does not set down

⁶³³ Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 1(1).

⁶³⁴ Article 1, CRPD Optional Protocol. 129 Article 6, CRPD Optional Protocol.

⁶³⁵ Article 6, CRPD Optional Protocol.

any new human rights, it would seem clear that it has, in fact, modified, transformed and added to traditional human rights concepts in key respects. The CRPD does contain entirely new or amplified formulations of human rights, including a number of collective or social group rights, such as the right to research and development,⁶³⁶ awareness raising,⁶³⁷ social protection and poverty reduction,⁶³⁸ and to international cooperation, including co-operation in international development programmes⁶³⁹ (sometimes called third-generation rights). The CRPD also incorporates a number of universal equality measures, such as the right to an accessible environment,⁶⁴⁰ which have the potential to benefit many persons, not just persons with disability (sometimes conceptualized as fourth-generation rights). Article 30 also contains an extensive exposition of rights to leisure, tourism and recreation (sometimes conceptualized as fifth-generation rights).

Additionally, the CRPD incorporates highly disability specific interpretations of existing human rights, which transform formerly essentially non- interference based rights (or negative rights) into positive state obligations. For example, the right of non-interference with personal opinion and expression is transformed into a positive state obligation to provide public information in accessible formats and to recognize sign languages, Braille, and augmentative and alternative communication.⁶⁴¹ Similarly, the non- interference based guarantee of equality before the law is extended or amplified into a positive obligation to ensure access to justice for persons with disability.⁶⁴² In these and other respects, the CRPD blends civil and political rights with economic, social and cultural rights, not only within its overall structure, but also within its individual articles. To this extent, the traditional distinction between those rights subject to immediate realization and those subject to progressive realization which is generally preserved in Article 4 of the CRPD, appears to be effectively abandoned.⁶⁴³ It is also noteworthy that under the Optional Protocol all CRPD rights are potentially justiciable, not just its civil and political rights.

Conclusion

Until December 13, 2006, when the Convention was adopted by the UN General Assembly, persons with disabilities had been tucked away in savings clauses and sidelined in a few

⁶³⁶ For example, Article 4(1)(f) and (g), General Obligations, CRPD.

⁶³⁷ Article 8, Awareness-raising, CRPD.

⁶³⁸ Article 28(2)(b), Adequate standard of living and social protection, CRPD. =

⁶³⁹ Article 32, International Cooperation, CRPD, which is not a new concept in international human rights law (cf Article 45, CRC), but its expression in the CRPD supersedes pre-existing formulations.

⁶⁴⁰ Articles 3, General principles (f), and 9, Accessibility, CRPD.

⁶⁴¹ Article 21, Freedom of expression and opinion, and access to information, CRPD.

⁶⁴² Article 13, Access to justice, CRPD.

⁶⁴³ Article 4(2), CRPD retains the distinction between the basic obligations of State Parties to each of the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (see Article 2(i) of each Covenant). Whereas civil and political rights must be guaranteed immediately, the same is not generally the case with economic and social rights. Article 4(2) of the CRPD reads: With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum extent of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realisation of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

resolutions and declarations. This contributed significantly to the invisibility of persons with disabilities in human rights discourse, which was highlighted by the Millennium Development Goal's (MDGs) failure to mention persons with disabilities explicitly.

The adoption of the Convention on the Rights of Persons with Disabilities by the UN General Assembly in December 2006 set off the process of signing and ratifying by UN Member States—and entities such as the European Union—as well as subsequent application and implementation at the national level.

The CRPD has been described as a 'paradigm shift' in relation to how human rights are to be understood in the twenty-first century.⁶⁴⁴ This would be a significant burden to bear for any piece of international law, let alone a law which protects the rights of individuals who have for so long been overlooked in society. Yet in the short period since its entry into force, the impact of the CRPD offers much promise. The Convention on the Rights of Persons with Disabilities spells out clearly and unconditionally that persons with disabilities have equal access and a right to full and effective enjoyment of all human rights—the removal of barriers explicitly termed as a condition for access and the enjoyment of equality.

Without doubt, the CRPD provides a transformative potential for the lives of the world's largest minority.⁶⁴⁵ Its passage into international law ought rightly to be a cause for celebration. By any measure, the CRPD is a high water mark not only in the area of disability rights, but also in the development of international human rights law concepts and implementation measures more generally. However, enthusiasm for the CRPD must be tempered with realism and strategy.

The CRPD, like all international instruments, is ultimately a negotiated text. It is therefore unrealistic to expect it to reflect a fully coherent or comprehensive exposition of disability rights. Ultimately, the CRPD has been most influenced by an uncritical, populist, understanding of the social model of disability. At times this understanding approaches a radical social constructionist view of disability, in which impairment has no underlying reality. In doing so it ignores the last decade of critical disability studies which—while not rejecting the central tenet of the social model of disability as social oppression—has reemphasized the realities of impairment as a dimension of the ontological and phenomenological experience of disability. Therefore, if there is truly to be a shift to a coherent new disability rights paradigm in international law, it will be important that CRPD interpretation and implementation efforts penetrate beyond populist social model ideas to a more sophisticated

⁶⁴⁴ Raz, Joseph, *Human Rights without Foundations*, in Samantha Besson, John Tasioulas (edit.), *The Philosophy of International Law*, Oxford Univ. Press, Oxford,

⁶⁴⁵ Raz, Joseph, *Human Rights without Foundations*, in Samantha Besson, John Tasioulas (edit.), *The Philosophy of International Law*, Oxford Univ. Press, Oxford, also see Rehman, Javaid, *International Human Rights Law*, Pearson Education Harlow, 2010.

understanding of impairment and disability in its social context.

Whether the CRPD will be able to fulfill its promise will depend on how national authorities grapple with complex issues such as legal capacity during implementation. In any case, the energy and vision that the CRPD has imparted on the struggle for equality for persons with disabilities should not be underestimated. The CRPD is therefore a crucial buttress and facilitator of a disability rights agenda, but it is not a proxy for that agenda. Some disability rights issues still remain untouched or undeveloped in international human rights law. Consequently, it will be important that disability human rights activists neither undervalue, nor overestimate, the role and scope of the CRPD and its potential contribution to securing the human rights of persons with disability into the future.

The CRPD is proving to be a key instrument for promoting law reform and requiring states to re-examine how persons with disabilities are perceived. Often it has asked fundamental questions of the paternalistic welfare policy adopted by most European countries towards disabled persons. Nonetheless, paternalistic rhetoric still underpins disability law, policy and practice. Consequently, these strategic developments will only lead to effective equality for persons with disabilities in key areas such as education, healthcare, criminal justice and political participation, once the initial enthusiasm and good will shown to the CRPD is transformed through the difficult task of putting in place practical solutions for the challenges encountered by persons with disabilities.

It is the contention of this thesis that a human rights approach, as exemplified in the CRPD, transcends models of disability and models of citizenship, and offers a better way forward for disabled people particularly those with intellectual disabilities. This can be seen in the provisions of Article 12 which are universal—in stark contrast to citizenship models which have excluded disabled people in the past.

In regard to education for disabled people, Article 24 provides a better platform than Salamanca, and offers a way for states to fully include all disabled people in education. However, in the case of the UK, the British government's reservations threaten to severely limit its provisions and undermine its purpose. Given the state of education for disabled people in England this is unfortunate. Education theory and practice in England during the last three decades, under the sway of the 1978 Warnock Report, has relied on flawed models of citizenship and disability and hasn't fully included disabled students in the education system. This is the topic of the next two chapters.

Chapter Six

Models of Disability as Expressed in The Warnock Report

A Case Study

Chapters Six and Seven take the watershed 1978 Warnock Report on 'special education' and the subsequent legislation and the 2005 Warnock Report as case studies. The Warnock Reports are shown to express and exemplify the strengths and weaknesses in approaches wedded to past models of disability and citizenship.

In this chapter I look at whether the flaws of the models of disability are expressed in the reports and subsequent acts, and if the medical and social models of disability helped enhance or minimize the citizenship status of disabled people in education, both in theory and practice.⁶⁴⁶

In the 1970s the social model of disability has prompted arguments for inclusion in education and changing the environment to fit the needs of the students in ordinary classes rather than trying to fix the child. The accompanying legislation and how models of disability and models of citizenship and human rights were expressed through the Warnock report reveals the political, legal and social processes responsible for the changes in special education. It shows the criteria by which one can judge how much change has in fact been made towards the education of disabled pupils and their equality towards full citizenship and rights.

Furthermore the limited financial funding for the implementation of the recommendation of the Warnock report in the 1981 Education Act together with the governments' definition of citizenship raises questions and concerns for the attainment of equal and full citizenship for disabled people in education (models of citizenship and the Warnock report are analysed in the next chapter - chapter7).

What is unique and important in using the Warnock Report as a case study in this chapter, is that it sets out the stages of change in education policies; after the social model of disability was introduced, the report shifted the analysis from an individual medical model to a social model of disability and a more inclusive notion of citizenship in education.

⁶⁴⁶ Warnock suggested that: 'up to one in five children during their school career will require some form of special educational provision' see DES, 1978, p41. Most of the recommendations in the report referred to children with 'severe, complex and long-term disabilities' DES, 1978, p45. Warnock's central message was libertarian, proclaiming the 'right of the handicapped to uninhibited participation in the activities of everyday life, in all their varied forms' DES, 1978, p99. This included the right to be educated in ordinary schools. The report emphasised the need to adopt a more positive conceptualisation of individuals with a disability. Warnock proposed that the statutory categories of handicap be replaced with a continuum of 'need' and that all teachers (specialist and mainstream) were to look to the curriculum and their own teaching methods as the source of difficulties.

The analysis shows that most of the educational provision for disabled children although more inclusive, still reflects the flaws of the models of disability, citizenship and human rights for disabled students, which remains basically segregative and is dominated by traditional medically-influenced attitudes, and commands a low priority within the education system as a whole. The limits of the social model reflected in the Warnock report and the disjuncture between first- and second-generation rights manifests in antidiscrimination laws and policies that do not link socially contingent exclusion in diverse sectors with artificial exclusion from mainstream schools.

I conclude chapter Six and Seven with the view that major limitations in the models of disability, citizenship and human rights resulted in education policy that had significant shortcomings in relation to equality for disabled children, and that the models of disability and citizenship that underpin the Warnock Report, the subsequent legislation and education provision for the disabled need to be rethought with a more inclusive model of human rights as a possible way forward for disabled people.

The Role of Specific Disabilities and Social Class in Education

Throughout the history of special education, disability policy in Britain has expressed several different objectives: the desire to contain, compensate, and care for disabled people, and to help them achieve eventual citizenship. Disability legislation as existed before the turn of the century was devoted principally to the segregation and containment of disabled people.⁶⁴⁷

This chapter critiques the models of disability and citizenship as theoretical/political foundations for policies to achieve equality and inclusion for the disabled in education. Although this and the next chapter deal with the education of the disabled as a group, they will mainly look at the provision and policies for the education of the people now known as children with learning/intellectual difficulties,⁶⁴⁸ and at the discourses which influenced these policies and citizenship status for such children. They will focus on state policy and what the provisions which, in the case of educational provision, implies for policy for England. This necessarily means focusing almost wholly on working-class children.⁶⁴⁸ The children of the middle classes were not to be found in great numbers within the state system until the second half of the twentieth century. Private provision, whether in schooling or otherwise, was the norm for all able middle and upper class children.

⁶⁴⁷ Swain, J. (2005) Inclusive education: readings and reflections (Book review), *Disability and Society*, 20(7), 787. Swain, J., & French, S. (2000). Towards an affirmation model of disability. *Disability and Society*, 15(4), 569-582. see also Thomas, C. (2002). Disability theory: Key ideas, issues and thinkers. In C. Barnes, M. Oliver & L. Barton (Eds.), *Disability studies today* (pp. 38-57). Cambridge, UK: Polity Press in association with Blackwell Publishers

⁶⁴⁸ HC Deb 06 March 1856 vol 140 cc1955-2015

It was surprising to find how class and capital were issues running through the analysis. Attention is drawn to the interaction of *multiple* sites of systemic inequality—including gender, class, race and perceived ability—and in producing the conditions through which individual agency is exercised. This chapter considers the intersections of class and ability with these other features of what is essentially a capitalist and patriarchal society. But the evidence suggests that, in the period in question, class and capital were indeed the major players in the game.

The division between working class and middle and upper class children, which has endured since the mid-twentieth century, must continue to be read into any analysis of education in England. In other words, it must be read into any analysis of the production of intellectual and physical subordination up to the present. The picture has changed over the years but the social structure of society of class divisions and education remain.

In a recent conference in July 2012 the Secretary of State for Education, Michael Gove, confirmed this view in a speech to Brighton College. He said of the seven percent of the population who are products of independent schools in comparison to those who attend state schools, and the small population who are products of independent schools, himself included, are handsomely represented⁶⁴⁹ in politics, the judiciary, the media, business, acting and sport.⁶⁵⁰

⁶⁴⁹ (Michael Gove, Minister of Education, Department of Education 10 May 2012).

⁶⁵⁰ Ican't help reflecting on some other facts about our society which the excellence of the education offered in our independent schools underlines. It is remarkable how many of the positions of wealth, influence, celebrity and power in our society are held by individuals who were privately educated.

Around the Cabinet table – a majority – including myself – were privately educated. Around the Shadow Cabinet table the Deputy Leader, the Shadow Chancellor, the Shadow Business Secretary, the Shadow Olympics Secretary, the Shadow Welsh Secretary and the Shadow Secretary of State for International Development were all educated at independent schools.

On the bench of our supreme court, in the precincts of the bar, in our medical schools and university science faculties, at the helm of FTSE 100 companies and in the boardrooms of our banks, independent schools are – how can I best put this – handsomely represented.

You might hear some argue that these peaks have been scaled by older alumni of our great independent schools – and things have changed for younger generations. But I fear that is not so.

Take sport – where by definition the biggest names are in their teens, twenties and thirties. As Ed Smith, the Tonbridge-educated former England player, and current Times journalist, points out in his wonderful new book Luck:

Twenty-five years ago, of the 13 players who represented England on a tour of Pakistan, only one had been to a private school. In contrast, over two thirds of the current team are privately educated. You're 20 times more likely to go on and play for England if you go to private school rather than state school. The composition of the England rugby union team and the British Olympic team reveal the same trend. Of those members of England's first 15 born in England, more than half were privately educated.

And again, half the UK's gold medallists at the last Olympics were privately educated, compared with seven per cent of the population. It's not just in sport that the new young stars all have old school ties. It's in Hollywood, Broadway and on our TV screens. Hugh Laurie, Dominic West, Damian Lewis, Tom Hiddleston and Eddie Redmayne – all old Etonians. One almost feels sorry for Benedict Cumberbatch – a lowly Harrovian – and Dan Stevens – heir to Downton Abbey and old boy of Tonbridge – is practically a street urchin in comparison.

If acting is increasingly a stage for public school talent one might have thought that at least comedy or music would be an alternative platform for outsiders. But then –

Armando Iannucci, David Baddiel, Michael McIntyre, Jack Whitehall, Miles Jupp, Armstrong from Armstrong and

The evidence suggests that in the UK class and capital continue to be the major factors in the game. This does not mean the analysis presented here is wholly a Marxist one, though it is undoubtedly concerned with the social relations of capital. If the able-bodied population are thought to be short-changed in a country where citizenship is accessed through work and education. What hope do disabled people have?

What is The Warnock Report 1978?

In England the 1978 Warnock report is the recommendations of the Committee of Inquiry into the Education of Handicapped Children and is considered a watershed and the most powerful report on Special Educational Needs (SEN) and inclusion in recent English history.⁶⁵¹ The Report, followed by the 1981 Education Act, radically changed the conceptualisation of special educational needs,⁶⁵² it shifted the focus from a medical model of disability to a social model.

Miller and Mitchell from Mitchell and Webb were all privately educated. 2010's Mercury Music Prize was a battle between privately educated Laura Marling and privately-educated Marcus Mumford.

And from Chris Martin of Coldplay to Tom Chaplin of Keane – popular music is populated by public school boys. Indeed when Keane were playing last Sunday on the Andrew Marr show everyone in that studio – the band, the presenter and the other guests – Lib Dem peer Matthew Oakeshott, Radio 3 Presenter Clemency Burton-Hill and Sarah Sands, editor of the London Evening Standard - were all privately educated.

Indeed it's in the media that the public school stranglehold is strongest. The Chairman of the BBC and its Director-General are public school boys. And it's not just the Evening Standard which has a privately-educated editor.

My old paper The Times is edited by an old boy of St Pauls and its sister paper the Sunday Times by an old Bedfordian. The new editor of the Mail on Sunday is an old Etonian, the editor of the Financial Times is an old Alleynian and the editor of the Guardian is an Old Cranleighian. Indeed the Guardian has been edited by privately educated men for the last 60 years...

But then many of our most prominent contemporary radical and activist writers are also privately educated. George Monbiot of the Guardian was at Stowe, Seumas Milne of the Guardian was at Winchester and perhaps the most radical new voice of all --Laurie Penny of the Independent – was educated here at Brighton College.

Now I record these achievements not because I wish to either decry the individuals concerned or criticise the schools they attended. Far from it. It is undeniable that the individuals I have named are hugely talented and the schools they attended are premier league institutions.

But the sheer scale, the breadth and the depth, of private school dominance of our society points to a deep problem in our country - one we all acknowledge but have still failed to tackle with anything like the radicalism required. (Department of education May 10 2012) and

We live in a profoundly unequal society. More than almost any developed nation ours is a country in which your parentage dictates your progress. Those who are born poor are more likely to stay poor and those who inherit privilege are more likely to pass on privilege in England than in any comparable county. For those of us who believe in social justice this stratification and segregation are morally indefensible.

And for those of us who want to see greater economic efficiency it is a pointless squandering of our greatest asset - our children - to have so many from poorer backgrounds manifestly not achieving their potential. When more Etonians make it to Oxbridge than boys and girls on benefit then we know we are not making the most of all our nation's talents.

When hundreds of primary schools allow children to leave not able to read, write or add up properly we know we are indulging in a form of national self-harm so profound as to be disabling. Even when disadvantaged children attend schools which perform well overall, they continue to lag behind their wealthier, luckier peers (Michael Gove, Minister of Education, Department of Education 10 May 2012).

⁶⁵¹ See Gipps et al, 1987; Wedell, 1992; Visser, 1993

⁶⁵² The Warnock Committee was not the first to advocate inclusive education for disabled people. The move towards inclusion in England can be traced back to the Wood Committee, which emphasized the unity of ordinary and special education for disabled people and the 1944 Education Act, which acknowledged that education for some children with special needs, should take place in ordinary schools⁶⁵² while wholly excluding others deemed uneducable.

The Committee was established by Margret Thatcher as Secretary of State for Education, and taken on by the Labour government of 1974. The committee was chaired by Mary Warnock (now Baroness Warnock) and started work in the summer of 1974. One of the reasons for setting it up was that in 1972 two years earlier, legislation had been introduced giving all children an entitlement to education, however severe their disabilities, and abolishing the category of the ineducable child.⁶⁵³ The 1972 Education Act gave all children a right to education, the concept of the uneducable child was abolished, and new principles of universal education was needed. Since 1972 Local Education Authorities had been struggling without much systematic guidance to provide school education, mostly in existing special schools, for the most severely disabled with whom they had not had to deal with before. A new principle of genuinely universal education had to be formed. The committee's task was to articulate a concept of education that could make sense in the context of any child, anywhere on the continuum of ability or disability.⁶⁵⁴

The Warnock Report made a key change by abandoning the eleven categories of handicap established by the 1944 Education Act which used to identify those children who can benefit from an education and those thought to be uneducable. Which was allied to the shift in policy that wherever possible children should be educated in mainstream schools.

The progress of special education and the inclusion of all disabled people in education was a considerable step forward yet the theory and practice of special educational needs continued to sustain and construct exclusionary practices within education and render disabled people second-class citizens. The flaws of the medical and social model and the models of citizenship are clearly expressed in the 1978 Warnock Report both within its text and the way it has been implemented. It is argued here that the limitations of the models of disability and citizenship and traditional UN human rights expressed in the Warnock Reports can be enhanced by the UNCRPD both in theory and practice in education and give disabled people full citizenship status.

The chapter is divided into four main sections:

1. Background of The Warnock Report as the Focus of the Analysis in this Chapter
2. The Warnock Report's Expression of the Medical Model and its Problems and Limitations
3. The Warnock Report's Expression of the Social Model and its Problems and Limitations
4. Warnock, Special Educational Needs the Conflation of the Medical and Social Model of Disability and its Problems
5. The Warnock Report 2005 Critique of the Implementation of the 1978 Report

⁶⁵³ Lady Warnock, in *Special educational needs a new look*, Warnock, Norwich, Tenzi, continuum international publishing group, 2010 London, p.15

⁶⁵⁴ Lady Warnock, in *Special educational needs a new look*, Warnock, Norwich, Tenzi, continuum international publishing group, 2010 London, p.16

1. Background of The Warnock Report as the Focus of the Analysis in this Chapter

The Warnock Committee on the education of disabled children in England 1978 was the first Committee to advocate educating *all* children.⁶⁵⁵ It produced the report (The Report of the Committee of Enquiry into the Education of Handicapped Children and Young People) and abolished definitions of the 1944 Education Act where children with special educational needs were categorized mainly by their disabilities defined in medical terms.⁶⁵⁶ The Warnock Report was not the first official report or legislation to advocate inclusion of disabled people in education, rather it was the first to advocate inclusion for *all* disabled people.⁶⁵⁷ This notion of inclusion started to take shape in the 1944 Debate, on the 1944 Education Bill which explained the limited adoption of the inclusive philosophy of the 1944 Education Bill, by the Parliamentary Secretary (Mr Chuter Ede) in these words:

May I say that I do not want to insert in the Bill any words which make it appear that the normal way to deal with a child who suffers from any of these disabilities is to be put into a special school where he will be segregated. Whilst we desire to see adequate provision of special schools we also desire to see as many children as

⁶⁵⁵ Due to society's shift from a medical model approach for disabled people to a social model approach, there is widespread agreement within the UK that the Warnock report represented a watershed for special education in educating all children and that no child was eneducable.

⁶⁵⁶ The 1944 Act brought significant reforms to the education system. While most of these reforms were directed at mainstream education and the provision of free secondary education for all, the Act also addressed certain aspects of education for children with special needs. However, its approach to, and definitions of children with special needs was not as liberating as its prescriptions for education in general. Special educational provisions were re-enacted in sections 33 and 34 of the Education Act 1944 and modified in subsequent Acts of 1948 and 1953. Children identified under Section 34 would need 'special educational treatment'. Under Section 33, LEAs had to see that severe cases received appropriate help in special schools, but where this was impractical or where disability was less serious, 'in any school maintained or assisted by the local education authority'. This reversed the 1921 Act's stipulation that special education was to take place in special schools. A continuum of need was thus recognized which logically required close cooperation between special schools and mainstream education. However, most contemporaries complained that this close relationship could not be achieved and, therefore, special education continued in to be viewed as special provision. (Cole, 1989; 100) the stigmatizing 'certificate' which had drawn an arbitrary line between the official handicapped and the normal was abolished along with the label 'defective'. A continuum of need was therefore recognized which logically required close cooperation between special schools and ordinary schools and the inclusion of special schools within the mainstream education. However, most contemporaries explained that this close relationship could not be achieved and, therefore, special education continued to be viewed in terms of special provision. The growth of the welfare state during the postwar period, with the provision of services which were seen as a common social good—rather than a national economic drain on resources signaling economic and social dependency—also marked changes in perceptions of disability. As in the cases of illness, poverty and housing, rather than being a purely private and personal problem impairment and disability came, to some extent, to be regarded as a *social* issue legitimately requiring state support and intervention. At the same time, the legacy and continual refinement of systems and procedures concerning the diagnosis, categorization and medicalization of impairment and the important role played by professionals in these processes led to a continued isolation of disabled children in the education system. In the past, members of the medical profession were the main arbiters of special education provision. The 1944 Education Act formalized the role of the medical profession by giving them a statutory right to diagnose handicap and prescribe treatment (both medical and educational). The need for co-operation between medical and educational professionals was noted by Frizell (1947) *as having the makings of dissension and rivalry*' (p7).

⁶⁵⁷ —The principle is not new to education. It has been long-standing government policy, confirmed in numerous official documents, that no child should be sent to a special school who can be satisfactorily educated in an ordinary one. There has in fact been a steady increase over time in the number of children ascertained as handicapped who have been placed in designated special classes and units in ordinary schools. It rose from 11,027 in 1973 to 21,245 in 1977, that is from 6.8% to 12.0% of all children ascertained as requiring separate special provision. The children placed in these classes and units have been mainly those with moderate rather than severe disabilities, but all categories of handicap are represented. They still form quite a small proportion of all handicapped children for whom special education is provided, but the trend is likely to continue. Although the existence of such classes and units does not necessarily entail integration in any complete sense, nevertheless it is a proof that segregation is diminishing. Moreover, although figures are not available, placements of children with disabilities in ordinary classes, of which we give examples in paragraph 7.12(i), are becoming more frequent." Warnock report 1978 p.113,

possible retained in the normal stream of school life.⁶⁵⁸

Accordingly, Section 33(2) of the Act provided for the less severely handicapped (the great majority of all handicapped) to be catered for in ordinary schools, and the ensuing departmental guidance to local education authorities contained detailed suggestions as to how this might be achieved. The post-war planning of special educational treatment thus proceeded on two main assumptions: first that special educational treatment would be required for up to seventeen percent of the school population; and secondly, that ordinary schools would have the major share in providing it.⁶⁵⁹

However, many children in the 1944 Education Act were excluded from education and considered to be uneducable, and pupils were labelled into categories such as maladjusted or educationally sub-normal and given special educational treatment in separate schools. It was not until the 1970 Education (Handicapped Children) Act that ineducable children ceased to be the sole responsibility of the health service, and were brought within the services of Local Education Authorities (LEAs) shifting from a medical model approach to a social model approach in education. The 1970s was a time of political and social change for disabled people in England, with the rise of the disability movement; the introduction of the social model of disability; and the journey and desire to achieve full citizenship. It marked a change in attitudes towards handicapped children and pressure grew for a committee of enquiry into their education.⁶⁶⁰ The pressure to create legislation fundamentally to shift the focus of change away from the individual to the social model and other influences had created pressures for a disability civil rights approach. The result of this pressure for a civil rights approach⁶⁶¹ was the creation of the Warnock Committee in 1974 to examine educational provision for handicapped children in England, Scotland and Wales. The 1978 Warnock report constitutes a major watershed in educating *all* disabled children. The Warnock Framework was later introduced under the 1981 Education Act.⁶⁶² The Warnock Report in 1978, followed by the 1981 Education Act,⁶⁶³ changed this conceptualization of

⁶⁵⁸ Parliamentary Debates: Hansard Vol 398 Col 703 .21 March 1944

⁶⁵⁹ Warnock Report 1978 p.31-32

⁶⁶⁰ Evans & Varma, 1990

⁶⁶¹ The fight for disability rights has a long history which, the disability rights movement as it is now exists, was shaped in the second half of the twentieth century. see Oliver, 1993, also See Pfeffer, 2001. Activists brought forth a challenge to devaluation based on their personal experience, while highlighting barriers and confronting conventional thinking in Barnes, Oliver & Barton, 2002. This activism, has sought empowerment and emancipation, and the ability to influence policy decisions see Ward & Flynn, 1994. Since the 1960s, the disability movement has progressed in the fight for disability rights. From this activism, disability studies developed, fighting for societal inclusion and value. In an analysis of the development of this movement, Shakespeare (1993) cites Ethel Klein's (1984) identification of the stages of political consciousness in the women's movement, which have also been shown to be reflective of the disability movement. Klein identifies: affiliation through group membership, rejection of traditional definitions and the recognition of personal problems as political and systemic issues as the basis for a movement. The disability rights movement is argued to have followed a similar trajectory in its pursuits. Providing various understandings and approaches to disability, this movement has challenged negative conceptions and denials, attempting to replace constructions of passivity and objectification with autonomy and inclusion (Shakespeare, 1993).

⁶⁶² However, it was not until 1994 that the Warnock Committee's commitment to education within mainstream settings was translated into the Government's support for inclusive education.

⁶⁶³ The 1981 Education Act was a limited measure which only addressed some of the recommendations of the Warnock committee. It offered nothing specifically to help meet Warnock's priority needs. a) Disappointingly, for many observers, the government was to make no additional funding available to help implement the Act. During the

special educational needs and declared no child was uneducable thus expressing social model views.⁶⁶⁴ Furthermore, instead of the medical categorizations and labels previously used to describe disabled children in education, the term special educational needs was used by the Warnock committee to describe all children who may have individual educational needs shifting from a medical perspective to a social model.

Disability rights advocates have successfully invoked the social model's view that disability-related exclusion is an avoidable and remediable social construct. The report concluded that this exclusion arose from unwarranted prejudice. Hence, the Warnock report was premised on the social model's belief that peoples' functional limitations are caused by the socially constructed environment, such that the repercussions of having a disability are mutable:

Special means of access to the curriculum may be required by children with impairments of sensory or motor functioning, including visual, hearing, speech and physical disabilities. For example, children with severe visual disabilities may need reading material translated into braille. A special or modified curriculum is likely to be required by children who are currently described as educationally sub-normal.⁶⁶⁵

The influence of the social model is clearly reflected in the Warnock report. The social model influenced legislation for the disabled and aimed to guarantee them full citizenship but failed many disabled students by excluding them from ordinary education.

The major problem for inclusive citizenship as advocated by Warnock was the contradictions in the report about inclusive education. The Warnock committee never advocated that all children should attend mainstream schools. The point has been very clearly stated by the Secretary of State for Education and Science at the time:

The new law ... does not herald the precipitate dismantling of the very valuable work

ensuing years this was often seen as the major reason for the limited advance towards integration.

b) Implementation of the Act was also hampered by the difficult practicalities involved in altering traditional organizational structures and preparing and training staff in schools receiving the children with special needs.

c) Successful integration was always thought to depend on welcoming good teachers, the preparation of teachers were thought to be good in only some areas, in some schools, through local effort, it is probable that many staff did develop greater expertise and understanding for children with special schools. However, preparation of the majority of teachers for greater integration continued to be scarce. d) Unfortunately, the training of teachers to work with SEN children had always been low on local and central government agendas and, historically, had contributed much to the low status of special schools or special class teachers.

The Warnock Framework was introduced under the 1981 Education Act but with no additional funding for the new processes involved in statementing or teacher training, despite the closure of many special schools. The 1988 Education Act then established the National Curriculum and a system of league tables where schools competed based on academic attainment. Baroness Warnock described things as getting: *far worse from 1988 onward (for children with SEN) who were not going to help the league tables*". The Warnock framework remained firmly in place through the 1980s-90's. During the 1980s and 1990s there was a considerable decline in the number of children in special schools and a gradual increase in the proportion of children both identified as having special educational needs (SEN) and given statements of SEN. As Brahm Norwich, Professor of Educational Psychology and SEN at the University of Exeter, identified to the Committee in evidence:

there has been quite a sizeable decline in the total population of special schools. That was greatest in the 1980s and flattened out somewhat in the 1990s. "Educational reform (such as the Education Act of 1993) continued to push for an inclusive approach.

⁶⁶⁴ However, it was not until 1994 that the Warnock Committee's commitment to education within mainstream settings was translated into the Government's support for inclusive education. The various Acts and legislation that have followed demonstrate the progress in attitude that has taken place since the Warnock report towards the aim of trying to include all children in a common education framework and away from categorising children with SEN or disabilities as a race apart. This has been representative of a broader international trend.

⁶⁶⁵ Warnock Report 1978 p.41

of special schools, particularly those for children with severe disabilities. . . a minority of handicapped children will always need the help that only a special school can give, and it will be important to ensure that integration does not force them into isolation.⁶⁶⁶

The Warnock report confirms this position regarding special schools as follows:

We are in no doubt whatever that special schools will continue to feature prominently in the range of provision for children with special educational needs. This view was supported by the weight of the evidence submitted to us, which was in favour of a continuing place for special schools, alongside a move in the direction of educating a greater proportion of handicapped children, including more severely handicapped children, in ordinary schools. The Inner London Education Authority in its evidence to us affirmed that in many respects, the special school represents a highly developed technique of positive discrimination.⁶⁶⁷ We believe that such discrimination will always be required to give some children with special educational needs the benefit of special facilities, teaching methods or expertise (or a combination of these) which cannot reasonably be provided in ordinary schools. In this chapter we consider the organisation of special schools and of other forms of special educational provision located outside the ordinary school.⁶⁶⁷

We consider that both day and boarding special schools will continue to be needed for children with moderate learning difficulties, although the numbers required may decrease as ordinary schools acquire greater expertise and experience in this field. We envisage that the special schools will provide for children with more complex learning problems combined with other disabilities and emotional and behavioural disorders.⁶⁶⁸

And:

Young people at the age of 16 who are currently described as severely educationally sub-normal may be at a critical stage in their development, both educational and social, and unless suitable educational provision is made for them they may not only fail to make any further progress but actually fall back. Continued education in a special school will be right for some, but it may be difficult for others to mature in such a setting, particularly if the school caters for children of all ages.⁶⁶⁹

Although education for all is a positive step forward the Warnock Report continued to employ the old notions of citizenship rather than notions of universal human rights.

Throughout the history of special education, disability policy in England has expressed several objectives: the desire to contain, compensate, care, and achieve eventual citizenship. Disability legislation as existed before the turn of the century was devoted principally to the segregation and containment of disabled people.⁶⁷⁰ Cultural understandings of difference are reflected not only in the beliefs and attitudes of people, but also in the reactions and behaviors of individuals and in social policy. The educational system is constructed to include some children and not others. For decades, this separation of students has meant

⁶⁶⁶ Warnock Report 1978p. 135, see also Speech by the Secretary of State for Education and Science, Mrs Shirley Williams, at the opening of Inkersall Green Special School at Staveley, Derbyshire on 21 January 1977.

⁶⁶⁷ Warnock 1978 report p.135

⁶⁶⁸ Warnock 1978 p.234

⁶⁶⁹ Warnock 1978 Report p.192

⁶⁷⁰ Warnock 1978 Report 1978

that some children with individual deficits could not succeed in an ordinary educational system.

The Limits of Education Policy Analysis

It would be difficult to analyse the cause or reason for a specific policy or Act. Do models of disability and models of citizenship, as reflected in watershed education policies, move things forward or simply reflect? This is an interesting question and it can be said that what these policies *reflect* is the change in understanding notions of disability and citizenship. Disability policies are not solely the result of social definitions or categorizations of who the disabled are; rather, it is the conceptions and models of disability which can be seen as a key administrative category in the historical and contemporary development of social policy.

This thesis is not an examination of how ideas shaped policies, but an analysis of how disability education policies express models of disability and citizenship for the period 1978-2005. This is a more reliable analysis of the education policies in this thesis because it is tricky to try and analyse the rational or perceptions behind a specific policy, due to the fact that most policies have a number of differing justifying rationales and supporting arguments in their favour.⁶⁷¹ Policymakers and legislators can agree on a policy without agreeing on the underlying rationales for that policy. Any policy can have multiple objectives and be informed by multiple, and even competing, ideological perspectives. Thus when analysing education policies for the disabled in England we should take these limitations into account.

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The Process of Policy Making and Disabled People in Britain

The fundamental premises on which UK governments base their policies on disability depend largely on how governments define disability. The way that a government conceives of disability has a great effect on the country's laws and institutions, as well as the quality of life that disabled people can enjoy.

⁶⁷¹ Adapting the work of Bramely et al (1995), we may theorize policy making in four main ways: 1) A "welfare economics" account has been proposed by writers like Le Grand et al (1992), Walker (1981) and Jenkins (1978) Put simply, any economic and other advantages would be measured against any costs in bringing them to fruition. A decision would be therefore based on a view of whether the overall benefits outweighed the liabilities or vice versa; 2) A second model of the policy process accords with analysis by sociologists such as Dahl (1961) and Ham and Hill (1984), and economists like Laver(1979). This "pluralist" politics account assumes that policy implementation takes place within a decentralized, democratic system of government. Decisions are therefore taken by politicians who bear in mind the impact of such choices on their subsequent electoral chances. They may be especially sensitive to the views and wishes of voters in marginal constituencies. If there is that natural conservatism and wariness of innovation, the likelihood is that the political instinct is for resistance to change; 3) Neo-Marxist in origin, this account stresses the power of "elites" who have privileged positions in the political process. If this theoretical model is correct and certain groups exercise a predominant influence over policy planning, then these groups may wish to see development rather than the preservation of the status quo, in which circumstances the balance shifts away from inactivity towards change in some specific direction; 4) Finally the fourth theory of policy formation and implementation is the bureaucratic model. This model is based on the premise that policy is made and carried out in the interests of politicians and bureaucrats themselves. Tullock argues that bureaucrats are ordinary people and as such. The constant aim of bureaucrats is the accretion of power. Accordingly administrations seek to secure their own positions, increase their staffing, enhance their budgets and extend their sphere of influence.

⁶⁷² Lindblom, 1979: 523; Lindblom, 1982: 135

Throughout history, children with disabilities were considered almost in all countries in the world as invalid or inferior. This perspective led to their exclusion, at best, they were concentrated into institutions to accommodate them.⁶⁷³ Seen as needing special protection and as not able to benefit from education, children with disabilities were the last to be offered access to education in England.⁶⁷⁴

Whichever model of the state proves to be nearest the truth, it is evident that none of these accounts is particularly helpful to disabled people. The policies reinforced and reflected existing relations between the powerful and the powerless. Policies towards disabled people, as a marginalised group, were unlikely to enfranchise them. In a pluralist state, where policy is the product of competing interests and power blocks, disabled people, as a minority group, are likely to command influence and individual input on policy. Disabled people experienced a spectrum of responses, ranging from the very negative through to the guaranteeing of citizenship.

The British experience has consisted of a trend starting with policies intended to isolate disabled people from society and from each other, and moving gradually through a piecemeal service approach slowly towards inclusive citizenship. The encapsulation of disability within a medical context is critically important because this interconnection has been paramount in the formulation and implementation of policy. From Victorian times through to the present day, policies have reflected four successive (but overlapping) kinds of objective, and medicine has provided the main context for the first three of these. The policy goals have been:

1. To effect the containment or segregation of disabled people;
2. To provide redress for social exclusion, and especially to compensate disabled people for injuries received in war or at work;
3. To provide welfare through social services, ostensibly as an attempt to reintegrate disabled people into society and also as an attempt to normalise or control them;
4. To secure rights and citizenship, and where necessary, reconfigure the social and built environment.⁶⁷⁵

The way society views people with disabilities is, in a general sense, constructed by the internal logic and assumptions of definitions, views and models of disability and models of

⁶⁷³ http://portal.unesco.org/education/en/file_download.php/4af79d6b0090ec99b5656ac9efa387e1Balescut_J.doc

⁶⁷⁴ Thomas, C. (2002). Disability theory: Key ideas, issues and thinkers. In C. Barnes, M. Oliver & L. Barton (Eds.), *Disability studies today* (pp. 38-57). Cambridge, UK: Polity Press in association with Blackwell Publishers.

⁶⁷⁵ Vernon, A. (1998). Multiple oppressions and the disabled people's movement. In T. Shakespeare (Ed.), *The disability reader: Social science perspectives* (pp. 201-210). London: Continuum. Walmsley, J. & Atkinson, D. (2000) *Oral History and the history of learning disability*, in: J. Bornat, R. Perks, P. Thompson & J. Walmsley (Eds) *Health, welfare and oral history*.y (London, Routledge).

citizenship and human rights, one of which tends to be dominant in a particular society at a particular time. Policy and resulting legislation flows from that model, giving effect to one or other particular ideological stance that determines the overall relationship of the state to people with disabilities. Each ideological stance tends to reflect those views. For example after the industrial revolution disability emerged as a social category which linked those who were impaired, to growing systems of medical care and excluded them from access to education and the labour market.

Relationship Between Policy and Disability, some Historical Examples of Exclusions based on the Medical Model and its effect on full Citizenship for Disabled People in Education

An example of this relationship between policy and models was demonstrated in lack of policies prior to the nineteenth century when most Western countries did not have any clearly defined policy for people with disabilities. Salisbury indicated that in Britain, no attempt was made to respond systematically to the problems of the disabled population.⁶⁷⁶ The reason for this lack of policy was due to policy approaches where the government did not have any active policy and it was seen to be the role of charities to look after people with disabilities, reinforcing the association of disability with tragedy and loss. This medical/individual model focused purely on how a person with a disability compared to what might be perceived as a normal individual.⁶⁷⁷

The principle of state intervention was established more firmly during the period between 1914 and 1945. During the Second World War, for example, the government introduced free school meals and milk. In addition to the Beveridge Report, it also sponsored in the 1944 White Paper on Education, strategies for achieving full employment, and the creation of a national health service. These changing attitudes to social policy in wartime Britain were reflected in the series of reforms introduced by the post-war Labour government under Clement Attlee (1945-51). Examples are the National Insurance Act 1946, the NHS Act and the 1944 Education Act.

The National Insurance Act (1946), for example, created a comprehensive system of unemployment, sickness, maternity and pension benefits funded by employers, employees and the government. Most famously of all, the National Health Service (NHS) Act instituted for the first time in Britain a universal state health service. The Act, which came into force in July 1948, provided free diagnosis and treatment of illnesses at home or in hospital, including dental and ophthalmic treatment.

⁶⁷⁶ Salisbury (1973, p12), Finklestein, V (1993) *Workbook 1: Being disabled*, K665. *The disabling society*. Milton Keynes: Open University.p.69

⁶⁷⁷ Barton, L (1993a) The struggle for citizenship: the case of disabled people. *Disability, Handicap and Society* 8 (3) pp235-248.

Changes in social life brought about by the First World War have also influenced perceptions concerning impairment and disabled people and, in turn, have influenced the development of special education. During the Second World War the infrastructures of ordinary schooling, special education and residential institutions, were profoundly affected by the blitz, the evacuation of children from the cities, the widespread disruption in education services and a massive reduction in human resources and basic amenities. In 1941, for example, the number of disabled children attending special schools in London was reduced by fifty percent and many attended ordinary schools.

Primary education was to be followed by free compulsory secondary education starting at age eleven in either grammar, technical or secondary modern schools for the vast majority. For some, however, where the LEA saw fit, education was to be continued in multilateral schools. For a small minority whose placement was to be decided by the LEA rather than by its medical officers, an expanded system of special schooling would be needed.

The post-war period marked a shift in emphasis in terms of the power and responsibility of different agencies in the governance of social life and how citizenship was defined. Education authorities took on the role of coordinating the assessment process and making the final decision regarding special education placements, although medical professionals have continued to perform an important role in assessment procedures and outcomes.

Improved economic and social conditions, the end of empire, membership of the European Union and the impact of increased immigration all contributed to conditions which followed a greater inclusivity of citizenship and rights for all members of society. Up till the 1944 Education Act, mainstream secondary education, like special education, was not really considered a major area for government intervention. Most schools, both mainstream and special, were run by private or church charities under the supervision of local government boards. The 1939-45 war, however, changed this situation. Recruits to the armed forces were tested for general ability, and the authorities were startled by the results, which showed widespread ignorance. Concern about postwar economic recovery prompted the Government to rethink its education policy. The Education Act of 1944 was steered through Parliament by the Education Minister, R.A. Butler, and was followed by a similar Act for Scotland in 1945. This Act provided free secondary education for all pupils. Butler stated the changes to education as follows;

Clause 34 says: It shall be the duty of the parent of every child of compulsory school age to cause him to receive efficient full-time education suitable to his age, ability and aptitude, either by regular attendance at school or otherwise. And thus, instead of the rudiments of letters,' we offer in Clause 7 and onwards an opportunity to every child to pass through the primary and secondary stages. Butler added that the

educational system is important to making better *citizens*, which this Bill attempts to do.⁶⁷⁸

He went on to say:

Further, if these children are not educable, then how would they be employable?

I think it is time to say that education should be the ally and not the dreaded competitor of employment. To the question “Who will do the work if everybody is educated?” we reply that education itself will oil the wheels of industry and will bring a new efficiency, the fruit of modern knowledge, to aid the ancient skill of farm and field.⁶⁷⁹

Butler added that educational system is important to making better citizens who participate and would be employable.⁶⁸⁰ Disabled individuals who would not achieve this aim were excluded from education. Local Education Authorities were required to submit proposals to the new Department of Education for reorganising secondary schooling in their areas.

Therefore the advent of elementary mass, and then compulsory schooling at the beginning of the period in question, was predicated both on the needs of industrial capitalism to reproduce an appropriately skilled workforce and upon the humanist ideal that education would produce ‘civilised’ individuals for a civilised society.

Those children and adults who were never going to be able to compete in the labour market, and who were never going to be able to produce themselves as the liberal humanist version of learned individuals, became marginal to the endeavour of compulsory schooling from its beginnings.⁶⁸¹ This was particularly true for those with intellectual disabilities. There can be no absolute notion of what constitutes intellectual disability, since the means of coming to know about it is historically and socially situated. Unlike some physical and sensory impairments, a learning or intellectual impairment cannot be discerned in the absence of instruments of normalisation⁶⁸² This is not to argue that intellectual impairments, whatever we choose to call them, do not exist. But the means of separating those who can be categorised as intellectually disabled from the general population has been produced through a discursive field in which the (political) imperative to separate out the economically unproductive from the productive has prevailed. The policies expressed medical model of disability and exclusionary models of citizenship and they continued to exclude disabled people from mainstream education.

⁶⁷⁸ .Hansard HC Deb 19 January 1944 vol 396 cc207-322) Order for Second Reading reading

⁶⁷⁹ Hansard HC Deb 19 January 1944 vol 396 cc207-322) Order for Second Reading reading

⁶⁸⁰ (Hansard HC Deb 19 January 1944 vol 396 cc207-322) Order for Second Reading read.

⁶⁸¹ see (Hall 1992)

⁶⁸² (Foucault, 1975) and also, Foucault, M. (1975). *The Birth of the Clinic; An Archaeology of Medical Perception*. New York: Vantage Books.

Education, the Medical Model and Normalization In England

This medical deficit perspective continues to exist in the current educational system and continues to influence society's beliefs and assumptions relative to many students with disabilities. Poplin contended that the deficit perspective continued to result in the emphasis of deficits over strengths and focus on the teaching of discrete, task analyzed skills in the absence of context, meaning, and relevance.⁶⁸³

Deficit thinking can take on different forms to conform to what is politically acceptable at the moment, and while the popularity of different revisions may change, it never ceases to be important in determining school policy and practices.⁶⁸⁴

Justice is relevant in all contexts, especially in the context of teaching students with disabilities. All students have the basic human right to have access to equitable learning opportunities, such as allocation of resources and challenging curriculum. These opportunities evolve and unfold based on the present belief systems and principles that exist in our society and educational system. According to Carrier, our knowledge and understanding of academic success and failure and ability and disability can be considered as cultural constructions.⁶⁸⁵ Gliedman, Roth, and Children assert this is because the dominant group in a society defines the features of the culture that differentiate those who can and those who can't.⁶⁸⁶

England began to integrate students with disabilities into mainstream classrooms in the mid-1970s after almost a century of educating many students with disabilities in segregated settings since 1870. This was in response to both research findings about the relative effectiveness of special education settings, and a shift in attitudes in the Western world towards how people with disabilities should be educated, and indeed, live their lives alongside non-disabled people. A significant factor in the changing of attitudes was the principle of normalisation—the right of people with disabilities to learning and living environments as close to normal as possible—developed by Bank-Mikkelson and Nirje.^{687 688} Wolfensberger also wrote extensively on this subject, coining the term social role valorisation to highlight the right of all individuals to be valued equally, and to have the opportunity to contribute meaningfully to their communities.⁶⁸⁹

⁶⁸³ Poplin (1988), Abberley, P (1993) Disabled people and 'normality' in J Swain, V Finklestein, S French and M Oliver *Disabling barriers - enabling environments*. London, Sage Publications/The Open University.

⁶⁸⁴ Valencia, 1997, p. 2

⁶⁸⁵ Carrier (1990),

⁶⁸⁶ Gliedman, Roth, and Children (1980)

⁶⁸⁷ Bank-Mikkelson (1969)

⁶⁸⁸ Nirje (1970)

⁶⁸⁹ Wolfensberger, W (1980) The definition of normalization: update, problems, disagreements and misunderstandings in R Flynn and K Nitsch (Eds) *Normalization, social integration and community services*. Baltimore: University Park Press.

The legacy of the 1944 Education Act continued until the early 1970s where many disabled children continued to be considered as uneducable,⁶⁹⁰ and unsuitable for education at school. Some 32,000 disabled children attending junior training centers, special care units and hospitals were denied an education until the 1970 Education (Handicapped Children) Act, which outlawed the practice of classifying children as uneducable.

In 1970 children who hitherto had been viewed as uneducable and designated severely subnormal⁶⁹¹ after 1959 were integrated into the special education system. The Mental Health Act of 1959 had suggested that these children should receive education and training but the 1970 Education (Handicapped Children) Act made this compulsory.

The 1971 Department of Education and Skill's (DES) report *The Last To Come In* was decidedly positive about the proposed integration of children previously termed ineducable with those who were designated Educationally Subnormal (ESN). This created a further distinction, with the former referred to as ESN severe—or ESN(S) as opposed to ESN(M). For the latter it emphasized the idea of the inclusion of mentally handicapped children within the category of educationally subnormal recognizing the fact that mental handicap is a continuum, which will allow disabled children to be moved from one type of school to another if their development requires a need for it.⁶⁹¹

Since the mid-1970s, the policy in England has been to integrate students with disabilities for part or all of the day in regular classrooms wherever possible, but specialized segregated facilities remained an option for children with severe disabilities. Students who were integrated often, but not always, had some level of curriculum modification and teacher aide support. Because some children required specialized adjustments, such as ramps, modified toilets, large print or Braille materials, students with similar disabilities were often transported to a school where such resources could be centralized. Therefore many students were not able to attend their local neighborhood school, although they may have been located in a more normalized environment.

The shift from a medical model in education to a social model was evident but not for all children in the DES report on special education of April 1973, which re-examined the categorization, and education of children with impairments. It was critical of the use of categories of handicap but did little to implement their abolition. A shift of emphasis was evident in DES Circular 2/75, which introduced new education-focused forms to replace the previous medical assessments (HPI forms). An educational approach to assessment was now deemed preferable to a medical one, although medical concerns were still considered

⁶⁹⁰ Cole 1989, p

⁶⁹¹ DES, 971, p.3

important.⁶⁹²

In 1976 the Labour Government incorporated a section on special education in the 1976 Education Act, which was intended to implement comprehensivisation' (the introduction of comprehensive schools supposed to accommodate all children regardless of academic ability) in England and Wales.

Section 10 of the Act was included as a substitute for Section 33(ii) of the 1944 Education Act, a clause which was intended to change the legal emphasis of special education treatment in special schools to provision for all categories of disabled children in the mainstream sector. Section 10 stated that children should be educated in special schools only if they could not receive adequate tuition in ordinary' schools, or if the cost of that instruction would cause unreasonable public expenditure.⁶⁹³

This is reflective of the dilemma liberal citizenship has been posing for disabled people. Either disabled people are taken to be equal to able bodied students, in which case their specific capacities as disabled' are unrecognized and their citizenship is substantively unequal; or else the disabled are taken to be different, with the consequent risk that the rights citizenship allows and the obligations it imposes will again be substantively unequal. While the critique of liberalism in relation to disability is important to analyzing the logic by which the disabled have been positioned outside full citizenship rights, in practice, as reflected in the report, disabled people have made some gains by reconfiguring the terms of liberalism around this undecidability.

The problem with the medical model along with the 1944 Education Act is that both suffered from a lack of inclusivity and precision in failing to treat many intellectually disabled people as full citizens. The Warnock Report changed this by including many provisions delineating the specific needs of mentally disabled children and made space for addressing their needs. Although the shift toward comprehensive education implied an end to segregation for disabled children, there was little evidence during the 1970s that these schools were any better than their predecessors at integrating children who required special treatment.⁶⁹⁴

⁶⁹² Special education (SE) forms 1-4 were intended to replace HP forms 2-4. Form SE 1 was completed by a teacher, SE 2 by a medical officer, SE 3 by a psychologist and SE 4—a summary—by a psychologist or an LEA adviser. The views of parents or children were not considered important enough to warrant documentation.

⁶⁹³ Tomlinson, S (1982 p.78) *A sociology of special education*. London: Routledge and Kegan Paul.

⁶⁹⁴ (HMSO, 1979).

2. The Warnock Report's Expression of the Medical Model and its Problems and Limitations

Problems with Labelling and Categorisation of Disabled Children in the Warnock Report

Drawing on Michel Foucault's concept of the term discourse, this section takes as a premise that there is a complex relationship between words themselves and the real world as it is experienced: Discourses,⁶⁹⁵ in the form in which they can be heard and read, are not, as one might expect, a mere intersection of things and words: an obscure web of things, and a manifest, visible, coloured chain of words. Discourses are practices that systematically form the objects of which they speak. Of course, discourses are composed of signs, but what they do is more than use these signs to designate things.

Put simply, Foucault argues that the words we use do not designate material objects, including people, in a straightforward way. Words have more power than this – they are a mode of practice, and they construct their objects. A child with special needs⁶⁹⁵ thus *becomes* such a child precisely because it is said of that child. That there are pedagogical, psychological, political, or medical reasons behind this naming *matters* because the authority of those subject positions—the teacher, the psychology researcher or practitioner, the disability activist, the doctor—constructs the child within a specific framework, what Foucault calls a discursive formation.⁶⁹⁵

All this is to say that the words we use matter, not just as window dressing, *politesse*, or political correctness⁶⁹⁵—it is not *appearance* that is at stake in the language chosen to talk with and about young people with special needs, and, importantly, in the choices these young people make in representing themselves in language. Words matter precisely because they *are* matter—a crucial part of the material experiences of children with special needs, their communities and families, and the policymakers, legislators, service providers, educators, and others who have responsibilities to children with special needs. On one hand, words are what make funding schemes for support services possible. On the other, they are a means for people to fashion a subjectivity that appropriately represents not just their experience, but also the grounds of their political engagements. A central concern of Warnock was the negative effect that the existing statutory categories of handicap had on the identity of the individuals they defined. The concern is with how Warnock regarded the effects of these categories. They were seen as pinning a single label on a child, which could be difficult where children had multiple difficulties. Labels were irreversible and likely to stigmatise the child throughout his or her school career and beyond. The most damning indictment of categorisation was the confusion it promoted between the child's disability and

⁶⁹⁵ Foucault, M. (1975). *The Birth of the Clinic; An Archaeology of Medical Perception*. New York: Vantage Books.

the form of special education required. The Warnock Report set out an alternative vision of special education which shifted the space of identification:

we have adopted the concept of Special Educational Need, seen not in terms of a particular disability which a child may be judged to have, but in relation to everything about him, his abilities as well as his disabilities which have a bearing on his educational progress.⁶⁹⁶

This view of children with special educational needs has rendered them objects' of the rational knowledge of special education, bringing more factors into the field in which the objectifying gaze operates. This could legitimately focus on all aspects of the child's existence, including their personality, behaviour and even their parents. This constitutes evidence of the social model where the integrity of the whole person is considered holistically.

An important feature of the shift away from the statutory categories of handicap, advocated by Warnock, was the separation of the delivery of special education provision from the special school as the locus of that delivery. The former categories, for instance blind and partially sighted, educationally subnormal, maladjusted and delicate, defined clearly particular kinds of children and identified them with particular kinds of special schools.

The function of ascertainment (under the Education Act, 1944) was to pronounce children as not fit for ordinary schooling and to establish which form of special schooling was appropriate. The new conceptualisation of special education provision, which the Warnock Committee provided, was one, which need not take place in special schools.

This can only have limited success because it does not focus on systemic change—which raises concerns that a special education approach for example, by having students' educational difficulties measured in a clinical and medical way and the reflection about the school's inability to teach the student are rarely considered. Other concerns are that special education reinforces social prejudice. As a matter of course, education must cater to a diverse range of students' learning styles and academic ability. Schools' acceptance of these differences tacitly benefits one group and disadvantages children who are labeled as having special' educational needs.

From a social model of disability, the term and concept of special' accommodation needed for some students to participate in education further perpetuates their disability. The term Special Needs' that was coined by the Warnock committee can be seen as a pejorative descriptor that creates a powerful attitudinal barrier to the inclusion of individuals who are so

⁶⁹⁶ Warnock Report 1978 (p37).

described.⁶⁹⁷

Inclusive education is regarded as preferable because it enables avoidance of some practices that are central to special education, such as the identification of SEN categories and the setting up of Individual Education Plans. On the other hand practices of labeling children with SEN can be seen as stigmatizing them and therefore, should be avoided. There is then a dilemma, since if children are identified as having SEN, there is a risk of negative labeling and stigma, while if they are not identified there is a risk that they will not get the teaching support they require and their special needs will not be met. This confusion is referred to as the 'dilemma of difference' by Norwich.⁶⁹⁸ However, children with SEN should not necessarily attract labels from other children and teachers if they are not formally identified as having SEN. So being stigmatized is necessarily a result of the identification and labeling of disabled children which is related to the fact that their SEN mark them out as different in some way. Therefore, as a remedy, avoiding identifying SEN will prevent children with SEN from being stigmatized. Which may help allow them to get the education that they need without being labeled.

This approach of medical model labeling in the Warnock report has been insufficient to meet the educational and social requirements of many students with impairments and their status as citizens. Some say it has been detrimental to social inclusion, and places students with impairments further at risk of marginalization and exclusion.⁶⁹⁹

Problems with the Limited Implementation of the Warnock Report 1978

The Warnock Report said that legislation and structures alone cannot guarantee good quality education for the disabled. It also envisaged that resources were needed for good quality education and implementation of the recommendations of the report for special education.

The quality of special education, however, cannot be guaranteed merely by legislation and structural change. The framework provides the setting within which people work together in the interests of children, and the quality of education depends essentially upon their skill and insight, backed by adequate resources—not solely educational resources—efficiently deployed. Our report is pre-eminently about the quality of special education.⁷⁰⁰

Even though the report made clear the importance of resources to the quality of special education the Warnock framework was introduced under the 1981 Education Act but with no additional funding for the new processes involved in statementing or teacher training, despite the closure of many special schools. Although the Warnock Report gave the right to all

⁶⁹⁷ Snow, 2008, para. 2, Slee, R (1993) The politics of integration - new sites for old practices? *Disability, Handicap and Society* 4 (2) pp351-360.

⁶⁹⁸ Warnock in Terzi, 2010, p.91

⁶⁹⁹ Eklinth & Brule-Balescut, 2005; Hardmand & Nagel, 2004

⁷⁰⁰ Warnock Report 1978 p.35

disabled students to an education, the implementation was incomplete. Structures will not be specified by rights, hence, problems over how the disabled are to be included that are identified by them are not easily resolved. This is clearly reflected in the implementation of the 1981 Education Act and subsequent education policies for the disabled in England.

The Warnock report emphasized that funding was crucial to the successful implementation of the report's recommendations and the two pieces of legislation implemented those elements of the Warnock Report which the Government accepted and the 1980 and 1981 Education Act. The 1980 Education Act and the 1981 Education Act but it was clear where the Government's priorities lay in terms of policies of integration:

In present economic circumstances there is no possibility of funding the massive educational resources ... which would be required to enable every ordinary school to provide an adequate education for children with serious educational differences.⁷⁰¹

There was landmark legislation to support this view. The 1981 Education Act, which received all-party support in Parliament, placed inclusive education within a legal framework for the first time.

The 1981 Education Act imposed two duties on local authorities: firstly to identify, assess and arrange appropriate provision for children and young people with special educational needs; and secondly, to give greater weight to parental preference when choosing school placements. This second duty was subject to three conditions: whether the disabled child can be educated in a mainstream school, whether the education of other children will be adversely affected, and whether there is an efficient use of resources.⁷⁰²

Whilst the 1981 Education Act was a significant step forward, there was only really a moral duty to provide supported mainstream provision for children with SEN. Initially there was no legal mechanism to enforce children's rights to attend a mainstream school with appropriate SEN provision. It was not until the 1993 Education Act that children and young people with SEN had an increased, but still qualified right to mainstream education. This is because parents could challenge decisions made by local authorities and schools through an independent tribunal process. The tribunal panel were able to order local authorities to place a child with an appropriate support package in a mainstream school.

The 1981 Education Act initiated what are now generally seen as major changes in this area. The 1981 Education Act became law on 3 April 1983.⁷⁰³ Under Section 1, SEN are defined in terms of children who have a significantly greater learning difficulty than the majority of children of a similar age, or children with impairment or impairments preventing them from

⁷⁰¹ DES, 1980, quoted in Tomlinson, S (1982) *A sociology of special education*. London: Routledge and Kegan Paul. p. 54

⁷⁰² 1981 Education Act England

⁷⁰³ (Eds) *Policies for diversity in education*. London: Routledge. Lewis, A (1994) What Katy did; a case study in communication between a pupil with disabilities, p 77.

making effective use' of mainstream provision within the local area. Special educational provision in relation to a child over two years means services, which are additional to, or somehow different from those provided generally for children of the same age in schools maintained by the LEA. For children under two years the Act covers educational provision of any kind.

Under the Act LEAs in England and Wales have a duty' to identify, assess and provide full-time free education for all children with SEN from the age of two to the end of compulsory schooling and up to nineteen if they remain in school. LEAs must also provide facilities for children with SEN from birth. Local health authorities are compelled to tell LEAs and parents if they believe a child has, or may have, SEN, once s/he starts school at the age of five. Moreover, following a formal assessment an LEA may issue a child with SEN with a statement.'

This document describes the child's particular needs and recommends how they should be met. If the child leaves school at sixteen and goes on to college, LEAs are still bound to provide free full-time education, but the additional protection' provided by the Act is lost.

The Act underlines the importance of professionals—particularly doctors, educational psychologists, speech therapists, physiotherapists, occupational therapists, health visitors, school nurses—in the determination of SEN. It formally abolishes the categories of handicap, although it does not rule out their use. Diagnostic terms' may be necessary in the attainment of support services.⁷⁰⁴

Legally, however, parents have more involvement in the assessment of their child's needs. They can demand an assessment if they feel that these are not being met, and the LEA is bound to respond. Parents have access to more information and, theoretically at least, a larger say in the type of education to be provided, and where it should take place. They can contribute written information to the assessment process, and they have rights of appeal if they do not like the provision being proposed. The Act also suggests that the child's feelings should be considered during the examination process.

Although the 1981 Education Act clearly recognizes the discriminatory policies of the past and, like its predecessors, endorses the general principle that children with impairments and learning difficulties should be educated in mainstream schools, it sets conditions for integration which allow LEAs to continue to segregate at will. It states that a child with SEN maybe integrated into an ordinary' school so long as this is compatible with the child receiving the special education' that s/he requires; the provision of efficient education for the children with whom s/he will be educated'; and the efficient use of resources.⁷⁰⁵

⁷⁰⁴ see DES, Circular 22/89, 1989

⁷⁰⁵ HMSO, 1981

Another threat to the development of the integration of disabled children into mainstream schools is contained in the Education Reform Act of 1988. Briefly, this legislation allows schools to opt out of LEA control and become self-governing. It also introduced the national curriculum and encourages competition among schools through open enrolment.⁷⁰⁶

Up to September 1989 schools in the state sector were able largely to devise their own syllabuses, define their own attainment targets for individual children, set their own tests and choose which external examinations to prepare for. The new Act enables the Government to prescribe compulsory courses of study and to dictate examination arrangements and attainment targets in all state schools, except special schools in hospitals. Why these schools are excluded is not clear. In addition, the new curriculum can be modified for children with SEN. Indeed, pupils may be excluded from all or part of the new system if they are members of defined group or pupils with a particular kind of special need; pupils with statements; or children whose special needs are likely to be temporary.⁷⁰⁷

It has been noted by several sources that the mainstream sector's inevitable preoccupation with meeting the new requirements will make provision for disabled children an even lower priority.⁷⁰⁸ In order for mainstream schools to concentrate on the national curriculum it is probable that children with a modified curriculum will increasingly be placed in a separate unit or school. Disabled children will be identified by their inability to cope with a curriculum designed for the majority, namely the non-disabled majority.

Given the increased pressure on mainstream schools to achieve specified attainment targets, schools which are unable to meet these targets will be labeled accordingly. Competition between schools will intensify, and teachers keen to maintain their own and their schools' reputation may see full assessment and statementing as a means to exempt children who are unlikely to do well. Moreover, if special schools are able to offer a 'modified' version of the national curriculum, they might well appear more attractive to parents of children who have been categorized with SEN, particularly if it is evident that their needs are not going to be met elsewhere. The 1988 Act could squeeze disabled children out of the mainstream sector altogether.

Children and young people with SEN are still perceived as different from the rest of the school population. Whilst all schools are expected to assess children's abilities and to provide written profiles, reports or statements of their educational needs and progress, LEAs

⁷⁰⁶ Blaine 1989, Booth, T (1988) Challenging conceptions of integration in L Barton (Ed) *The politics of special educational needs*. London: Falmer.

⁷⁰⁷ see Blaine, 1989, Booth, T (1988) Challenging conceptions of integration in L Barton (Ed) *The politics of special educational needs*. London: Falmer.

⁷⁰⁸ see for example ACE, 1989; Blaine, 1989; Darlington, 1990; Swann (Eds) *Policies for diversity in education*. London: Routledge. Lewis, A (1994) What Katy did; a case study in communication between a pupil with disabilities, p 65, 1988; Simpson, 1990

are bound by law to mark pupils with SEN out for special treatment through the assessment and statementing process.

The integration and inclusion of disabled children and their status as full citizens is far from complete. Despite the UK government's commitment to removing barriers to learning and increasing staff training in mainstream schools so disabled students can be educated alongside their non-disabled peers,⁷⁰⁹ progress has been hampered by opposition at grassroots level.

An analysis by Croll and Moses suggests that although some of the teacher unions believe children should be in the mainstream wherever possible, they also argue that an inclusive policy both puts impossible pressures on teachers and ignores the superior educational placements which special schools offer to children with certain kinds of impairments. Further, many educationalists concur that the lack of adequate resources in mainstream schools means that special schooling is rated over inclusion for young people with severe physical or learning impairments⁷¹⁰

Research, including the European Social Fund study *Future Selves*, suggests disabled young people have not been given the same educational opportunities, or been expected to achieve the same, as their nondisabled peers.⁷¹¹ However, according to official statistics from the Disability Rights Commission Educational Research Study,⁷¹² many young disabled people in England and Wales feel marginalized and excluded at mainstream schools. Moreover, a report in the *Times Educational Supplement* headlined 'Inclusion is Just an Illusion,' stated that while schools are 'talking the talk' they are still not 'walking the walk.'⁷¹³ In 2004 OFSTED found that while there was a growing awareness of the need to treat all pupils equally, there was still a mismatch between schools' aspirations and reality. This has been echoed by MacBeath et al in their recent report, *The Cost of Inclusion*. They argued that mainstream schools often could not provide the facilities and expertise required for teaching some young disabled people. This inevitably led to the young people's exclusion within the school and put a strain on their parents and teachers.⁷¹⁴

What Does This Mean for SEN? MacBeath et al gave a description of some of the prevailing problems in schools' attempts to implement inclusion. Their conclusion was that the current education system itself made it difficult to implement inclusion.

⁷⁰⁹ DfEE, 1997

⁷¹⁰ Croll & Moses, 2000 Tomlinson, S (1982) *A sociology of special education*. London: Routledge and Kegan Paul.

⁷¹¹ ESF Future Selves

⁷¹² DRC, 2002–2003

⁷¹³ see Abrams, 2004 p.18 Tomlinson, S (1982) *A sociology of special education*. London: Routledge and Kegan Paul.

⁷¹⁴ MacBeath et al (2006) Liggett, H (1988) Stars are not born: an interpretive approach to the politics of disability. *Disability, Handicap and Society* 3 (3) pp263-275.

The House of Commons Education and Skills Committee (2006) in its report on SEN, reflected the general conclusion that the government's changing definition of inclusion is causing confusion,' and that implementation required a higher level of flexibility in schools. Commentators now generally recognize the need for greater flexibility in the education system, and that the Government's espousal of inclusion is itself stymied by its overarching emphasis on accountability in terms of standards.' It is evident that those schools that are successful in implementing inclusion achieve this despite the system, rather than because of it. In other words, the occurrence of good practice' does not validate the existing system, but rather indicates the need for system change. Consequently, Baroness Warnock's latter-day recantation is relevant only in terms of the system as it currently exists.

Most commentators now acknowledge that efforts to patch up' the system in order to achieve effective inclusion are destined to fall short of what is needed. It is necessary to devise an educational system that starts from an acknowledgement of the diversity of the learning needs of all learners. The further evidence for this lies in the continuing criticism of the limitations of the current education system for all learners, not just those with special educational needs.

Medical Model Problems for the Citizenship of Disabled Children as Reflected in the Warnock Report's Assessment and Statementing Process

While it may be argued that assessment and statementing in relation to SEN is a form of affirmative action, it can also be used to place children and young people with SEN in separate groups, classes or schools. Although lip-service is paid to the notion of parental and children's rights, education within the mainstream sector for a child with SEN is still not a right in the same way that it is for able-bodied children or children who do not experience learning difficulties. Integration is provisional, and is acceptable only as long as it does not interfere with the smooth running of the mainstream sector. It is a privilege, which can be awarded or withdrawn by LEAs at will.

The procedures for assessing SEN required by the 1981 Act are highly discriminatory and complicated, and take time. One study estimated that the full assessment process can last as long as 67 weeks.⁷¹⁵ This can have serious negative implications for a child's education.

Swann has noted that it has been hard to discern anything that could be termed a national integration policy since 1981. No clear steps have been taken by the DES to reduce the numbers of pupils going to special schools. They have not issued guidance to LEAs on how they should interpret the integration clauses of the 1981 Act. This point was taken up by the House of Commons Select Committee Report on the implementation of the 1981 Act. The DES also came under criticism from the same source for failing to monitor the consequences of the Act. Moreover, although the Committee called both for more effective monitoring and

⁷¹⁵ ILEA, 1985

guidance from central Government there has been no response.⁷¹⁶

Table 1 **Numbers of Children in Special Schools in relation to School Population as a Whole**

	No. of children in school*	No. of children in special scho
1977	9,278,268	131,151
1978	9,915,672	132,384
1979	9,094,150	131,688
1980	8,933,033	129,724
1981	8,720,123	128,125
1982	8,501,527	126,487
1983	8,276,185	124,811
1984	8,096,233	120,097
1985	7,955,879	116,273
1986	7,832,067	113,554
1987	7,721,209	100,865
1988	7,610,240	105,070
1989	7,553,484	102,064

* Includes full- and part-time pupils in nursery, primary, secondary and independent schools. + Includes full- and part-time pupils in maintained independent schools. Source: Adapted from Table A30.89, pp. 175-6, DES, 1990.

⁷¹⁶ Swann, 1989, Swann (Eds) *Policies for diversity in education*. London: Routledge. Lewis, A (1994) What Katy did; a case study in communication between a pupil with disabilities, p 77.

Although Table 1 suggests that segregation declined during the 1980s it is important to note that in 1989 it stood at only 0.06 percent below that of 1977, the year when the Warnock Committee was finalizing its report which endorsed the need for integration. It should also be noted that these figures are misleading. Local education authorities vary greatly in their levels of segregation. While many LEAs have reduced their level of segregation, others have increased it. Recent evidence from the Centre for Studies on Integrated Education (CSIE) shows that since 1981 fifteen English LEAs have increased the proportion of children they send to segregated special schools, and three of them, Doncaster, Rotherham and St Helen's, did so by more than twenty-five percent.⁷¹⁷

Also, the age structure of pupils in segregated schools is cumulative. More children are directed into special schools as they grow older.⁷¹⁸ As Swann points out, a more accurate picture of segregated schooling could be seen by looking at the numbers of children transferred each year from mainstream to segregated provision. This is referred to as the inflow rate. It has been shown that there was a fall in the inflow rate in 1983, but it increased in the following two years. Later figures for the annual rate of inflow into special schools for each LEA are not yet available.⁷¹⁹

Another important factor which needs to be borne in mind in relation to the rhetoric of integration is that there has been a considerable reduction in the child population during the 1970s and 1980s. This is clearly reflected in the numbers of children attending school. Disabled children are marginal members of school communities. When mainstream school places are in short supply, segregation is the order of the day. When registers are empty, schools are less reluctant to exclude pupils with SEN.

Since the 1981 Act it has often been argued that progress on integration is slow because of the cost involved. According to estimates,⁷²⁰ LEAs in England and Wales spend more than £820 million a year on special education. A vast amount of this money is spent on special education rather than integration. The main problem is not simply a lack of resources but a lack of commitment to transfer resources from segregated provision to the mainstream sector. It is not a lack of funds which is the key to integration but unwillingness to change.⁷²¹ The directive for change must come from Government. It is unlikely, however, that integration was helped by Government reforms carried out in the late 1980s, an example the 1988 Education Reform Act.

⁷¹⁷ Swann, Swann (Eds) *Policies for diversity in education*. London: Routledge. Lewis, A (1994) What Katy did; a case study in communication between a pupil with disabilities, p 77.

⁷¹⁸ Meltzer, Smyth and Robus, 1989

⁷¹⁹, Swann (Eds) *Policies for diversity in education*. London: Routledge. Lewis, A (1994) What Katy did; a case study in communication between a pupil with disabilities, p 92

⁷²⁰ the Education Statistics Estimates 1988-9 published by the Chartered Institute of Finance and Accountancy quoted in CSIE, 1989

⁷²¹ Brighouse, 1989

Problems with the Medical Model's Differentiated Curricular expressed in the Warnock Report

The national curriculum had several problems from its idea, structure to its implementation. Warnock represented a clear shift from the advocacy of special education as something that was distinctive from ordinary education. However, as Marks notes, integration has emerged as part of the new binarism' in which integration signals progress and its antithesis, segregation, does not.⁷²² As Corbett says, Warnock even uses the metaphors of travel and track to signify progress.⁷²³

Another problem with the Warnock report's recommendation has been the confusion surrounding entitlement and the appropriateness of curricula for children with SEN. The 1988 Education Act established the National Curriculum and a system of league tables where schools competed based on academic attainment. Baroness Warnock in 2005 described things as getting: far worse from 1988 onwards ...(for children with SEN)... who ...were not going to help the league tables.⁷²⁴

The lack of additional funding in this area is also problematic for disabled people's citizenship. From when a national curriculum was first proposed in the U.K. the SEN field supported the government's intention to include children with SEN in this curriculum to the greatest extent possible. There was, some ambivalence within the Warnock Report about whether integration could be realistic for all children, especially in relation to the curriculum. The three tiers of integration (locational, social, functional) objectified the individual with special educational needs by requiring him or her to be placed in ascending degrees of proximity to school, peers and curriculum.

Professionals were required to scrutinise this proximity and to make judgements about the success or failure of integration according to where' they found the child. Obtaining locational inclusion was contingent on connected factors such as the availability of a modified curriculum, accessible buildings, and specialist teaching.

This process of categorisation reinforces the discriminatory categories of normality and abnormality. Disabled students identified as abnormal were therefor placed in segregated

⁷²² Marks (1994) (p74), Wolfenberger, W (1980) The definition of normalization: update, problems, disagreements and misunderstandings in R Flynn and K Nitsch (Eds) *Normalization, social integration and community services*. Baltimore: University Park Press.

⁷²³ Corbett 1993, Liggett, H (1988) Stars are not born: an interpretive approach to the politics of disability. *Disability, Handicap and Society* 3 (3) pp263-275.

⁷²⁴ <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmmeduski/478/47805.htm#a2>

schools and provided with special education.⁷²⁵ This nature of categorisation is certainly problematic for equal citizenship, especially when referred to education and when concerning those categories arising from medical definitions and connected to the area of intellectual disabilities.

Differentiation of the curriculum was also identified as the key to pursuing the same curriculum goals, but few specific recommendations were provided as to how this might be achieved and schools were left to devise their own solutions. Learning support teachers were called upon to be the most imaginative of all, and suddenly found themselves thrust into a new pedagogic (or consultative) role with their mainstream colleagues.⁷²⁶

That all children with SEN should be entitled to have access to the same curriculum as other children was seen as being a step forward. This was in fact the case for many children with SEN, for example, those with severe visual impairment who, in the past, may have been denied opportunities such as taking science subjects. However, for the majority of children with SEN, who have learning or behavioral difficulties, Warnock said it has been a backward step. National curricula, with their associated national assessments and their consequences, such as league tables of schools, have emphasized academic achievement much more than other aspects of the curriculum such as personal, social and vocational education.

Therefore, having a national curriculum as the whole curriculum is not appropriate for children with moderate to severe learning or behavioral difficulties and leads to many of them becoming disaffected.⁷²⁷ Inclusion in an unsuitable curriculum directly contributes to the development of emotional or behavioral difficulties for many children, which leads them to be disruptive and eventually results in the exclusion of some of them from schools. As argued by Farrell, the priority for children with SEN must be that they have access to curricula which are appropriate for them, not that they are fitted into a national curriculum which was designed for the mainstream population.⁷²⁸

⁷²⁵ A blunt version of the social model is that of feminist disability rights advocate Susan Wendell, who avers that "the entire physical and social organization of life" has been created with the able-bodied in mind. See Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* 39 (1996). A more nuanced description is by philosopher and disability rights commentator Anita Silvers. See Anita Silvers, *Formal Justice, in Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* 13, 75 (Anita Silvers et al. eds., 1998). She argues that being biologically anomalous is only viewed as abnormal due to unjust social arrangements, most notably the existence of a hostile environment that is "artificial and remediable" as opposed to "natural and immutable."

⁷²⁶ Warnock Report 1978 p.207

⁷²⁷ Warnock Report 1978p.233

⁷²⁸ Farrell (2010), Wolfenberger, W (1980) The definition of normalization: update, problems, disagreements and misunderstandings in R Flynn and K Nitsch (Eds) *Normalization, social integration and community services*. Baltimore: University Park Press.

Problems with a Medical Model view in Education

There are a number of problems with the above medical model in education. The first problem is that education policies were embedded in the eugenic⁷²⁹ notion that there are those in society who are able (or normal) and those who are not. This dualism segments society into two groups: those, who are whole and able and those who are less than whole, (disabled) who are imperfect and to be kept apart from the able. As a result disabled are rarely treated as normal people.⁷³⁰

This concept of normality has been central to much of the traditional thinking and practice of SEN. At the heart is the negative perception that to be normal is to be measured by the behaviours, performances and interactions of society as a whole. While some interpretations of normalization link to the concept of equality, there has been a widely held but misguided belief that disabled people want to be normal rather than how they are. This is described as one of the most oppressive experiences to which disabled people are subjected. It is argued, with a great deal of justification, that the quest to be normal is simply reinforcing stereotypes of what comprises normality at the expense of others who are different. Again Morris states that; I do not want to have to try to emulate what a non-disabled woman looks like in order to assert positive things about myself. I want to be able to celebrate my difference not to hide from it.⁷³¹

Normality is powerfully linked with social acceptance. A pupil is more likely to be included within the social and educational processes of a school if he or she is socially aware, knows the rules of engagement, succeeds in learning and does not stand out as physically, emotionally or mentally different. There are numerous examples of how the quest for normality has resulted, historically, in educational, social or even medical interventions, which are designed to reduce the outward signs of difference—to make a person appear normal. Thus there are examples of children with Down's syndrome having plastic surgery or of blind people who are taught to use certain facial expressions in order to give the impression that they are engaging with others in normal ways.

⁷²⁹ At the opening of the twentieth century, the eugenic movement which was based on Charles Darwin's theory of survival of the fittest was gaining momentum, and social reformers sought segregation and prohibitions on marriage and procreation of disabled people. The medical model continued to be the major model of disability until the end of the 1960's.

⁷³⁰ Gartner and Lipsky 1987, Morris, J. (1993). Prejudice. In J. Swain, V. Finkelstein, S. French & M. Oliver (Eds.), *Disabling barriers-- enabling environments* (pp. 101-106). London ; Newbury Park, Calif: Open University.

⁷³¹ Jenny Morris, 1993, Morris, J. (1998) *Don't leave us out: involving children and young people with communication impairments* (York, Joseph Rowntree Foundation).

The second problem with this concept is that after being labelled as disabled (for example, deaf, learning disabled, dumb, blind or physically impaired) the label tends to become the defining feature of the person. The person becomes the disabled' or the deaf' or crippled' rather than being varied as a complex multifaceted, fully human person.

The third area of concern with the medical model (or the personal tragedy concept) relates more specifically to education systems and the manner in which they deal with difficulties, problems or failures. A disability or disorder is an inherent characteristic of the individual and consequently attributes student failure to a deficit or inadequacy within the individual.⁷³² However, it can be argued that student disability results from organizational pathology rather than student pathology.

Because the medical concept locates the cause of failure within the individual student, it masks the role which education systems play in creating and replicating failure. A disability implies a non-problematic pathological condition intrinsic to the individual; it fails to recognize that the concept of disability is socially constructed. Rather than being a non-problematic feature of the individual, it occurs as a consequence of diverse student characteristics interacting within highly constraining demands of the classroom. Because of the manner in which school function is taken for granted and seen as unproblematic, the source of students' difficulties is seen to reside in their disabilities and defects rather than the limitations and defects of schooling. Thus it could be argued that schooling is itself disabling, that lack of flexibility in accommodating a diverse range of student attributes creates disabled students.

There have also been criticisms of the concept of normalization. Not the least of these have been problems with the concept of normality.' Some have interpreted the concept as meaning that people with disabilities have to change to be more normal to be accepted. This led to debate between the interpretations of Wolfensberger and Nirje about whether we should be seeking to normalize' people or should be celebrating their differences.⁷³³

Furthermore, in the early part of the twentieth century, ideas about the provision of education for children with special needs continued to be based on a medical model of defects.' This model continued to focus on difference rather than normality, on illness rather than wellbeing, and particularly on the problem' with the child.⁷³⁴ Therefore, it is hardly surprising that education for children with special educational needs originally took the form of separate, special

⁷³² Carrier 1993, Michael Oliver and Colin Barnes, (1998) *Disabled people and social Policy* (Longman Social Policy In Britain Series)

⁷³³ Nirje, 1985, Jackson, M. (2000) *The borderland of imbecility, Medicine, Society and the fabrication of the feeble mind in late Victorian and Edwardian England*. Manchester: Manchester University Press.

⁷³⁴ Lewis, 1999, McCulloch, G. W. (2004) *Documentary research in education, history and the social sciences* (Buckingham, Open University Press).

schools for those who were thought to need them. Psychometric testing by early psychologists (such as Cyril Burt) also confirmed this type of approach to disability and difference. School practice is largely a result of the values of people who engage in the practice.⁷³⁵

3.The Warnock Report's Expression of the Social Model and its Problems and Limitations

The Shift to the Social Model in the 1978 Warnock Report

Prior to the Warnock report education for the disabled originated from the development of the pathology of difference' within medical disciplines.⁷³⁶ As expressed in the medical views of the 1944 Education Act where medical model notions were applied to education to locate the deficit related to a difficulty within the disabled person, and suggests a compensatory model based on medical and clinical intervention.⁷³⁷

This when translated in education reflects the essentialist view of the medical model where the individual possess inherent characteristics, thus leading to definitions in terms of the level of intelligence, ability, skills and general capacities in relation to the individual person without any considerations to methods of assessment or wider social and educational context.

By 1965 it was the Labour Government's declared objective to end selection and separation in secondary education.⁷³⁸ These sentiments were reflected by an increasing number of people who objected as much to the segregation of the least able and handicapped as to that of the most intelligent. The plan was that the comprehensive should strive to be a school for all, meeting requirements of the child with special needs as well as those of the average or higher achieving pupil. In national terms, integration was much talked about and a small group of academics tended to dominate the special education press who reverently espoused the cause.

As late as 1967 handicapped children still faced enormous institutionalised discrimination as shown in a 1967 report by the Central Admission Council for Education in the Plowden

⁷³⁵ Skrtic 1991, Hubbard, R. (1997) Abortion and disability: who should and who should not inhabit the world?, in: L. J. Davis (Ed.) *The Disability Studies Reader*. London: Routledge.p.123

⁷³⁶ see Clough and Corbette, 200, p.11

⁷³⁷ Psychometric testing by early psychologists such as Cyril Burt also confirmed this type of approach to disability and difference. Illustrative of this is the case of 'subnormality', a handicap which was first mooted by Sir Cyril Burt in 1935. He calculated that children scoring 50-85 on mental tests should be considered as educationally subnormal. This type of practice was praised in Parliament, by Dr. Hyacinth Morgan Rochdale MP a psychiatrist, who assess the severely educationally as 'ineducable' (*Hansard, Mentally Defective children (care)HC Deb 13 December 1946 vol 431 cc1568-78*) Once categorized, the child was allocated to a school or other setting. There was little involvement from parents or careers, those diagnosed as ineducable had no place to turn. This position was made tenable at this time by the widespread faith in intelligence test as a culture and environment free method of ascertaining a child's innate and largely immutable level of ability. Indicative of the thinking of the time was the general philosophy that the child should adjust to fit the school rather than the school making any major changes to its policies or operations to meet the learning difficulties of the child. 'Training' meant institutional care.

⁷³⁸ DES, The Organisation of Secondary Education, Circular 10/65, July, 1956,p.1

Report.⁷³⁹ The case for segregated education was articulated within a need based approach. Special schools were promoted for two reasons: firstly, teaching expertise and materials were geared to particular circumstances of impairment; and secondly, they offered a sympathetic environment where disabled pupils could acquire the interpersonal skills necessary for adult life.⁷⁴⁰ Ordinary schools were not deemed appropriate because the use of clinical referrals was seen as the appropriate response.⁷⁴¹

In 1967, there was about the same percentage of English schoolchildren in special schools as on the eve of the Second World War.⁷⁴² This was partly due to the government's new accepted view which was no child is ineducable.'

Stanley Segal wrote that the idea that no child is ineducable' influenced perceptions of many people.⁷⁴³ This view was translated and expressed through the 1970 Education Act and in 1971, over 30,000 severely subnormal' children were added to the Educationally Sub Normal (ESN) category.⁷⁴⁴

The expansion also reflected an increased provision for maladjusted' children and an increase in their numbers until a decrease occurred in the early 1980s. These factors are reflected in the table below, which gives the number of children identified under the 1944 Education Act and those under the 1981 Act and designated special schools, special hospital school and designated special classes as well.

Table 2

Year	no. In SEN schools	total school population	percentage
1957	60417	7467585	0.8
1967	78256	7980940	0.98
1977	135261	9663978	1.40
1987	107126	7450127	1.44

⁷³⁹ Primary Education (Plowden Report) HC Deb 16 March 1967 vol 743 cc734-847

⁷⁴⁰ Hughes, B. (2002). Disability and the body. In C. Barnes, M. Oliver & L. Barton (Eds.), *Disability studies today* (pp. 58-76). Cambridge, UK: Polity Press in association with Blackwell Publishers. p.11

⁷⁴² Cole 1989, Holt, J. (1975) *Escape from Childhood: The Needs and Rights of Children* (London: Penguin)

⁷⁴³ Stanly Segal (1968)

⁷⁴⁴ Cole 1989, Hubbard, R. (1997) Abortion and disability: who should and who should not inhabit the world?, in: L. J. Davis (Ed.) *The Disability Studies Reader*. London: Routledge. p 45

The Department of Education and Science (DES) statistics did not indicate substantial movement towards inclusion beyond what already existed in 1965. The continuing pressure to exclude many disruptive children from the ordinary classes, probably exacerbated by the breakdown in stable family life in a permissive society of the sixties, led to an explosion in provision for the maladjusted. New schools continued to open and many special schools continued to flourish, while others, with the active support of the parents of the pupils, fought off attempts to close them.⁷⁴⁵

Problems with the Social Model and Inclusion in The Warnock Report 1978

Disability rights advocates have successfully invoked the social model's view that disability-related exclusion is an avoidable and remediable social construct, through a sustained commitment to inclusivity. Their influence is clearly reflected in the Warnock Report and its recommendations. The report concluded that this exclusion arose from unwarranted prejudice. Hence, the Warnock Report was premised on the social model's belief that peoples' functional limitations are caused by the socially constructed environment, such that the repercussions of having a disability are mutable.⁷⁴⁶

The introduction of the social model changed legislation for the disabled and aimed to guarantee them full citizenship and this is reflected in the recommendations of the Warnock Committee. Warnock also identified three ways in which integration might be achieved: locational, social, and functional.

- a) Locational integration refers to a situation in which a special school or class and a mainstream school share the same site
- b) Social: Opportunities for social integration could enable children with special educational needs to interact socially with their mainstream peers, possibly at intervals, lunchtimes or school assemblies.
- c) Functional integration, the most demanding, takes place when pupils with special educational needs join, part-time or full-time, the regular classes of the school and make a full contribution to the activity of the school.⁷⁴⁷

Each of these forms of integration locates the child with SEN in different relations to his or her school, peers and the curriculum. They each imply that integration is something done to the child to move him or her closer to so-called normal schooling. In short, integration is normalising. Warnock made it clear that the educational goals for all children were the same, regardless of the severity of need. They are:

⁷⁴⁵ Oliver, M., J. (1999). Disabled people and the inclusive society or the times they really are changing. Public Lecture, Strathclyde Centre for Disability Research.67

⁷⁴⁶ Warnock report 1978, p.42

⁷⁴⁷ Warnock Report 1978 (p101)

- a) First, to enlarge a child's knowledge, experience and imaginative understanding, and thus his awareness of moral values and capacity for enjoyment;
- b) and secondly, to enable him to enter the world after formal education is over as an active participant in society and a responsible contributor to it, capable of achieving as much independence as possible.⁷⁴⁸

Such educational development would make the child more able to participate in society and to be accepted inclusively in it. The child is in a position to be accepted as a citizen under the citizenship models by virtue of his/her ability to participate from receiving educational development.

One of the problems the report has is that the Warnock Committee appeared never to reconcile its desire for all pupils with special educational needs to pursue the twin educational goals of knowledge and understanding and independence. It recognized that: For some, independence may in the end amount to no more than the freedom of performing a task for oneself rather than having someone else do it, even if the task is only getting dressed or feeding oneself.⁷⁴⁹ Children with SEN were seen by Warnock as requiring one or more of the following:

- a) Providing special means of access to the curriculum through special equipment, facilities or resources, modification of the physical environment or specialist teaching techniques.
- b) Providing a special or modified curriculum.
- c) Paying particular attention to the social structure and emotional climate in which education takes place.

The second of these is the most important, since it specifies the need to change the curriculum and raises the question of whether the same curriculum goals can be maintained. This is somewhat ambitious, given the difficulties, which some children experience. Most examples of claims that alternative methods can achieve the same goals turn out to have addressed different goals for different levels of activity.

All children, according to Warnock, were travelling along the same path towards these two goals, but some would meet obstacles, which were so daunting that their progress would inevitably be limited. The implied paradox here of the impossibility of all children attaining the same goals along the same route, has subsequently been questioned more explicitly, not least of all by Warnock herself in 2005, who has described the Committee as having been

⁷⁴⁸ Warnock Report 1978 (p5)

⁷⁴⁹ Warnock Report 1978 p.6

naïve.⁷⁵⁰ This may be because the Warnock Committee viewed second-generation type rights as beyond their political mandate. They may not of been aware that some people with disabilities are able to perform essential functions but cannot do so because of extreme external limitations; or that some disabled persons fall beyond the reach of sameness criteria but that their inclusion would nonetheless be valuable both for them as individuals and for society at large.

A common confusion occurs among educators influenced by the rhetoric of full inclusion, despite its contrast with the reality of the situation in schools. The rhetoric of full inclusion suggests that it is possible to effectively educate all children with SEN in mainstream classrooms. However, the reality of the situation in mainstream schools is that many teachers do not feel able or willing to implement this scenario.⁷⁵¹

Limits of a Social Model Perspective in the Warnock Report on Special Education

There are several problems with the social model perspective and inclusive education in the Warnock report. Inclusive education is primarily political as it is concerned with the inclusion of all citizens in a democracy. Its political dimension stems from its commitment against exclusion both in policy and practice and from its convergence with the social model of disability and disabled people's civil rights movement. Some of the important elements of inclusion are: the challenge to the social and educational conditions defining difference as disadvantage and abnormality, and overcoming oppressive power relations which through medical professionals, medical categorisations, regulate the identity of disabled people to the ideology of need and care.

The political aim of inclusive education is that difference should be respected and promoted. These elements, furthermore, contribute to the understanding of inclusion in terms of entitlements of disabled people to the benefits and opportunities entailed by rights of

⁷⁵⁰ White, 1991; Warnock, 1992. The Warnock report is full of ambivalences and contradictions, ranging across different discourses. There has been, in line with the aim of integration, a reduction of the numbers of children taught in special schools in England in since the Warnock Report. There were 100 hospitals schools with 4,485 students, and 1,429 special schools responsible for 11, 0262 students. A decade later, these figures had fallen to 31 hospital schools with 228 full time students and 1,291 special schools with 9,5271 students (Department of health 1996). At first sight, the Warnock report and its fundamental switch in policy seem to promise much for the education of disabled children, their access to society and their status within it. However, although the concept of inclusion has fundamentally changed the foundations of special education, the very apparatus of what legitimates special education as a field has been called into question. Two government bodies, The Audit Commission and Her Majesty's Inspectorate, issued a severe indictment on educational provision for pupils with 'special educational needs' in England and Wales. Their national investigation on this area of education was the first since the implementation of the 1981 Act in 1983 and amounted to finding 'serious deficiencies in the way in which children with special needs are identified and provided for'. In 2005 in a second Warnock Report (2005) on education titled: *Special Educational Needs: A New Look*, Warnock herself criticized how the system of education operates in theory by retracting old recommendations for inclusion for children with SEN. The 2005 report presented a thorough critique of the issues of SEN amounting to the idea that the whole system has to be re-examined. This includes: the growth of disability categories and their reification; the separate education and certification of teachers; academic journals devoted to specializations; the burgeoning industry of professionals to serve the disabled (therapists, counselors, evaluators, school psychologists, etc.); separate schools; segregated programs within existing schools, different funding sources.

⁷⁵¹ (Croll & Moses, 2000; Scruggs & Mastropieri, 1996).

citizenship. Inclusive education as a matter of rights, and specifically human rights are central to the debate on inclusion.

Warnock's central message was libertarian, proclaiming the right of the handicapped to uninhibited participation in the activities of everyday life, in all their varied forms.⁷⁵² This reflected the social model's view, which exerted a powerful influence in revising legal regimes affecting disabled persons in education.⁷⁵³ These measures are crucial but limited. Because social model advocacy is grounded exclusively in formal equality notions, legislatures have promulgated civil rights protection; by definition these antidiscrimination legislations do not encompass positive rights such as equality measures. Put another way, disability civil rights are directed at ensuring equal treatment but not equal opportunity. As a result, the formulated statutes are not adequately empowered to bring about disabled citizens' full social inclusion.

Founded upon egalitarian principles, comprehensive schools were envisaged as catering for all children with regard to their education. While the demedicalisation of the labeling of disabled individuals within the educational context must be viewed positively. The concept of SEN retains the assumption that people with SEN in this way are somehow less than human.⁴ The emphasis is still on the inadequacy of the individual: it is s/he who is different; it is s/he who is at fault; and, most importantly, it is s/he who must change.

The Committee did not seriously question the general philosophy and organization of the education system although by implication it acknowledged that it is incapable of meeting adequately the educational needs of up to a fifth of its users. Their solution to the problem of SEN was a further expansion of professionally dominated support services. Within the present educational context this can only reinforce the perceived difference between pupils and students with SEN and the rest of the school population, as well as the general view that people with impairments are incapable of looking after themselves without professional help.

Further Problems With the Social Model in Education in Practice

The report made 225 recommendations, one of which was to abolish the use of categories which it saw as damaging and irrelevant. The medical model was now being criticized for

⁷⁵² DES 1978, p99

⁷⁵³ Flaws in the 1981 Act were cured by the 1993 Act. It took more than ten years before provision of the 1993 Act which was implemented in September 1994. This Act gave a better appeal process for parents, especially with the establishment of the Special Educational Needs Tribunal. The 1993 Act represented a step in the right direction, as it took appeals out of the virtual control of LEAs and it brought with it time lines which demanded more rigorous responses from LEAs with regard to the procedures. The central issue of integration was maintained in the 1993 Act, and so were the three earlier conditions from the 1981 Act limiting progress with integration and inclusion; however, integration was further qualified by the new phrase, *unless that is incompatible with the wishes of his parent*. It wasn't until The Disability Discrimination Act (DDA) in 1995 that aimed to end discrimination that many disabled people face and to establish a National Disability Council. The provisions of this Act make it unlawful to discriminate against disabled persons in connection with employment, provision of goods, facilities and services or the disposal or management of premises; and to make provision about the employment of disabled persons. This was a move towards an international shift towards a human rights approach towards disabled people as drawn by the United Nations.

being dehumanising, treating children like objects.⁷⁵⁴ It groups vague symptoms together and assumes they can be treated in the same way. This move towards inclusion by the Warnock committee was an advance but not all encompassing.⁷⁵⁵ There has been inadequate scrutiny of the motives behind integration which is rooted in economic, professional and social interests.⁷⁵⁶ The notion of integration itself is unsatisfactory, suggesting that something is done to pupils with difficulties' and that success is measured in terms of how well they have been absorbed into the mainstream. It also implies that integration is a once only event. The social model's notions of formal justice as sameness also limit its application in two respects. First, the social model argues that people with disabilities would not be marginalized if prevailing social convention used inclusive concepts, for example the altering of the physical environment (Universal Design). Yet, while Universal Design continues to evolve, it does not include all disabled persons because some have environmental restructuring needs that surpass current parameters.

Second, social model advocates have relied exclusively on the provision of reasonable accommodations in education as an equalizing inclusion measure. These reasonable' parameters do not embrace all individual differences among disabled persons. Reasonable accommodation requirements mandate environmental restructuring to the level of equal treatment but not to the level of extra-reasonable accommodations that some individuals may require. Thus, disabled students are not entitled to collective accommodations that could achieve equal educational opportunities or to a variety of measures that could ameliorate historic discrimination.

Despite the success of the Warnock report and subsequent legislation in invoking the social model, the full inclusion of a socially marginalized group requires invoking both negative and positive rights; education-related antidiscrimination legislation can prospectively prevent prejudicial harm, while equality measures are needed to remedy inequities that exist due to past practices. Moreover, failing to counteract the unequal position of people with disabilities perpetuates their social stigma and the attitudes that maintain subordination. Thus, education-related anti-discrimination legislation is only effective when linked with equality

⁷⁵⁴ Historically, society viewed persons with disabilities through a medical model that considered "handicapped" individuals as naturally excluded from mainstream culture. Due to this medical based pathology disabled persons have been either systemically excluded from social opportunities, or have been accorded limited participation in those opportunities, for example by having their education circumscribed to separate schools. See Kenny Fries, Introduction to *Staring Back: The Disability Experience From the Inside Out* 1, 6–7 (Kenny Fries ed., 1997) (noting that "his view of disability . . . puts the blame squarely on the individual"); Claire H. Liachowitz, *Disability as a Social Construct* 11 (1988) (averring that the "medical/pathological paradigm" of disability, which stigmatizes the disabled by conditioning their inclusion "on the terms of the able-bodied majority").

⁷⁵⁵ Although the medical model approach prior to the Warnock report has previously informed special education, its effects are still currently relevant, a clear example relates to the continuing segregation of special education. In terms of inclusion in education provision, the 1976 Education Act, Section 10 decreed that all children were to be educated in ordinary schools, at a date to be fixed later, but subject to practicability, efficiency and cost. This was never implemented⁷⁵⁵ and was superseded by the 1981 Education Act, which likewise decreed that children with special needs should be educated with non-disabled children in ordinary schools but, as the 1976 Act, subject to the same constraints. These constraints would seem to have been powerful deterrents to the advance of integration. LEAs preferring the special school can always use them as an excuse for inaction.

⁷⁵⁶ Barton and Tomlinson, Tomlinson, S (1982) *A sociology of special education*. London: Routledge and Kegan Paul. p.65

measures (such as inclusion preferences) that alter educational frameworks, hierarchies and cultures.

Unfortunately, the disability rights agenda has not embraced both first and second-generation rights.⁷⁵⁷ This is because the social model has been proscribed to a rigid concept of formal justice that narrowly treats similarly situated people as alike. And so long as the extent of disabled versus non-disabled equality is assessed in terms of sameness, it cannot adequately account for programmes seeking to raise the group to an equal level through treatment that is more than equal. By limiting itself to the boundaries of the social model, the Warnock committee agenda has neglected these complementary means of institutional restructuring. In consequence, although the social model seeks to remove institutional barriers, a central means of achieving that goal has been neglected.

The position enforced by the Warnock report endorsing social model perspectives in relation to inclusive education express two further limitations of the social model of disability.

1. First insisting on the social construction of special education needs presents obvious elements of over emphasising of the socialization;
2. Second, the rejection of any concept of normality and the assertion of the celebration of difference as main educational aim is in itself problematic. Social model views theorising the construction of the social model in special education needs, in overlooking the experience of impairment, and in deconstructing and rejecting definitions of functioning, present a strict socialisation of impairment itself.

Moreover, in identifying the oppressive nature of professionals, as the medical model does, social perspectives in education may lead to an underestimation of the important contribution of professional expertise in children's development. Further many disabled children require an inclusive culture and ethos, a differentiated curriculum and assessment methods and they might also need additional resources and special aids. Furthermore the social model, with its strong emphasis on self-advocacy and collective action, is inadequate for some children with profound or multiple impairments who, even with the maximum access to resources and inclusive education, are largely reliant upon others.

Inclusive education is primarily political as it is concerned with the inclusion of all citizens in a democracy. Its political dimension stems from its commitment against exclusion both in policy and practice and from its convergence with the social model of disability and disabled people's civil rights movement. The political aim of inclusive education is that difference should be respected and promoted. These elements, furthermore, contribute to the

⁷⁵⁷ Broadly stated, first generation rights are thought to include prohibitions against State interference with rights that include life, movement, thought, expression, association, religion, and political participation. They are often referred to as "negative rights." Second generation rights focus on basic standards of living that States must ensure, such as the availability of employment, housing, and education. These are frequently thought of as "positive rights."

understanding of inclusion in terms of entitlements of disabled people to the benefits and opportunities entailed by rights of citizenship. Inclusive education as a matter of rights, and specifically human rights are central to the debate on inclusion.

But perhaps the most glaring indictment of the Warnock Committee's position with regard to SEN and the role of disabled people within the community can be found in its discussion of what it terms significant living without work:

The problem of how to accept life without employment and how to prepare for it, faces people with a variety of disabilities, including those who are of the highest intelligence but very severely handicapped. We believe that the secret of significant living without work may lie in handicapped people doing far more to support each other, and also in giving support to people who are lonely and vulnerable.⁷⁵⁸

Although the Committee acknowledged the economic, social and psychological significance of paid employment for individuals within our society it is clear that it had accepted unequivocally the orthodox view that disabled people would be excluded from the workplace. This has salient implications for the perpetuation of this myth. The most obvious of these is that professionals, themselves in secure employment, will determine when a child is young that s/he is unsuitable for paid work. The child's subsequent education will be organized accordingly. This results in a self-fulfilling prophecy, producing a downward spiral in professionals' expectations about the child's potential for achievement.⁷⁵⁹ It is not surprising therefore that since the 1980s there has been a proliferation of life and leisure skills teaching for children and students with SEN throughout the education system.

4. Warnock, Special Educational Needs the Conflation of the Medical and Social Model of Disability and its Problems

Warnock, Special Educational Needs the Conflation of the Medical and Social Model of Disability

Warnock sought to dislodge the vice-like grip in which medical discourses have held disabled children. The Warnock Committee took exception to the system of ascertainment, under the 1944 Education Act, which sought to classify children into particular kinds of handicaps and to associate them with particular kinds of schools. Here, medical practitioners were the principal arbiters and the system of classification of conditions they used had much in common with medical nosology (the science of classification of diseases). Warnock aimed to replace this system with a conceptualisation of a continuum of special educational needs,⁷⁶⁰ which seemed simply to shift onto another branch of medicine, epidemiology. Warnock proposed to tackle what was seen as an unhelpful bipolarity: we have made very

⁷⁵⁸ Warnock Report, 1978, p.202

⁷⁵⁹ Kent and Massie, 1981, Radford, J. P. (1994). Intellectual disability and the heritage of modernity. In M. H. Rioux, & M. Bach (Eds.), *Disability is not measles: New research paradigms in disability* (pp. 9-28). North York, Ont: Roeher Institute.p.67

⁷⁶⁰ Warnock Report 1978 p94

clear our determined opposition to the notion of treating handicapped and non-handicapped children as forming two distinctive groups, for whom separate educational provision has to be made.⁷⁶¹

The proposal of a continuum of special educational needs was a significant displacement from a system of classification towards an epidemiological model. This new view empowered professionals to search for causes of a disability, or at least contributory factors, that were found outside the person. It began to map out new trajectories of special educational needs, rather in the way of the development of medical knowledge of the early eighteenth century—a symptom was situated within a disease, a disease in a specific ensemble, and this ensemble in a general plan of the pathological world. Special educational needs, in a similar way, became situated within a map which related the child's disability to other features (for example, behaviour, personality, attitude). These could be found by extending the focus to the child's immediate environment (the parents and family) and the wider locale of the school. This new way of speaking legitimised extensive surveillance of the child.

The progressive specificity of medical knowledge, located within the clinic, opened up to the gaze 'a domain of clear visibility.' All aspects of a patient's disease could be subject to scrutiny, for example through the practices of immunology or radiology. As a result, medical perception was: freed from the play of essence and symptoms, and from the no less ambiguous play of essence and individual.⁷⁶²

The disability of the child, whilst at the centre of the special needs map, is circumnavigated within Warnock and the focus is instead on the rest of the child—his or her characteristics and the environment inhabited by the child. The system of classification, which Warnock proposed to leave behind, had been crucial in separating children who could be educated, from those who were required to be cared for throughout their lives. Great efforts were made to ensure that this system of ascertainment, managed largely by the medical profession, was accurate. This was significant, given the pressure from those proposing birth control or sterilisation (arising from notions that mentally handicapped were excessively fertile) and from eugenicists, looking to inhibit the birth of defectives.

Classification clearly had an important role in distinguishing educable from ineducable defectives. Warnock saw no need for such a distinction, since all children were to be educated. However, the attempt to replace categories with the notion of a continuum was problematic. It encouraged professionals to see the causes of disability as being outside, rather than within, the child. This opened up to the gaze, 'among other things, the child's

⁷⁶¹ Warnock Report 1978 p.100

⁷⁶² see Foucault, 1973, *The birth of the clinic*, p105

parents, invoking them as a cause of disability. Attempts to demedicalise disability appear instead to have shifted the way in which the diagnosing gaze operated. This took place in an epidemiological rather than an ontological domain and still involved the attribution of causal factors. It also legitimised maximum surveillance of pupils with special educational needs.

Problems with the Conflation of the Medical and Social Model in the Warnock Report

In the Warnock Report there is a conflation of the medical and social model of disability, which can be problematic. Education systems and policies have been instrumental in building and sustaining the current citizenship regimes in England. There was no question raised within the Warnock Report as to the educability of all children, regardless of the severity of their needs. Special educational treatment was to be replaced by special education,⁷⁶³ asserted Warnock. The Warnock Report was also famous for attempting to shift the medical model way of thinking in education provision to a social model of disability in its march towards inclusive education.

Inclusive education was not seen an end in itself, rather it was a means to an end, that of establishing an inclusive society. Thus the role of education was seen as central to that achievement.⁷⁶³ The Warnock Report's adoption of the social model of disability and a more inclusive notion of citizenship with its emphasis on disability as primarily caused by social structures is evident in its definition of inclusivity as the process of removal of all exclusionary and disabling barriers in education. And in the important role inclusive education plays in the achievement of an inclusive society.

The Warnock Report challenged the medical model's individualized approach to the problem of disability and special educational needs to a view that locates the difficulty or the deficit within individual school structures. Special education developed from pathology of difference within medical disciplines.⁷⁶⁴

However the Warnock Report continued to reflect medical views which when applied to education locates the problem within the child and suggests cure and compensation based on medical interventions. Translated to education this implies that disabled people possess inherent characteristics that are graded based on intelligence, skills and abilities. This medical approach as reflected in the Warnock Report has previously informed special education, a clear example is segregated education and special schools which are still

⁷⁶³ Inclusive education is not an end to itself but a means to an end, that of establishing an inclusive society. Thus, the notion of inclusivity is a radical one that it places the welfare of all citizens at the center of consideration. It is not merely about providing access to disabled students, who have been previously excluded, or about closing down special schools and including them in an unchanged mainstream school system. Inclusive education is about the participation of all children and the removal of all forms of education. See Barton, 1998, p.84-85

⁷⁶⁴ see Clough and Corbett, 2000, Clough, P (1995) Problems of identity and method in the investigation of special educational needs in P Cough and L Barton (Eds) *Making difficulties: research and the construction of SEN*. London: Paul Chapman.p:11

available today. The clinical and medical assessment of disabled students introduces categories of normality and abnormality. Students identified as abnormal are therefore placed in segregated special institutions and schools.

The shift to the social model expressed by the Warnock Report was not translated into an automatic right for all children to be included in a common education with other children. Children with severe difficulties would continue to need separate special schooling. An important confusion with inclusive education that has been addressed in 2010 by Warnock is whether inclusion is a means to an end or an end in itself.⁷⁶⁵ Proponents of full inclusion argue that segregated SEN placement is wrong because a key goal of education should be to fully include children in the community in which they live. Therefore, they ought to be included in their local mainstream schools. However, as suggested by Warnock, inclusion in the community after leaving school is actually the most important end that educators should be seeking. Inclusion in mainstream schools may be a means to that end but should not be an end in itself. For some children with SEN, segregated SEN placement may be the best means to the end of eventual inclusion in the community when they leave school. In contrast, inclusion in mainstream schools which does not fully meet children's SEN may be counterproductive in that it is likely to reduce their potential for full inclusion in the community as adults.

This conflation of the medical model approach and the social model approach expressed in the Warnock report is problematic and exclusive for many disabled people, particularly those with intellectual and complex disabilities. The application of medical definitions in the case of physical disability has different interpretations that definitions applied to intellectual disabilities.⁷⁶⁶ This negative social interpretation of intellectual disabilities is reflected in the historic changes both in the descriptors and use of these categories.⁷⁶⁷ This medical model

⁷⁶⁵ Warnock in Terzi, 2010

⁷⁶⁶ For example paralysis is a category that is agreed by professionals and can be readily applied to education settings, but categories used to identify and classify intellectual disabilities are subject to the cultural and structural factors according to social interpretation. This is due to the fact that there are no adequate measuring instruments or criteria in society of intellectual limitations.

⁷⁶⁷ In the mid 1950s some LEAs objected to boarding schools and the drying up of the supply of buildings led to the building of large numbers of day schools after 1955. By then the Chief Medical officer's annual Reports and government circulars were reminding LEAs that special education should not be equated with provision in special schools. Sending a child away from home should only happen if there was no other practical alternative: *—a child has a mental handicap does not necessary involve his withdrawal from normal environment but, if he has to be withdrawn at all, that withdrawal should not be further or greater than his condition demands. Handicapped children have a deep longing to achieve as much independence as possible within normal community instead of being surrounded by an atmosphere of disability"* (Report for 1952 and 1953 of the CMO of the Ministry of education, HSMO, 1958,p.6) In 1964 the new Department of Education and Science (DES) said of the slow learner following the ordinary timetable: *his failures are exposed many times a day. In such a situation his self-respect is undermined and he quickly loses heart, so that the way is wide open for the development of anti social conduct"* This perceived unsuitability of the normal curriculum, ethos and organizations of many ordinary schools for SEN, placement for as many as possible in special schools or classes was seen as being necessary to help children escape from experiencing repeated failure, and its consequent damaging effect on their self concept and attitudes to education. Most leading educationalists considered this to override any considerations of the stigma attached to segregation. An element of social control in the selection of children in special schools was openly admitted by the ministry in 1946 (in 1946, a ministry pamphlet indicated that the first group of children with low IQ, should attend the new ESN schools, rather than the relatively brighter 'remedial' children). The 1959 Mental Health Act contained a provision within the community for severely subnormal children. Eugenic fears had now largely been dispelled and there was a growing pressure for children to live at home and attend health authority junior training centers rather than stay in subnormality hospitals. Section 57 of the 1944 Education Act was the legal mechanism by which

view expressed in the report can actually become deterministic, especially if the emphasis is placed on individual causation.

The radical changes in the Warnock Report expressed unequal citizenship status of disabled children, many were still educated separately and excluded from mainstream education. This relates consistently to the critical analysis of the medical model provided by the social model of disability. The relationship of power between social groups and the dominant, hegemonic imposition of some groups on others, in this case medical and educational professionals on disabled people and their parents. The traditional special education discourse in the Warnock report is one in which the voices of the professionals continued to dominate.⁷⁶⁸

Furthermore, the implementation of specific school structures, curricula, and standards of achievement act as disabling barriers excluding de facto a wide number of children from mainstream schools. It is through these positions that issues of inclusive education widen from considerations referred primarily to disabled children and special education needs to a more general perspective that encompass a response to students' diversity in an inclusionary way. This situates inclusive education in a larger political movement, which questions the organisation of society and declares the positive celebration of difference as its fundamental political aim, and the realisation of an inclusive society which values difference.

5. Warnock 2005 Critique of the Implementation of the Warnock Report 1978

In the second Warnock Report (2005) on education titled *Special Educational Needs: A New Look*, Warnock criticized how the system of education operates in theory by retracting old recommendations for inclusion for children with SEN. The 2005 report presented a thorough critique of the issues of SEN amounting to the idea that the whole system has to be re-examined.⁷⁶⁹

The Warnock Report 2005 made it clear that the way schools care for children with special needs has caused a disastrous waste of money and has to be completely overhauled and replaced by a process for meeting pupil's social and educational needs. Moreover, it decided that SEN should only be catered for in mainstream schools when it can be supported from within a school's own resources.

The report recommended that the Government has to recognise that the whole idea of inclusion should be rethought, and a new commission is needed to look into the whole area of SEN provision. Warnock's 1978 call for the greater integration of children with special

children believed to have an intelligent quotient of less than 50 were excluded from the education system. Parental hatred of this was increasingly recognized and the justice of their view more widely appreciated as is evident in the next section where the issue was debated in parliament.

⁷⁶⁸ See Corbett and Slee, 2000, p.135, Slee, R (1993) The politics of integration - new sites for old practices? *Disability, Handicap and Society* 4 (2) pp351-360.

⁷⁶⁹ Warnock report 2005

educational needs into mainstream schooling has been embraced to a level that has resulted in Baroness Warnock recently expressing concern that it may be being employed in ways that are unhelpful for some children.⁷⁷⁰ However, a more subtle challenge to the philosophy behind the Warnock Report has been the resurgence of the medical model in identifying and assessing children with special educational needs. There appears to be a growing emphasis upon categorical diagnosis and classification that can distract clinicians, teachers and parents from the primary purpose of the assessment, finding ways to help children learn more effectively.

In 2005 around eighteen percent of all pupils in school in England were categorized as having some sort of special educational need (SEN) (1.5 million children). Around three percent of all children (250,000) had a statement of SEN and around one percent of all children were in special schools (90,000), which represents approximately one-third of children with statements.⁷⁷¹ Warnock criticized the government's policy of inclusion and the confused and changing definition of inclusion which caused the closure of special schools and forced some children into mainstream schools when it is not in their best interests to be there, resulting in distress for pupils and parents.⁷⁷²

There is no single solution to providing education for children with disability. However there are now some valuable lessons which have been learned which other disability initiatives can draw from. In July 2005 Baroness Warnock wrote an article on SEN in which she called for the Government to set up another commission to review the situation. In her 2005 report *Special Educational Needs: A New Look*, Warnock expressed regrets about how the system of education operates in practice:

Unless someone is brave enough to bring an end to what I regard as our—my greatest mistake, namely statementing, money will still be squandered in the same way as now, the problems to do with statementing are almost insoluble and very expensive. The only way to solve it is to cut through the whole thing.⁷⁷³

She concluded that there was an urgent need to review SEN, particularly the concept of inclusion, the process of statementing, and to gain a better understanding of the link between social disadvantage and SEN. Warnock went on to cause great consternation by saying

... one of the major disasters of the original (Warnock, 1978) report was that we introduced the concept of special educational needs to try and show that disabled children were not a race apart and many of them should be educated in the mainstream... But the unforeseen consequence is that SEN has come to be the name of a single category, and the government uses it as if it is the same problem to include a child in a wheelchair and a child with Asperger's, and that is conspicuously

⁷⁷⁰ Warnock 2005

⁷⁷¹ Warnock Report 2005

⁷⁷² The Sunday Times Review, June 11 2006

⁷⁷³ Warnock 2005

untrue.⁷⁷⁴

Warnock argued that there is an underlying problem, in that the premise on which models of SEN provision have progressed to in recent times is premised upon a 'single category' of children with SEN which she argues is fundamentally flawed. Warnock suggested that children exist on a broad continuum of needs and learning styles but do not fit into neat categories of different sorts of children—that is, those with and those without SEN. As such Warnock advocates that the categorization of SEN is an arbitrary distinction that leads to false classifications and, it can be argued that, this is what is causing the high levels of conflict and frustration with all those involved in relation to modeling who should/should not be included in mainstream schooling and what strategies and models to adopt to support children with SEN.

According to the Warnock Report (2005), children with special needs in mainstream schools have not benefited from the best teaching and they have been taught almost entirely by teaching assistants who are not fully qualified. Accordingly, it was envisaged that there is need to deploy the expertise of teachers from special schools to support and train teachers in mainstream schools. In 2004 Ofsted reported that one of the weaknesses of inclusion preventing disabled students reaching their full potential, is the use and quality of teaching assistants.⁷⁷⁵ Priestley found that for some young disabled people, the physical proximity of the helper could work against social processes of acceptance among other children in the class.⁷⁷⁶ Consistent with this, Allan suggests that all aspects of the child's interpersonal relationships can be brought under the vigilance of the staff, as disabled children are more comprehensively observed than their non-disabled peers.⁷⁷⁷ This promotes a divide between young disabled people and their nondisabled peers. Further, the former, who are the minority in mainstream schools, are perceived as 'different' and therefore a legitimate target for bullying.⁷⁷⁸

The 2005 Warnock Report indicated that, while the situation for inclusion was not so bad in primary schools, pending provision of the necessary support, more acute problems were identified in secondary schools. Inclusion was seen, in practice, often to mean that children are physically included but emotionally excluded. With respect to bullying, the 2005 report sees children with SEN are not as vulnerable to bullying in special schools as they inevitably are in mainstream schools (particularly secondary schools). Warnock calls for addressing the tendency of children to bully those they see as different, and also notices that some parents

⁷⁷⁴ Warnock 2005, pg 16

⁷⁷⁵ Ofsted 2004

⁷⁷⁶ Priestley (1998), Rieser, R. (1992). 'Stereotypes of Disabled People'. In Rieser, R. and Mason, M. *Disability Equality is the Classroom: A Human Rights Issue*. P.87

⁷⁷⁷ Allan 1996, p. 222, see also Allan, J, Brown, S and Riddell, S (1995a) *Theorising special education: an overview*. Paper presented at the International Special Education Congress, Birmingham, 10-13 April.

⁷⁷⁸ Wilson, C. & Jade, R. (1999) *Whose voice is it anyway?* London: Alliance for Inclusive Education.p.26

see attendance at a special school as a bad thing which is likely to expose their child to abuse.⁷⁷⁹

Baroness Warnock realised that inclusion must embrace the feeling of belonging which is necessary for well-being and successful learning. It also criticized the practice of SEN is lacking due to budget inadequacies and lack of planning. She also noted that the lack of special equipment that might make it possible for some children with sensory deprivation to be taught in the ordinary classroom deprives many children of inclusion when they are educated in mainstream schools.

The access and resource limitations of several mainstream secondary schools may also mean that young disabled people have to move to designated schools, with suitable facilities for disabled people, several miles from their home while their local nondisabled peers can make a straight transition to their local secondary school.⁷⁸⁰ This is not only tiring for the young disabled people, as they needed to travel long distances, but also means that they may be separated socially from friends made at school and peers from their home locality.

The above factors led Lady Warnock in her 2005 commentary to say: the idea of inclusion should be rethought insofar at least as it applies to education at school.⁷⁸¹ This statement raises the crux of the issue. The Government recognised the barriers to inclusion that exist in schools in its statement in 2004 and set out its proposals about how the barriers should be tackled.⁷⁸² OFSTED, in its report in 2004, found that more mainstream schools saw themselves as inclusive, but that only a minority met special educational needs very well. Members of the SENCo Forum (an electronic mailing list for SENCos) responded to the consultation on the government's Special Needs Action Plan by stating that schools would have to provide a much higher level of flexibility in the way that learning and teaching take place, if the aims of inclusive education are to be realized.⁷⁸³

A number of arguments have been used by policymakers, professionals and parents to argue that segregated special schools are the best option for some disabled students, with their supportive barrier-free environment and specialist resources and support to meet the students' needs. They criticize mainstream schools for failing to adequately prepare for a disabled child's care, educational and social needs.⁷⁸⁴ Further, they believe that too often, only lip service is paid to integration'—whether in the classroom and curriculum or in wider social activities.

⁷⁷⁹ Warnock 2005

⁷⁸⁰ Pitt, V. & Curtin, M. (2004) Integration versus segregation: the experiences of a group of disabled students moving from mainstream school into special needs further education. *Disability & Society*. 19(4), 387–400. Shah, 2005

⁷⁸¹ Warnock 2005

⁷⁸² DfES, 2004

⁷⁸³ SENCo Forum, 2003

⁷⁸⁴ Saunders, S. (1994) The residential school: a valid choice, *British Journal of Special Education*, 21(2), 64–66.

Evidence that inclusion in Education Can be Positive: Studies on Inclusive Education

In a study on the effects of school inclusion programs on male and female non-disabled students' stereotypes, their attitudes toward people with Down's syndrome were studied. Non-disabled students (11–15 years of age) from schools with and without inclusion programs reported positive and negative attitudes toward people with Down's syndrome. As hypothesized, girls and students attending schools with inclusion programs showed more favourable attitudes toward people with Down's syndrome than did boys and students attending schools without inclusion programs, respectively. Interaction effects of the school system and the sex of participants suggest that boys' attitudes, in particular, benefit from inclusive schooling.⁷⁸⁵

Moreover negative attitudes can be changed as seen in a German study where an experimental study was designed and tested to change negative attitudes towards the physically disabled. A pre-test intervention was conducted including three conditions: (a) cognitive intervention; (b) cognitive and behavioural intervention involving equal-status contact with the target group; (c) no-intervention control. The sample consisted of seventy ninth-grade students. Following baseline assessments of attitudes, attitude change was measured immediately following the intervention and at a follow-up three months post-intervention. The cognitive intervention provided information about physical disability and challenged stereotypic conceptions about the physically disabled. The behavioral intervention consisted of engaging in three Paralympics disciplines under the instruction of a group of disabled athletes. The cognitive intervention alone did not result in significant changes in attitudes towards the physically disabled. However, the combined cognitive-behavioral intervention resulted in greater attitude change than the no-intervention condition, both immediately post-intervention and at a three months follow-up.⁷⁸⁶

Therefore, the weakest points of full implementation are seen to be negative attitudes and perceptions of disabled people. The solution could be summarized in: (a) financing which need a large input from government to cater for establishment of primary infrastructure; (b) special facilities and continuous teacher training; (c) teachings about equality and respect for difference etc. A 1995 study by Hastings and Graham maintains that educational integration assumes that heterogeneous grouping will increase the extent to which the disabled are accepted by peers. Reports on a study of 128 adolescents in integrated and nonintegrated schools find that the frequency of contacts, not the type of school attended, led to more positive expectations.⁷⁸⁷ I also suggest here that knowledge learned within the private sphere can contribute to more inclusive forms of care that do not construct difference as a

⁷⁸⁵ (By: Sirlopú, David; González, Roberto; Bohner, Gerd; Siebler, Frank; Ordóñez, Gabriela; Millar, Andres; Torres, David; de Tezanos-Pinto, Pablo. *Journal of Applied Social Psychology*, Nov2008, Vol. 38 Issue 11, p2710-2736, 27p).

⁷⁸⁶ . (*Journal of Community & Applied Social Psychology*, Jan/Feb2006, Vol. 16 Issue 1, pp59-69, 11p).

⁷⁸⁷ Hastings, R.P. and Graham, S. (1995) *Adolescents perceptions of young people with severe learning difficulties: The effects of integration schemes and frequency of contact*

problem or an abnormality to be resolved through technical and assimilation programs. If negative perceptions and attitudes towards disability can be addressed and combated, then inclusion in a homogeneous society would not be far behind. As it stands at the moment, legislation alone without a societal shift in understanding about disability and disabled people will only go so far.

Although legislation has laid the foundation for the fair and equitable treatment of people with disabilities, yet their unemployment rate remains far above that of people without disabilities. Schools, employers, agencies, and other entities may not be predisposed to provide equable treatment and equal access to individuals with disabilities. If people have negative attitudes toward people with disabilities, discrimination can result. Individuals' behaviours may be influenced more by attitudes and beliefs than by legal mandates. Attitude change is essential to creating a society and workforce of equal opportunity. Education and training programs at schools through citizenship lessons may be a simple, low cost method for changing beliefs and attaining equality.

Recommendation of the Warnock report; Mainstream schools vs. Special schools for Disabled People

Warnock 1978 identified three groups of children for whom provision in special schools is particularly likely to be needed in future. These are:

- (i) Children with severe or complex physical, sensory or intellectual disabilities who require special facilities, teaching methods or expertise that it would be impracticable to provide in ordinary schools;
- (ii) Children with severe emotional or behavioural disorders who have very great difficulty in forming relationships with others or whose behaviour is so extreme or unpredictable that it causes severe disruption in an ordinary school or inhibits the educational progress of other children; and
- (iii) Children with less severe disabilities, often in combination, who despite special help do not perform well in an ordinary school and are more likely to thrive in the more intimate communal and educational setting of a special school.⁷⁸⁸

The report stats:

The groups of children identified above provide a broad indication of those children who are likely to attend a special school, some of them on a residential basis, at least for a period of their school life. Some may need to attend a special school all their school life; others may, after a period in a special school, be able to pursue their education in an ordinary school. Special schools will thus have a continuing and important function in offering separate special educational provision for certain

⁷⁸⁸ Warnock Report 1978p.135

groups of children with special needs. Further, we recommend that their facilities and expertise should be more widely available to provide intensive specialised help on a short-term basis and sometimes at short notice.⁷⁸⁹

Although in the mid-1990s, the Salamanca Statement focused the majority of Western countries on the need to *include* students with special educational needs as the core agenda of broad-based educational innovation. Inclusion opponents decried the resource limitations of the general education classroom, arguing that specialized instruction and other services were best provided in separate settings where the specific amount and type of student deficit and disability could be matched to appropriate services.⁷⁹⁰

Without one-to-one specialized instruction, opponents argued, disabled students would simply not learn and futures would be sacrificed. Debates over *where* students with disability should be educated grew, as more and more disabled students were in fact integrated into general education classrooms, to debates over *time*: should all students' spend all of their time' in general education classrooms?⁷⁹¹ Or is there a continuing need for separate environments for many students for at least part of their school day? This argument was addressed by Baroness Warnock in her 2005 report.

Warnock's 2005 Argument For Keeping Special Schools

One of the proposed hallmarks of inclusion is that children with SEN are educated along with their peers in mainstream classrooms. However, Warnock points out, Inclusion is not a matter of where you are geographically, but where you feel you belong.⁷⁹² Many children with SEN are more comfortable with peers who have similar disabilities and interests to themselves, rather than peers of the same chronological age. So for these children a sense of belonging, and therefore being included in a learning community, is more likely to result from placement in a special class or special school than a mainstream classroom.

As Warnock puts it, What is a manifest good in society, and what it is my right to have... may not be what is best for me as a schoolchild.⁷⁹³

Warnock here reflects a critical confusion, which concerns the rights of children with SEN. A typical argument put forward in favor of full inclusion is that it is a basic human right of all children to be educated along with their mainstream peers. To segregate children for any reason is considered by many inclusionists to be a denial of their human rights.

Warnock here assumes two main issues. First she differentiates between human rights and moral rights. She argues that just because someone has a human right to a certain option

⁷⁸⁹ Warnock 1978, p.135

⁷⁹⁰ UN Salamanca Statement

⁷⁹¹ in Brown et al. 1991, Rieser, R. (1992). Stereotypes of Disabled People'. In Rieser, R. and Mason, M. *Disability Equality is the Classroom: A Human Rights Issue*.

⁷⁹² Warnock in in Terzi, 2010, p.34

⁷⁹³ Warnock in Terzi, 2010, p. 36

doesn't necessarily mean that it is morally the right thing for them to do. Thus, although their human rights allow children with SEN to be educated alongside their mainstream peers, for some of them this may not, morally, be the right or best option.

Secondly she states: It is their right to *learn* that we must defend, not their right to learn in the same environment as everyone else.⁷⁹⁴ Which is a second aspect of the rights confusion and concerns priorities. According to Warnock as well as their right to be included, children also have a right to an appropriate education suited to their needs—that is, the right to an appropriate education which meets children's specific needs which is more important than the right to be educated alongside their mainstream peers. Therefore, it cannot be morally right to include all children in mainstream schools if this means that some of them will not be able to receive the education most appropriate for their needs.

In recent years there has been increasing emphasis on academic achievement as the primary goal of education in the UK. The government has focused their attention on the improvement of academic standards by various means including the establishment of national curricula and national assessment regimes. This has deflected attention away from the broader goals of education, such as those concerned with the development of life and social skills. All children in mainstream schools are driven by the need to achieve high academic standards results. These goals of education for many children are inappropriate. This confusion applies to all children including children with SEN. Because an important confusion that impacts on the issue of inclusion concerns the goals of education.⁷⁹⁵ The major goal of education for many children including those with SEN must then be to produce happy, well-adjusted and productive citizens. As stated in the Salamanca Statement on Special Needs Education: Schools should assist them to become economically active and provide them with the skills needed in everyday life, offering training in skills which respond to the social and communication demands and expectations of adult life.⁷⁹⁶

Arguments Against Warnock's 2005 Position Regarding Special Schools

Warnock's recent argument regarding education in England as reflected in her statement has medical connotations and major limitations. The medical and social model resulted in education policy that had significant shortcomings in relation to equality for disabled children, and the models of disability that underpin the Warnock Report need to be rethought. Both the medical and social models of disability have limits to the achievement of equal citizenship for disabled people, and that inclusive education is about a positive definition of difference. It asks for a celebration instead of a medicalization perpetuated by the oppressive ideology of normality. Defining difference on the basis on which to establish

⁷⁹⁴ Warnock, in Terzi, 2010, p. 36

⁷⁹⁵ as noted by Terzi 2010

⁷⁹⁶ UNESCO, 1994, p.10

equal entitlements for all groups in society is a matter of human rights. This is evidenced empirically by the fact that post the Warnock Report disabled students continue to experience disproportionately high rates of segregation in special schools. The problem is heightened in the most socially marginalized among disabled people—those with intellectual and complex disabilities.

Special schools have their own shortcomings and have been criticised for restricting disabled students' options in other ways. Disabled young people who attend the same school from their early infancy to early adulthood are being denied the experiences considered essential for the transition from childhood to adulthood, and thus shielded from the realities of society.⁷⁹⁷ This will only serve to reinforce the commonly held conception that individuals with impairments are eternal children. Dr John Mary and the British Council of Organisations of Disabled People believed that the special education system is one of the main channels for disseminating able-bodied minded perceptions of the world and ensuring that disabled school leavers are socially isolated.⁷⁹⁸

This isolation results in disabled people passively accepting social discrimination, lacking the skills necessary to pursue the tasks of adulthood successfully, and not understanding about the main social issues of our time. As well as reinforcing the myth that disabled people are eternal children, segregated education ensures disabled school leavers lack the skills for overcoming the myth.⁷⁹⁹ This is supported by Jenkinson and Fuchs and Fuchs, who believe that the lack of appropriate behavioral role models, the lack of feedback from non-disabled peers, and the removal from the common culture of childhood and adolescence, contributes to later isolation in the community.^{800 801}

Mulderij agrees that the experiences of mainstream situations are essential during school years if disabled children are to develop the skills required to be successful in adult society. Furthermore, disabled young people need to be in an environment where their career aspirations are fed, and not suppressed by a system that lacks encouragement and flexibility, or a system that makes them feel they do not fully belong.⁸⁰²

A further major criticism of special schools is of their isolated curricula which focus disproportionately on specific educational needs, and prevent students from learning the

⁷⁹⁷ BARNES, C (19991) *Disabled People in Britain and discrimination: A case for Anti-Discrimination Legislation*, (London: Hurst).p.45

⁷⁹⁸ *Historical perspectives on special education, 1890–1970* 469, Hurt, J. (1988) *Outside the mainstream: a history of special education* (London, Batsford). Jenkinson, J. C. (1997) *Mainstream or special? Educating students with disabilities*. London: Routledge.

⁷⁹⁹ BCODP, 1986

⁸⁰⁰ Jenkinson, J. C. (1997) *Mainstream or special? Educating students with disabilities*. London: Routledge.p.107

⁸⁰¹ Fuchs, D. & Fuchs, L. S. (1998) Competing visions for educating students with disabilities: inclusion versus full inclusion, *Childhood Education*, 74(5), 309–316.

⁸⁰² Mulderij, K. (1996) Research into the life world of physically disabled children, *Child: Care, Health and Development*, 22(5), 311–322.

wide range of subjects that are offered in mainstream schools and are perceived to be important to successful economic participation. Furthermore, Jenkinson offers the opinion that the small number of staff in special schools, coupled with their significantly limited, if not deficient, curricular expertise, undeniably serves to restrict the range and content of the curriculum.⁸⁰³

The above are ethical, social and educational arguments for and against inclusive education, although not by disabled young people themselves. This study highlights disabled students' experiences and opinions of special and mainstream education, therefore bringing their perspective to the segregation versus inclusion debate.

A 1997 comparative study by the OECD's Centre for Educational Research and Innovation found that disabled students in the UK were significantly under-represented in science and teacher training courses.⁸⁰⁴ This is often related to a number of factors connected with disability and how society reacts to it. Some young people are not able to access all school resources, and may have to forego certain activities and classes. Burgess maintained that despite the ongoing policy drive towards inclusion, mainstream schools are not fully accessible, as those responsible for developing inclusion still think of accessibility in terms of ramps and rails. In her study of disabled secondary school students throughout the UK, Burgess found that their curriculum choices were severely curtailed: 36 percent of young disabled people she talked to could not study subjects of their choice due to poor access to the curriculum and the disabling environment, including attitudes of teachers.⁸⁰⁵

It can be argued, that as long as mainstream schools do not embrace the full process of inclusion, young disabled people still may have no real choice in deciding where to continue their education or what to do after school. According to a survey commissioned by the DRC (2002–2003) on the aspirations of young disabled people, 24 percent of disabled people aged 16–24 have no qualifications compared with 13 percent of non-disabled people of the same age, bringing exclusion throughout their lifetime. As early as 16 years of age, disabled young people are twice as likely to be out of work, education or training as their non-disabled peers (15 percent compared with 7 percent).

Evidence suggests that young disabled people feel they receive insufficient support in school and are discouraged from taking standard educational qualifications required for university entrance.⁸⁰⁶ Too often, disabled students in secondary schools are taught almost entirely by teaching assistants, not fully qualified teachers, while non-disabled students are taught by

⁸⁰³ Jenkinson, J. C. (1997) *Mainstream or special? Educating students with disabilities*. London: Routledge.p.107

⁸⁰⁴ OECD/CERI, 1997

⁸⁰⁵ Burgess, E. (2003) *Are we nearly there yet: do teenage wheelchair users think integration has been achieved in secondary schools in the UK?* (Whizz-Kidz No Limits Millennium Award). P.99

⁸⁰⁶ Martin, A. (2004) Do the right thing, *Care & Health Magazine*, September, 24–25.

the teacher.⁸⁰⁷ According to MacBeath et al, there is also a tendency for teaching assistants to isolate their child from group learning situations. This means there could be very little interaction between the teaching staff and the disabled students, again reinforcing the disabled/non-disabled divide. Further, disabled students may not receive the same standard of tuition as their non-disabled peers.⁸⁰⁸

Should Special Education be Reconsidered?

Barnes has argued that inclusion is imperative in the fight towards the elimination of discrimination and towards disabled people being accepted as citizens by the social majority.⁸⁰⁹ Cooperative learning can promote greater interpersonal attractions between the disabled and their non-disabled peers, and more positive interactions, with social benefits extending beyond the classroom and becoming long-term.⁸¹⁰ Being educated in an inclusive environment is positively correlated with the successful transition of individuals with disabilities into employment and wider society.⁸¹¹ Further inclusive education can (for some people) facilitate the establishment of social relationships between disabled and non-disabled peers, as awareness and understanding of disability is said to engender an increasing acceptance of it.⁸¹² Moreover, it presents disabled people with a training equal to that of their non-disabled counterparts and, therefore, with qualifications to compete with them in mainstream economic society. There is general agreement that the experiences of disabled children in the UK have changed rapidly as a direct result of social transformation in the past two decades.⁸¹³

Historically, disabled children were perceived as unnatural and undesirable. This justifies significant medical intervention, their abandonment into special institutions away from mainstream society, or their death. However, since the emergence of the disability movement and the social model perspective, the disadvantage encountered by disabled children has increasingly been seen as the result of social structures failing to include them, rather than as the result of their impairment. These political claims, coupled with human rights discourse, have played a considerable part in the government's recent commitment to promote and accommodate human diversity in education and general society.⁸¹⁴

⁸⁰⁷ Warnock 2005

⁸⁰⁸ 2006

⁸⁰⁹ Barnes, C (1999) *Disabled People in Britain and discrimination: A case for Anti-Discrimination Legislation*, (London: Hurst). P.178

⁸¹⁰ Putnam J. W. (1993) *Cooperative learning and strategies for inclusion: celebrating diversity in the classroom*. Baltimore, MD: Brookes.

⁸¹¹ Jenkinson, J. C. (1997) *Mainstream or special? Educating students with disabilities*. London: Routledge. p.1 ; Shah *et al.*, 2004

⁸¹² Wertheimer, A. (1997) *Inclusive education: a framework for change. National and international perspectives*. Leicester: Centre for Studies on Inclusive Education. P.36

⁸¹³ Centre for Studies in Inclusive Education, 2002; Priestley, 2003

⁸¹⁴ Norwich, B. (2002) Education, inclusion and individual differences: recognising and resolving dilemmas, *British Journal of Educational Studies*, 50(4), 482–502.

Integration for the disabled has many connotations. It means the absence of segregation, social acceptance, and being able to be treated like everybody else; the fight to contribute materially to the community, to have the usual choices of association, movement and activity, to be educated up to university level with one's unhandicapped peers, and to travel without restriction on public transport.⁸¹⁵

The rights of the handicapped' person to the same education as their peers was a central theme of the Warnock Report. Yet, integration, it was warned, had to be compatible with the interests of other children in the class.⁸¹⁶ This suggested that the rights of pupils with special educational needs to integration were capable of being removed just as readily as they had been granted.

The education of disabled people, for most of this century, appeared to serve mainly social and economic interests, by striving for independence (reducing the obligations of the state) for as many as possible. Warnock's principle of education for all was founded principally on humanitarian concerns of equality and rights. These rights ushered into the general population a group of pupils who would have been confined to hospitals and pronounced unworthy or incapable of being educated a process which affirmed their non-being.' Yet, these new rights were fragile, capable of being removed if they infringed those of the general population.

Priestley found that for some young disabled people, the physical proximity of the helper could work against social processes of acceptance among other children in the class.⁸¹⁷ Consistent with this, Allan suggests that all aspects of the child's interpersonal relationships can be brought under the vigilance of the staff, as disabled children are more comprehensively observed than their nondisabled peers.⁸¹⁸ This promotes a divide between young disabled people and their nondisabled peers. Further, the former, who are the minority in mainstream schools, are perceived as different' and therefore a legitimate target for bullying.⁸¹⁹

A number of arguments have been used by policy makers, professionals and parents to argue that segregated special schools are the best option for some disabled students, with their supportive barrier-free environment and specialist resources and support to meet the

⁸¹⁵ Snowdon, P (1976) *Integrating the disabled: report of the Snowdon working party*. The National Fund for Research into Crippling Diseases.p'7

⁸¹⁶ Warnock 1978 p103

⁸¹⁷ Priestley, M. (1998) Childhood disability and disabled childhoods, *Childhood—A Global Journal of Child Research*, 5(2), 207–223.

⁸¹⁸ Allan (1996, p. 222) Rioux, M. H. (1994). Towards a concept of equality of being: Overcoming the social and legal construction of inequality. In M. H. Rioux, M. Bach & G. Allan Roeher Institute (Eds.), *Disability is not measles : New research paradigms in disability* (pp. 67-108). North York, Ont: Roeher Institute.

⁸¹⁹ Wilson, C. & Jade, R. (1999) *Whose voice is it anyway?* London: Alliance for Inclusive Education.

students' needs. They criticise mainstream schools for failing to adequately prepare for a disabled child's care, educational and social needs.⁸²⁰

The New Labour Government's Response to the Dilemma of Special Education

The Third Report of the Committee of Education and Skills was set up to review these concerns. Having received over 230 written submissions, taken evidence from over forty witnesses in oral evidence, made visits to schools, and having considered the recent Warnock report, as well as Ofsted and Audit Commission reports, it was clear that there are significant problems with the current system of SEN provision and high levels of dissatisfaction amongst parents and teachers. In their written memorandum Ofsted have said that SEN is becoming more of a confusing and litigious area than ever before.⁸²¹ In oral evidence the Kids First Group, a parent-representative organisation, described a situation where: too many of our special needs children are severely let down.⁸²²

In its submission to this inquiry the DfES recognised that the current system is not working perfectly.⁸²³ Lord Adonis, then Under Secretary of State for Schools and the Minister with responsibility for SEN, told this Committee that: I would be the last person to claim that all is well in the system.⁸²⁴

The DfES went on to say in their memorandum that for the great majority of families the system is operating effectively to meet their children's needs.⁸²⁵ This does not, however, take away from the significant difficulties faced by a large number of parents for whom the system is failing to meet the needs of their children causing frustration and conflict.

In her 2006 submission of evidence to the House of Commons Committee on Education and Skills minutes of evidence, Baroness Warnock said that a radical review of SEN policy is needed. In their submission the DfES said that It (The Government) does not believe that a major review of policy on SEN would be appropriate at present ...what is needed now is change on the ground. Any new review would simply delay progress in making this happen.⁸²⁶

⁸²⁰ Saunders, S. (1994) The residential school: a valid choice, *British Journal of Special Education*, 21(2), 77

⁸²¹ Office for Standards in Education (OFSTED) (2004) *Special educational needs and disability towards inclusive schools*. London: Audit Commission.

⁸²² Office for Standards in Education (OFSTED) (2004) *Special educational needs and disability towards inclusive schools*. London: Audit Commission.

⁸²³ Office for Standards in Education (OFSTED) (2004) *Special educational needs and disability towards inclusive schools*. London: Audit Commission.

⁸²⁴ Office for Standards in Education (OFSTED) (2004) *Special educational needs and disability towards inclusive schools*. London: Audit Commission.

⁸²⁵ Office for Standards in Education (OFSTED) (2004) *Special educational needs and disability towards inclusive schools*. London: Audit Commission.

⁸²⁶ Office for Standards in Education (OFSTED) (2004) *Special educational needs and disability towards inclusive schools*. London: Audit Commission.

Lord Adonis told this Committee that the case for a wholesale replacement of the local authority system and statementing does not appear to us to have been made convincingly.⁸²⁷ The Minister went on to say that: Ofsted has been critical of the SEN in the past, but ... we know the challenges, we know what works, we know the conditions that make things work and we know what does not work. Ofsted's view would be: Let us focus on those things and change them."⁸²⁸

In their memorandum to this inquiry, the DfES argued that it is precisely because of the Ofsted and Audit Commission reports that the issues are known and, therefore, a major review of SEN policy is not needed. The Audit Commission has, however, specifically called for a review of policy on the issue of statements. It published a briefing entitled *Statutory Assessment and Statements of SEN: In Need of Review* in June 2002 which highlighted claims the following issues: demand for statements was rising; statutory assessment was costly and bureaucratic, stressful for parents and added little value in meeting a child's needs; and that statements were leading to an inequitable distribution of resources, and failed to support early intervention and inclusive practice.⁸²⁹

Despite the Audit Commission specifically calling for a review of the statementing process in 2002, it is only now, ten years on, that the Government has acknowledged the need to review the statementing process.

At the time when asked about SEN policy during Prime Minister's Questions on 2 November 2005, however, the former Prime Minister Tony Blair said I accept there is room for improvement and we are keeping SEN provision under review.⁸³⁰ Along with the DfES innovations unit, Lord Adonis held a private ministerial seminar on Next Practice in SEN in November 2005 which involved a wide ranging discussion with experts—particularly on proposals surrounding third way provision on which a paper was provided.⁸³¹

Furthermore, the Treasury was undertaking a root and branch review of funding for children with complex needs. David Singleton of Children Now reported that

the DfES has identified this area as the one in which it would most like funding to be increased in the next spending review [...] The Treasury will now begin a process called zero-base budgeting", in which it calculates the amount of funding required from a base level of zero (or from first principles). This could lead to a significant increase in the level of funding directed towards children with complex needs—an area that includes looked-after children, children with special educational needs and

⁸²⁷ Office for Standards in Education (OFSTED) (2004) *Special educational needs and disability towards inclusive schools*. London: Audit Commission.

⁸²⁸ Armstrong, F. (2002). The historical development of special education: humanitarian rationality or wild profusion of entangled events? *History of Education*, 31(5), 437–456.

⁸²⁹ *Statutory Assessment and Statements of SEN: In Need of Review* in June 2002

⁸³⁰ Office for Standards in Education (OFSTED) (2004) *Special educational needs and disability towards inclusive schools*. London: Audit Commission

⁸³¹ *Statutory Assessment and Statements of SEN: In Need of Review* in June 2002

those with severe disabilities.⁸³²

The DfES told the Committee that this is a joint review with the Treasury and will report through the Comprehensive Spending Review either in November 2006 or March 2007. Ofsted did not believe a major review of SEN was necessary, but Eileen Visser, Area Division Manager, Ofsted, did say to the Committee that:

Some aspects of the structural provision need more than a tweak. They do need us to sit down together, across the political dimension, the inspection dimension and the professional field, and say, ~~What~~ what is it that we need to do?⁸³³

Whilst the then Government said it did not wish to undertake a major public review of its policy on SEN, it did seem to be reconsidering its policy in private. In addition, the fact that the DfES has identified SEN as the area it would most like significant additional funding for was an encouraging sign of progress. The Minister said that the Government:

would look very carefully at anything you recommended to us in this area or other areas." The Committee believes this is a critical time to be publishing the results of the inquiry. We would urge the Government to give most careful thought to our recommendations and consider a completely fresh look at SEN. We look forward to constructive and vital progress for children with SEN and disabilities.⁸³⁴

Although one cannot deny the positive change in education policies for the disabled since the 1944 Education Act there continue to be problems. It seems that the New Labour government started to recognize this but no real change followed.⁸³⁵ Indeed real change cannot happen if new policy and practice do not reflect new models and ideas. In the next chapter it is argued that the UN CRPD offers a positive way forward for the education of the disabled.

⁸³² *Statutory Assessment and Statements of SEN: In Need of Review* in June 2002

⁸³³ Office for Standards in Education (OFSTED) (2004) *Special educational needs and disability towards inclusive schools*. London: Audit Commission.

⁸³⁴ ⁸³⁴ Office for Standards in Education (OFSTED) (2004) *Special educational needs and disability towards inclusive schools*. London: Audit Commission.

⁸³⁵ Office for Standards in Education (OFSTED) (2004) *Special educational needs and disability towards inclusive schools*. London: Audit Commission.

Chapter Seven

Models of Citizenship as Expressed in The Warnock Report

A Case Study

This chapter takes the Warnock Report on special education⁸³⁶ and the resulting legislation as a case study and examines how models of citizenship and human rights prior to 2006 have flaws which are expressed in the twin goals of the Warnock Report. These flaws failed disabled people in education both in theory and practice.

This chapter offers an alternative rights-based discourse. The experiences of the disabled people's movement suggest that an educational rights⁸³⁷ discourse could enhance the provision and practice of education for the disabled and non-disabled alike creating an inclusive structure of education.

The models of citizenship and UN human rights prior to 2006 examined in the previous chapters of this thesis all aim to respect difference while promoting forms of equality. But they did not achieve this aim. This chapter analyses how the failure of the models of citizenship is reflected and expressed in education policies for the disabled and it is proposed here that the CRPD could perhaps provide the necessary scope and content from which to derive a blue- print that will secure their rights in future.

The Chairman of the negotiating Committee has conceptualised the CRPD as an implementation convention⁸³⁶; one that sets out a detailed code for how existing rights should be put into practice⁸³⁷ with respect to persons with disability. The CRPD does not create any new rights or entitlements, rather it expresses existing rights in a manner that addresses the needs and situations of persons with CPRD disabilities.⁸³⁷

Inclusive Education as Reflected in the Warnock Report 1978

In endorsing the principle that handicapped and non-handicapped children should be educated in a common setting so far as possible, the Warnock Committee proposed three progressive stages of integration: locational, social and functional integration. The least ambitious, locational⁸³⁶ integration meant that handicapped and non-handicapped pupils shared the same site. Functional⁸³⁷ integration was seen as the ultimate aim, where they shared the same curriculum. The mainstream classroom was to become the main site where

⁸³⁶ UN Press Releases, Chairman says draft convention sets out detailed code of implementation and spells out how individual rights should be put into practice, 15 August 2005, SOC/4680, available at: <http://www.un.org/News/Press/docs/2005/soc4680.doc.htm>

⁸³⁷ Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities, available at: <http://www.un.org/disabilities/default.asp?navid1422&pid14151#qg>

mainstream and learning support specialists tackled learning difficulties. This required them to develop a completely new professional relationship and the report elucidated these demands. The report, then, seeks to reconstruct the child with SEN within more positive discourses.

Deep-seated difficulties deriving from the structure and vocabulary of the language employed in teaching, or of a conceptual nature, require to be dealt with in the class or subject context in which they arise. Class and subject teachers cannot escape their responsibility for dealing with them.⁸³⁸

Warnock addresses issues in a cleansing tone of elimination and abolishment, and asserts the Committee's intention to establish a new way of speaking. The report shifts the locus of the difficulty away from the child and alters the space in which this identification takes place. The child, in this new way of speaking, is constructed as a victim, no longer just of biologically determined circumstances, but of the ineptitudes of teachers and other external perpetrators.

Reflecting on how the identities and experiences of disabled people have been constructed, it appears that the Warnock report represents a disjuncture. They appear more libertarian than past economic discourses which dehumanised individuals, by classifying them according to their potential to function independently and earn a living. The report issues the imperative to abandon categorisation in the 1944 Education Act and labelling, yet seem effectively to have shifted the labels and the space in which this naming takes place. In other words, the system of differentiation, which constitutes individuals as effect, and object of power, as effect and object of knowledge' has simply been relocated.⁸³⁹

Implication for Citizenship for Disabled people as expressed in The 1981 Education Act and Warnock Report 1978

In November 1973 the Rt Hon Margaret Thatcher MP, then Secretary of State for Education and Science, announced that she proposed, in conjunction with the then Secretaries of State for Scotland and Wales and after consultation with the then Secretaries of State for Social Services and Employment, to appoint a Committee with the following terms of reference:

To review educational provision in England, Scotland and Wales for children and young people handicapped by disabilities of body or mind, taking account of the medical aspects of their needs, together with arrangements to prepare them for entry into employment; to consider the most effective use of resources for these purposes; and to make recommendations.⁸⁴⁰

This section is about the twin goals of the implementation of the Warnock report

⁸³⁸ Warnock Report 1978 (p22).

⁸³⁹ Foucault, M. (1977, 1995). Discipline and punish: The birth of the prison (2nd Vintage Books ed.). New York: Vintage Books. p192

⁸⁴⁰ Warnock Report 1978 P.4

recommendations through the 1981 Education Act. There is an assumption about citizenship in the recommendations of the report and the implementation of the Act that is consistent with the British government's definition of citizenship, which has at various points, promoted different definitions of the term citizen.⁸⁴¹

The revision of education in England and the objectives of the Warnock Report can be seen as part of the government's identification of what are perceived to be the social, economic and/or political problems of the day. The term citizen' has been used in the promotion of policies as solutions to these problems. Reflected in the above quote the Warnock report required education for the disabled where they could be autonomous, participate in the wider community and to contribute to his/her community via employment.

The Warnock Report and Problems with Linking the Twin Goals of Disability Education to Autonomy, Participation and Contribution

Sometimes policies have involved the rights of individuals but more often, and more recently, it is individuals' behavior that has been the focus in terms of both problems and solutions. It is also the tradition of communitarianism that has clearly influenced government policy on citizenship. Communitarianism emphasizes that cultural solidarity amongst individuals creates communities and social stability and that it is this community identity that is the basis of citizenship.⁸⁴²

Here I examine two contradictory statements from the 1978 Warnock report. The first is perhaps the most direct quote on equal citizenship expressed in the Warnock report:

There is in our society a vast range of differently disabled children, many of whom would not have survived infancy in other periods of history. In the case of the most profoundly disabled one is bound to face the questions: Why educate such children at all? Are they not ineducable? How can one justify such effort and such expense for so small a result? Such questions have to be faced, and must be answered. Our answer is that education, as we conceive it, is a good, and a specifically human good, to which all human beings are entitled. There exists, therefore, a clear obligation to educate the most severely disabled for no other reason than that they are human.⁸⁴³

The second statement sets out two twin goals for education:

We hold that education has certain long-term goals, that it has a general point or purpose, which can be definitely, though generally, stated. The goals are twofold, different from each other, but by no means incompatible. They are, first, to enlarge a child's knowledge, experience and imaginative understanding, and thus his awareness of moral values and capacity for enjoyment; and secondly, to enable him to enter the world after formal education is over as an active participant in society and a responsible contributor to it, capable of achieving as much independence as possible.

⁸⁴¹ Young, I.M (1990) *Justice and the Politics of Difference* Prince, Princeton University Press.

⁸⁴² Beiner, Robert (ed.) (1995) *Theorizing Citizenship*. Albany: State University of NewYork. P.127

⁸⁴³Warnock 1978 p.6

The educational needs of every child are determined in relation to these goals. We are fully aware that for some children the first of these goals can be approached only by minute, though for them highly significant steps, while the second may never be achieved. But this does not entail that for these children the goals are different. The purpose of education for all children is the same; the goals are the same. But the help that individual children need in progressing towards them will be different. Whereas for some the road they have to travel towards the goals is smooth and easy, for others it is fraught with obstacles. For some the obstacles are so daunting that, even with the greatest possible help, they will not get very far. Nevertheless, for them too, progress will be possible, and their educational needs will be fulfilled, as they gradually overcome one obstacle after another on the way. The criterion by which to judge the quality of educational provision is the extent to which it leads a pupil towards the twin goals which we have described, towards understanding, awareness of moral values and enjoyment and towards the possibility of independence.⁸⁴⁴

While the Warnock report's march towards inclusive education is clear in the first statement, in the second statement the twin goals expressed by Warnock are problematic for disabled people. In the first statement Warnock asserts disabled people's rights to freedom and autonomy while at the same time identifying the action required to achieve it. As a result the rights-based approach, which has been seen as necessary by Warnock not only for pupils with special educational needs but for all children, and the report stresses the value and strengths of all learners and is key to constructing an inclusive educational environment.

However, the concept of SEN in the second statement retains the assumption that people who are not able to function in this way are somehow less than human if unable to attain the twin goals. They shift the focus onto an individual child's perceived deficits: the emphasis is on the inadequacy of the individual who is different, who is at fault, and, most importantly, who must change. In spite of Warnock's professed commitment to equality, the twin goals demonstrate how she is wedded to a liberal citizenship discourse—a discourse which (as has been shown in Chapter Three) excludes disabled people from full citizenship. Experience leads us to consider what the impact of the adoption of a rights-based discourse that excludes disabled people might have on education. Autonomy, freedom and independence are about making decisions for yourself. For example, in making the case for people with learning disabilities' rights to citizenship, Simon Duffy states, "Put simply, if you have autonomy then this means you are in charge of your own life. If you do not have autonomy then other people are in charge of you"⁸⁴⁵. To illustrate let's refer back to John Locke's analysis, which offers a key to the puzzle of the concept of person through his analysis of personal identity.

⁸⁴⁴ Warnock report 1978 p. section 1.4 -1.6

⁸⁴⁵ (Duffy, 2003, p.5). Rioux, M. H. (1994). Towards a concept of equality of being: Overcoming the social and legal construction of inequality. In M. H. Rioux, M. Bach & G. Allan Roeher Institute (Eds.), *Disability is not measles : New research paradigms in disability* (pp. 67-108). North York, Ont: Roeher Institute.

Locke, incorrectly I believe, insisted on viewing personhood as a matter of possessing certain capacities, and not of membership in a particular species. In other words, we consider human beings to be persons because of their capacity for self-consciousness and development of a concept of right and wrong, rather than because they possess a body of a particular form or genetic composition. This characterization makes it clear that Locke's concept of a person (also expressed by Warnock's second statement) is not by merely existing, since it states that personhood consists of the complex activities (or capacities to engage in them) such as thinking, reasoning, feeling, which makes humans different from, or superior to, animals or things'.⁸⁴⁶

Thus when we move from the question of what makes a person to the question of what makes a person at time x the same person at time xx, Locke finds unpersuasive the answer that it is the possession of the same human body. It is, Locke maintains, not the same body, but the same continuing consciousness, which constitutes the criterion for the identity of persons. When used in this sense, consciousness denotes more than simply the sensate awareness of one's surroundings that all animals have to one degree or another. In order for there to be a sameness to consciousness, it must be of a higher order, i.e., self-consciousness. On Locke's account, some human beings have irretrievably lost or will never have the capacity for personhood at any given moment, or for personal identity over time. Obvious cases would be some mental health patients, learning disabled people or people being in a persistent vegetative state. If the brains of such people will never develop, or have if they have suffered sufficient trauma or degeneration so as to preclude self-consciousness and rationality.

Thus these categories of people are permanently unconscious because they have no functioning higher brain and will thus never have a capacity for personhood. If this is true, then many disabled people never stood a chance at full citizenship, and if persons had irretrievably lost their capacity for personhood then their citizenship status is irretrievably lost as well. Furthermore, when Locke turns to the possibility of innate ideas in the much earlier *Essays on the Law of Nature*, he similarly sets up a dualistic divide between the wise and the stupid:

If this law of nature were written in our hearts, why do the foolish and insane have no knowledge of it, since the law is said to be stamped immediately on the soul itself and this depends very little upon the constitution and structure of the body's organs? Yet therein admittedly lays the only difference between the wise and the stupid.⁸⁴⁷

In the first half of this quote, Locke regards the foolish and insane as both oblivious to the law of nature, but by the end, the latter have disappeared from Locke's analysis. Instead,

⁸⁴⁶ John Locke, *An Essay Concerning Human Understanding* (Oxford, UK: Oxford University Press, 1975), 1.3.20.

⁸⁴⁷ John Locke, *Locke: Political Essays* (Cambridge, UK: Cambridge University Press, 1997), 99.

Locke only differentiates between the *wise* and the *stupid*, which suggests he only attributes *bodily* difference to the idiot, and not the insane. Locating idiocy in the body's organs is consequential for Locke because it signals *permanent* difference. This permanency is important and unique to the idiot. Unlike children who grow into adults or mad men who recover, idiocy is forever. Next in the chronology are idiots.

In the *Essay*, Locke speculates into the “great difference in men’s intellects, whether it rises from any defect in the *Organs of the Body* particularly adapted to thinking; or in the dulness or intractableness of those faculties, for want of use.” Locke differentiates between the few who cannot think clearly because of bodily difference – such as idiots – and the dull who simply lack the *desire* to think. The permanency of bodily difference is important to Locke, not only because it separates the wise from the stupid and the defective from the dull, but because it draws the boundaries of human equality.

According to Locke, idiots “cannot distinguish, compare, and abstract, would hardly be able to understand and make use of Language, or judge or reason to any tolerable degree.” Idiots, like brutes, possess minimal language, are unable to think abstractly, and rely primarily on their senses for information, comparable to brutes, or perhaps even less. Instead, their chronological position is primarily due to their outward shape as the body of the idiot is more human than beast. Yet, Locke delineates clearly between idiots and madmen.

Thus the defect in Naturals seems to proceed from want of quickness, activity, and motion, in the intellectual faculties, whereby they are deprived of Reason; whereas mad Men, on the other side, seem to suffer by the other extreme for they do not appear to me to have lost the faculty of reasoning: but having joined together some ideas very wrongly, they mistake them for truths; [...] In short, herein seems to lie the difference between Idiots and mad men, that mad Men put wrong Ideas together, and so make wrong Propositions, but argue and reason right from them: But Idiots make very few or no Propositions, and reason scarce at all.⁸⁴⁸

This passage makes clear that idiots possess no capacity for reason, repeatedly evident in Locke’s statement that idiots are “deprived of reason” and “reason scarce at all.” Mad men, however, are rendered very close to full personhood, as they have the ability to reason, but do so mistakenly.

At the time formal education was not seen as appropriate for ‘defective children’, and in large part they were consigned to special settings, asylums or mental institutions. Bodily difference is a recurrent theme throughout Locke’s *Essays on the Law of Nature* and in his later *Essay*. In the *Law of Nature*, Locke distinguishes between the dull “who make no use of the light of reason but prefer darkness” and those “through natural defect the acumen of the mind is too dull to be able to bring to light those secret decrees of nature.” Locke’s occupation with

⁸⁴⁸ John Locke, *An Essay Concerning Human Understanding* (Oxford, UK: Oxford University

bodily difference of the mind is not only categorical, but functions historically in the *Essay* in which he attempts to chronologically order the degrees of human and nonhuman understanding. His description of brutes, idiots, and madmen provides a ~~true~~ *History of the first beginnings of Humane Knowledge*” and functions as a powerful tool to both disprove innate ideas and normatively rank different kinds of species.

In the beginning of Locke’s history of knowledge are nonhuman animals: *“Brutes come far short of men”* because they cannot put simple ideas together and have no capability of composition. While brutes possess some minimal powers of reflection and perception, they are incapable of recognizing complex ideas and lack completely the faculty of abstraction.

Although Locke’s political exclusion of idiots is explicit, it somewhat undermines Locke’s commitment to human equality. Drawing primarily on *An Essay Concerning Human Understanding*, I argue that Locke’s concept and treatment of idiocy is central to his theory of knowledge, personhood and political equality.

Locke repeatedly uses idiots to define and delimit the category of personhood in *An Essay Concerning Human Understanding*. Personhood is essential to Locke’s social contract: only persons can consent to be governed and consent transforms the state of nature into civil society.

The idiot, incapable of consent, upturns the terms of the contract, undergoing an inverse metamorphosis from man to subhuman species, and thus, undermines the universal terms of the contract. Because Locke’s theory of personhood is foundational to the development of liberal political thought, his exclusion of idiocy threatens liberal egalitarianism more broadly.

The idiot figure, so often conjured by Locke, functions like a distorted mirror image: devoid of reason and reflection, the idiot face looks out at the citizen, and in turn, exaggerates the citizen’s rational capacity. The citizen’s gaze does not center on the idiot alone, but is cast upon a collection of marginalized subjects, including the lunatic, savage, criminal and child. Idiocy is distinct, however, because it signifies the complete and permanent absence of thought. Locke’s treatment of idiocy, by creating a subhuman population permanently denied entry into the public political sphere, thus justifies within liberalism a method to promote and conceal abuse.

Locke’s exclusion of idiots is indispensable to his theory of personhood, and yet, detracts from Locke’s commitment to human equality. The fact that liberalism’s best theory of equality, as reflected in the Warnock Report fails to encompass all human beings in the same education should be a problem for egalitarians.

Problems with Autonomy in Citizenship as reflected in the Warnock Report and the

Subsequent Education Act 1981

Disabled people concern with freedom echoes the concept of autonomy within the literature on citizenship. Autonomy refers to the ability to determine the conditions of one's life and to pursue one's life projects.⁸⁴⁹ If the Warnock Report regards autonomy and participation as its twin goals then this is problematic for disabled people. The concept of autonomy or freedom is to the fore in the neo-liberal perspective on citizenship. An autonomous citizen is an individual who is empowered by the availability and exercising of choice.

The analyses of the Warnock Report could see the focus on autonomy and participation and the citizen as consumer as belonging within the neo-liberal, which sits alongside a civic republican and communitarian concepts of citizenship. Moreover, public services are seen as essential to tackling inequality and, in this respect, there is recognition that people do not start off with equal chances in life, so it is essential that specific support is provided for those who are particularly disadvantaged.⁸⁵⁰ The government's promotion of choice and consumerism is, to a large extent, about models of service delivery and the key question is whether the market is the most effective delivery mechanism and whether the private and voluntary sectors should play a bigger role in providing publicly funded services. However, the issue for disabled people is not only about service delivery mechanisms but also about whether levels of resources are sufficient to deliver autonomy.

For example, the Warnock Report and the subsequent Education Act 1981 had the necessary guidelines for the inclusion of disabled children in education without the resources for implementation. But have not delivered the choice that they were intended to because of their limited value. This is reflected in a statement during the period of the implementation of the Warnock Report, where it was clear where the Government's funding priorities lay in terms of policies of integration:

In present economic circumstances there is no possibility of funding the massive educational resources ... which would be required to enable every ordinary school to provide an adequate education for children with serious educational differences.⁸⁵¹

The confusion the 1978 Warnock Report's recommendation for funding for inclusive education created is also evident here:

... the avoidance of unreasonable public expenditure — will obviously have different applications at different times according to the state of national prosperity and the ordering of priorities. If resources were unlimited it would theoretically be possible for all schools to be enabled to cater for all children in the catchment area, whatever their special needs might be. In practice resources have to be deployed with economy insofar as this is consistent with good standards. Moreover, public

⁸⁴⁹ Lister, R. (1997) *Citizenship: Feminist Perspectives* (New York: Macmillan).p.16).

⁸⁵⁰ (Office of Public Services Reform, 2004).

⁸⁵¹ (DES, 1980, quoted in Tomlinson, S (1982) *A sociology of special education*. London: Routledge and Kegan Paul. P. 56

spending on education cannot be determined independently of other public sector needs.

The provision of special facilities of a comparable standard to those in the best existing special schools will involve a very considerable amount of public expenditure and whether or not such expenditure is justifiable will be a matter of judgement by those responsible for the allocation and management of public resources. Moreover, the costs involved will have different implications depending on, for example, whether a particular area is sparsely or densely populated, rural or urban. At some stage it may be desirable to develop guidelines of reasonable cost in relation to different forms of special provision.⁸⁵²

But then she points out:

However, it would be short-sighted to judge a particular proposal solely on an immediate cost-efficiency basis. Section 10 of the 1976 Education Act refers to local education authorities' arrangements as a whole, and this implies a general plan or scheme of future provision into which the separate proposals fit. We have urged that local education authorities should prepare such a plan. The cost of each proposal should therefore also be looked at in terms of its contribution to the general plan, since it might well facilitate the later introduction of other components of the plan, with compensating savings at the later stage.⁸⁵³

Therefore, an assessment according to Warnock which combines professional expertise with the disabled individual's knowledge and experience can, if the resources are available, result in the provision of the education recommended in the report—for example speech and language therapy, physiotherapy, ramps, hearing aids etc., that would empower the person to exercise more control over their life through better access to education. This is not the case in practice as too often resources are not provided at a level sufficient to deliver full choice and control, and the assistance, people, need and the support required is not always available. Giving people only choice is therefore not sufficient to enable disabled people to exercise autonomy choice has to be backed up by sufficient resources.

While the government's promotion of education as a choice for the citizen consumer it is set in the context of (and to some degree in conflict with) the civic republican and communitarian agenda, a consumerist approach to public services is more unequivocally part of the liberal tradition of citizenship.

It is argued that the education of disabled children is part of this tradition and that enabling disabled people to become consumers (by giving them choice and control through their education promotes the notion of citizens as atomized individuals'. In fact, in education settings this is the reverse. Disabled people in education depend on the support of disabled people's need for specific extra support in school. Moreover, the extra support is itself part of collective provision and redistribution of resources in order to address inequality and promote social justice. They are the result of positive action by the state.

In fact, the liberal political tradition of citizenship, poses considerable problems for disabled

⁸⁵² Warnock Report 1978p132

⁸⁵³ Warnock 1978 p132

people. As it defines freedom and autonomy as the absence of coercion of or interference with individual action, and the state's role is the limited one of protecting such freedom.⁸⁵⁴ However, the issue for disabled people is that such negative rights are not sufficient to deliver even simple autonomy. Impairment and disabling barriers impose limits on freedom of action and positive action is therefore required to deliver opportunities for autonomy.

A minimal role for the state—as envisaged within the liberal tradition of citizenship—means that any additional assistance and resources that disabled people require in education could only be provided voluntarily or privately. Traditionally that has been the role of charitable organizations. Yet the ideologies and values that underpin charitable activity in Britain treat impairment as personal tragedy and disabled people as dependent people who need looking after. Within the Christian concept of disabled people are to be the subjects of good deeds and have no contribution to make themselves. None of this is compatible with the concept of autonomy for disabled people. A minimal role for the state also means that it would be left up to individuals as to whether they changed their attitudes towards impairment and mental illness.

For disabled people therefore, autonomy cannot be achieved without social rights. However, neither can it be achieved if we are merely passive recipients of social rights. For disabled people, the extension of social rights in the post-Second World War period was very limited and resources were used in ways which restricted their autonomy, namely by incarcerating people in various forms of institutional provision. Unless disabled people are key participants in the evolution of social rights it is unlikely that they will achieve autonomy.

Problems with TH Marshall's Limitations for Inclusive Citizenship

Another way of looking at the limits of citizenship for disabled people in education is to take TH Marshall's postwar writings on citizenship as a starting point. Marshall maintained, Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed.⁸⁵⁵

A common criticism of Marshall's model of citizenship is that he did not place sufficient emphasis on the duties and responsibilities of citizenship. Given the current political dominance of the civic republican and communitarian tradition of citizenship, it is probably not surprising that the aspirations for disabled people have been framed within a vision of citizenship as participation and contribution. While earlier debates about citizenship have tended to focus on rights (whether for individuals or for particular groups such as minority

⁸⁵⁴ Marshall, T. H. (1964) *Class, Citizenship and Social Development*. Chicago: University of Chicago Press

⁸⁵⁵ Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge University Press. McRuer, Robert. 2006. p.28).

ethnic groups), current debates have been much more concerned with obligations and responsibilities. These concerns arise, not only from the identification of problematic behavior within some communities, but also from the current political dominance of issues which juxtapose state and individual. Education policy debates are also informed by the liberal concept of the autonomous citizen, whose main requirement of the state is the protection of negative freedoms, thus allowing the exercise of individual choice and responsibility.

Perhaps most importantly, it is Marshall's concept of social rights that is currently seen as more contentious than civil or political rights.

Civil rights are relatively easy to enact since there are few costs and great gains to be made by the average citizen" from the introduction of rights such as freedom of speech and impartial justice.⁸⁵⁶ Political rights may be resisted by vested interests but once universal suffrage is achieved they are taken for granted. It is social rights that are the hardest to enact, since redistribution means that one person's benefits are another person's taxes.⁸⁵⁷ For the same reason, they can be harder to defend.

Faced with a situation where most theoretical and empirical discussions about citizenship fail to consider disabled people, and where human and civil rights have yet to be fully extended to this group, it is also clear while addressing the problems of education faced by disabled people, that we need to look more fundamentally at the whole question of citizenship and what it might mean for disabled people.

In talking about social rights to citizenship, Marshall's own definition is an appropriate yardstick to consider whether disabled people can claim to be social citizens:

By the social element I mean the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being, according to the standard prevailing in the society.⁸⁵⁸

Hence there are a number of elements to Marshall's notion of social citizenship; notably the right not to be poor or live in fear of poverty, to use social facilities in the same way as everyone else and to have a standard of living or lifestyle compatible with current social expectations.

⁸⁵⁶ Barnes C, Mercer G, Shakespeare, T (1999). *Exploring Disability: A Sociological Introduction*. Cambridge: Polity Press.

⁸⁵⁷ Marshall, T. H. (1972). Value problems of welfare capitalism. *Journal of Social Policy*, 1(1), pp. 15–32. p.17).

⁸⁵⁸ Marshall, T. (1950). *Citizenship and social class and other essays*. Cambridge: Cambridge University Press. McRuer, Robert. 2006. 11)

In none of these elements can it be argued that disabled people share the rights to social citizenship. In terms of poverty, the Government's own figures show over four million disabled people being reliant on social security benefits and hence living below the official poverty line.⁸⁵⁹ Further it has been suggested that these figures substantially underestimate the nature and extent of poverty amongst disabled people.⁸⁶⁰ Hence, when freedom from the fear of poverty is considered to be an element of social citizenship, then very few disabled people would be in this position.

On top of this, social rights to use the same facilities as everyone else are not accorded to disabled people, whether these are rights to the same education, to move around the built environment, to travel on various transport systems which claim to be public or to have access to employment. Finally, in many areas of their lives, disabled peoples' experiences do not accord with the lifestyle expectations of their contemporaries. For example, many disabled adults do not have the right to decide what time to get up or go to bed, or indeed who to go to bed with, when or what to eat, how often to bath or even be in control of the times when they empty their bladders or open their bowels.

For Marshall, civil rights went beyond a narrow conception of legal rights and included not only property rights and the right of contract but also rights to the freedoms of thought and speech, religious practice, and of assembly and association. In theory, disabled people are accorded these basic civil rights although in things like the right to the same education or the right of contract, they may experience severe difficulties: for example, in attending the same schools as non disabled people, in buying goods on hire purchase, taking out a mortgage or obtaining life insurance.

Problems with a Civic Republican Notion of Citizenship as reflected in the Warnock Report

Perhaps the most glaring indictment of the Warnock Committee's position with regard to SEN and the role of disabled people within the community can be found in its discussion of what it terms significant living without work:

The problem of how to accept life without employment and how to prepare for it, faces people with a variety of disabilities, including those who are of the highest intelligence but very severely handicapped. We believe that the secret of significant living without work may lie in handicapped people doing far more to support each other, and also in giving support to people who are lonely and vulnerable.⁸⁶¹

Although the Committee acknowledged the economic, social and psychological significance of paid employment for individuals within our society, it is suggested that it had accepted

⁸⁵⁹ Dean, Hartley., and Margaret Melrose. Poverty, Riches and Social Citizenship.

⁸⁶⁰ Dean, Hartley., and Margaret Melrose. Poverty, Riches and Social Citizenship.

⁸⁶¹ (Warnock Report, 1978, p.202).

unequivocally the orthodox view that disabled people would be excluded from the workplace. This has salient implications for the perpetuation of this myth. The most obvious of these is that professionals, themselves in secure employment, will determine when a child is young that s/he is unsuitable for paid work. The child's subsequent education will be organised accordingly. This results in a self-fulfilling prophecy, producing a 'downward spiral' in professionals' expectations about the child's potential for achievement. It is not surprising therefore that since the 1980s there has been a proliferation of life and leisure skills teaching for children and students with SEN throughout the education system.

This view also reflects the civic understanding of citizenship, where constructs connected to the states' obligations to individuals based on international law (for example, protection of human rights and non-discrimination), and a de-coupling of the state from nation-building. In civil society many loyalties and affiliations are tolerated or encouraged (including family, cultural and religious denominations), but difference appears through individual rather than through group rights.⁸⁶² Through education such states seek to maximize individuals' future choices without prejudicing children towards any conceptions of a good life.⁸⁶⁴ At the same time, it recognises the impracticability of neutrality in education and seeks to prepare its citizens for membership in a society committed to a 'conscious social reproduction' by collective decision-making, which includes the question of what values to promote through education.

This civic conception of education adopts Rawls' conception of citizenship in a constitutional democracy, which regards its citizens as free and equal. According to Rawls two layers of citizens' identity can be distinguished: a political identity based on the rights and duties of sustaining fair social cooperation over time, and citizens' 'deeper aims and commitments'—their non-institutional, moral identity.⁸⁶⁵ Citizens must adjust and reconcile these two aspects of their identity in order to affirm the values of justice and see them embodied in political institutions. The main purpose of education is preparation for citizenship where governmental control can be considered legitimate when it refers to their political identity.

Education's task then is to prepare citizens to take on their fair share of the responsibility for maintaining equal rights, the principles of justice, and equality of opportunity. Children need to become cooperating members of society, ready to 'propose fair terms of cooperation it is reasonable to expect others to endorse', and be 'willing to abide by these terms provided

⁸⁶² Janoski, Thomas (1998) *Citizenship and civil society: A framework of rights and obligations in liberal, traditional and social democratic regimes* Cambridge: Cambridge University Press p.43

⁸⁶³ (Gutmann 1987:33) *Democratic Education*, Princeton, N.J.: Princeton University Press, 1987

⁸⁶⁴ (Gutmann 1987:33) *Democratic Education*, Princeton, N.J.: Princeton University Press, 1987

⁸⁶⁵ Rawls, J. (1971). *A theory of justice*. --. Cambridge, Mass: Belknap Press of Harvard University Press.p,30

others can be relied on to do likewise.⁸⁶⁶

Further Problems with the Civic Republican Model Reflected in the Warnock Report and Subsequent 1981 Education Act

While the demedicalisation of the labeling of disabled individuals within the educational context must be viewed positively, it represents little more than a cosmetic exercise. The concept of SEN retains the assumption that people categorized in this way are somehow less than human'. The emphasis is still on the inadequacy of the individual: it is s/he who is different; it is s/he who is at fault; and, most importantly, it is s/he who must change.

The Committee did not seriously question the general philosophy and organization of the education system although by implication it acknowledged that it is incapable of meeting adequately the educational needs of up to one-fifth of its users. Their solution to the problem of SEN was a further expansion of professionally dominated support services. Within the present educational context this can only reinforce the perceived difference between pupils and students with SEN and the rest of the school population, as well as the general view that people with impairments are incapable of looking after themselves without professional help.

Although the Committee acknowledged the economic, social and psychological significance of paid employment for individuals within our society, it is clear that it had accepted unequivocally the orthodox view that disabled people would be excluded from the workplace. This has salient implications for the perpetuation of this myth. The most obvious of these is that professionals, themselves in secure employment, will determine when a child is young that s/he is unsuitable for paid work. The child's subsequent education will be organized accordingly. This results in a self-fulfilling prophecy, producing a 'downward spiral' in professionals' expectations about the child's potential for achievement.⁸⁶⁷

Thus in response to concerns that, in certain areas and situations, many disabled people have become idle and are producing behavior that is damaging to the wider social interest (as well as to the individuals and communities involved). This approach to citizenship is within the civic republican tradition of Aristotle's *polis*, where political participation was the means by which the citizen role was fully expressed.

This can be seen in the report's two goals:

We hold that education has certain long-term goals, that it has a general point or purpose, which can be definitely, though generally, stated. The goals are twofold, different from each other, but by no means incompatible.

⁸⁶⁶ Rawls, J. (1971). *A theory of justice*. --. Cambridge, Mass: Belknap Press of Harvard University Press. p81

⁸⁶⁷ (Kent and Massie, 1981). Russell, P. (1998) *Having a say: disabled children and effective partnership in decision making. Section 1: The report*. London: Council for Disabled Children.

- 1) They are, first, to enlarge a child's knowledge, experience and imaginative understanding, and thus his awareness of moral values and capacity for enjoyment;
- 2) and secondly, to enable him to enter the world after formal education is over as an active participant in society and a responsible contributor to it, capable of achieving as much independence as possible. The educational needs of every child are determined in relation to these goals.⁸⁶⁸

Here, while also emphasizing consumer choice in the context of public services, the committee has in addition aimed at encouraging disabled children to be active citizens.⁸⁶⁸ Here the emphasis, rather than being on the rights of individuals, is on the obligations that must be fulfilled in order to assure the health and stability of local communities and the wider society.

Moreover there are some children with disabilities who, through education along the common lines we advocate, may be able to lead a life very little poorer in quality than that of the non-handicapped child, whereas without this kind of education they might face a life of dependence or even institutionalization.⁸⁶⁹

Communitarians are concerned to reduce dependency on welfare and to encourage individuals to take responsibility for themselves and their families. Both traditions have debated the relationship between rights and responsibilities and whether rights are separate from, or contingent upon, responsibilities. The revised Clause 4 of the Labour Party constitution represents the unresolved conflict that persists within the Centre Left, in its somewhat vague (and ungrammatical) statement: Where the rights we enjoy reflect the duties we owe.⁸⁷⁰

Perspectives on citizenship can also be divided into those that take an individualist approach and those taking a structuralist approach. For the former, it is the individual's capacity to make choices that determines the nature of citizenship; for the latter individual action is much more influenced by social and economic factors. As Pattie et al explain, Choice based theories are exemplified in their purest form by economics.... In this world, individuals seek to maximise their utility by obtaining the highest return at the minimum cost from any course of action which they undertake.⁸⁷¹ Citizenship therefore emerges from the choices which agents make, and these reflect the costs and benefits of the choice situation.⁸⁷² New Right theories of citizenship are heavily influenced by this perspective, but so too is New Labour—although to what extent is a matter of contention.

On the other hand, structuralist approaches to citizenship place more emphasis on social norms and values, and on individual behavior being shaped by social and economic forces.

⁸⁶⁸ Warnock 1978 P.5

⁸⁶⁹ Warnock 1978

⁸⁷⁰ in Dietz, M. (1987) Context is all: feminism and theories of citizenship, *Daedalus*, 116(4), pp. 1–24.)

⁸⁷¹ (Pattie et al, 2004, pp.138-139). Schroedinger, E. (1964) *What Is Life?* Cambridge: Cambridge University Press Simons, H. (2009) *Case Study Research in Practice*. London: Sage Simons, H. (1996) 'The paradox of case study', in *Cambridge Journal of Education*, June, Vol. 26, Issue 2

⁸⁷² (*Ibid.*, p. 138).

Citizenship is therefore rooted within communities and society. Communitarian and civic republican perspectives of citizenship place more emphasis on these structural influences than do either classical or modern liberal theories of citizenship.

What Does a Citizenship of Duty Mean for Disabled People in Education

Participation is a concept often used by disabled people when engaging with the debate on social exclusion. In terms of wider citizenship debates, the concept includes the civic republican concept of political participation but also encompasses the broader concept of community participation. A common theme for disabled people and their organisations has been the promotion of the right to be included in mainstream society and to participate in family, community and national life.

Such inclusion requires that disabling barriers are removed and needs relating to impairment are met, thus making possible disabled people's full involvement.

Problem with Participation in Citizenship Reflected in the Warnock Report and 1981 Education Act

Participation is key to the civic republican concept of citizenship—membership of a political community, joining with others to make decisions which are then respected by all, and by so doing achieving true freedom. Indeed, the tradition makes the case that citizens are only truly free when they participate in shaping the political decisions that affect their lives.

Concepts of 'civil renewal' and 'active citizenship' have been used in the promotion of policies aimed at changing people's behaviour. It is argued that antisocial and criminal behaviour will only be reduced by increasing people's commitment to their local community, and that unless political apathy and disaffection is replaced by community and political engagement then our democracy is undermined. The idea of civil renewal has been around for centuries but it is, increasingly, being taken up by public bodies, people working in the voluntary and community sector, and active citizens in their own communities, as the effective way to bring about sustainable change and improve the quality of people's lives. It can happen anywhere, from the most deprived communities to the most affluent. It takes place when people become actively engaged in the well being of their communities and are able to define the problems they face and tackle them together with help from the government and public bodies.⁸⁷³

So where are disabled people in all of this? While the government is concerned that certain groups in society are not fulfilling their role as active citizens and that this is undermining our democracy and the viability of some communities, disabled people may be more concerned

⁸⁷³ www.homeoffice.gov.uk/comrace/active/civil/index.html

that they are denied the opportunity to be active citizens and that this is undermining the rights of disabled people.

In a complex society such as ours civic participation takes many different forms and opportunities. However, initiatives to encourage active citizenship tend not to treat disabled people as potential active citizens. If participation both requires and gives expression to autonomy and autonomy is an integral part of being a citizen, then disabled people cannot be full citizens without the extra resources that facilitate participation.

Although the Department for Work and Pensions has the target of working to improve the rights of disabled people and to remove barriers to their participation in society,⁸⁷⁴ this target does not seem to be reflected in any of the initiatives for promoting active citizenship that ODPM and the Home Office are responsible for. Indeed, sometimes these initiatives have reaffirmed the assumption that disabled people are passive recipients of care rather than active citizens.

Barriers to Participation

Nevertheless, in spite of these manifestations of disabled people's participation, there remain significant barriers and there is a continued struggle for acceptance and for the resources that would enable them to participate on an equal basis. Methods of participation are often themselves excluding: for example, lessons relying on the spoken word and on printed material (and often involving jargon particular to a subject or context) are the most common method of participation in the classroom. The basic form of political participation—voting in local and national elections—is still not accessible to all disabled people.⁸⁷⁴ In addition, many people are excluded (by design or by default) from jury service.

In discussing some of the key barriers to disabled people's participation the intention, as with the discussion on autonomy is not to provide a comprehensive analysis but a brief discussion of issues in the Warnock report and 1981 Education Act which need to be tackled to enable disabled people to participate as full citizens.

Just as social rights are necessary to enable disabled people have autonomy, so they are also necessary to enable them to participate. Yet the legislative framework through which such social rights are delivered creates barriers to participation. Not only are there inadequate resources made available, but also the legislation through which such resources are delivered is based on assumptions of dependency.

Problems with Contribution in Citizenship Reflected in the Warnock Report and 1981

⁸⁷⁴ (Scott and Morris, 2001; Daone et al, 2004), Christie, I., & Mensah-Corker, G. (1999). An inclusive future: Disability, social change and opportunities for greater inclusion by 2010. London:p.4

Education Act

Disabled people have emphasized the value of contribution to economic and social life when they make the case for both anti-discrimination legislation and the resources required for a reasonable quality of life. Such arguments dovetail with the communitarian emphasis on responsibilities and reciprocity, and with debates on the limits to social rights. These three different concepts all engage with Marshall's three concepts of civil, political and social rights. For disabled people (perhaps more than for any other group) there are close relationships between civil, political and social rights. Ruth Lister is unusual in that she identifies current debates and definitions as excluding disabled people but her alternative framework still fails to include people for whom impairment or illness has a fundamental impact on how they experience family, community, economic, social and political life.⁸⁷⁵

Problems with Contribution as a requirement of citizenship in the Warnock Report

Current debates on citizenship focus on the need for individuals to fulfill certain responsibilities and there is a strong assumption that it is the fulfillment of these responsibilities that qualifies them for full citizenship. This assumption is articulated not only in the debate about what and whether conditions/obligations should be attached to the receipt of benefits, but also in the encouragement of active citizenship as reflected in the Warnock report and the 1981 Education Act.

Thus participation, an important element of citizenship in its own right, is also a form of contribution, of fulfilling the responsibilities of citizenship. Indeed, current debates perhaps focus more on the *responsibility* to contribute than on the value in itself of people's contribution to the social good—or indeed on the right of people to contribute.

Concepts of equality and reciprocity are also important here, thus promoting greater equality and the extension of assets. Firstly, the question needs to be raised as to whether there are some disabled people who, whatever action is taken to address disabling barriers, are still likely to be heavily dependent on others. And if this is the case, does this mean that these disabled people cannot access full citizenship?

The second problem is that to follow the arguments put forward by Kant, Rousseau Hume and Rawls and Locke would be to accept that disabled people will not achieve social rights without fulfilling the responsibilities of citizenship. Yet for disabled people, social rights are necessary in order to fulfill these responsibilities. There is an assumption that once someone needs support to go about their daily lives, they are passive recipients of care. The only contribution that those who receive such support are expected to make is a monetary one

⁸⁷⁵ Lister, R. (1997) *Citizenship: Feminist Perspectives* (New York: Macmillan).

through the charges that are made for community care services.

Finally, current debates on the responsibilities of citizenship tend to assume that the only educational responsibility at issue for disabled people is that of taking up opportunities to move from being dependent and out of work to becoming autonomous and earning a living. When the wider concept of active citizenship is discussed, the only place for disabled people seems to be as recipients of other people's citizenship responsibilities. The limited right to participation in education limited by inadequate funding which is necessary to enable them to participate as autonomy, participation and contribution all need to be achieved if disabled people are to have equal opportunities to be equal citizens.⁸⁷⁶

In exploring these concepts we have also asserted that it is not impairment that determines whether disabled people can be full and equal citizens, but socially constructed barriers. The disadvantages experienced by disabled people are examples of social injustice and it is therefore impossible to address disabled people's potential for full citizenship without discussing values. Just as social rights are necessary to enable disabled people have autonomy. Yet the legislative framework through which such social rights are delivered creates barriers to participation. Not only are there inadequate resources made available, but also the legislation through which such resources are delivered is based on assumptions of dependency.

Loophole in the Law, SENDA 2001, an Inclusive Approach to Citizenship?

From 1996, disabled children's entitlement to mainstream education was no longer dependent on the efficient use of resources condition. But it was not until 2001, with the Special Educational Needs and Disability Act (SENDA), that schools were prohibited from discriminating against disabled children. Schools were now required to make reasonable adjustments for their disabled pupils.

The Special Educational Needs and Disability Act (SENDA), 2001, strengthened the right to mainstream schools for disabled children by repealing two of the provisions in the 1996 Act, and made educational discrimination unlawful. Nevertheless, two conditions limiting the progress with inclusive education are still left on the statute book: a disabled child can go to the mainstream provided that it is compatible with the parent's wishes, and there is an efficient education of other children. The Special Educational Needs and Disability Act (2001) stipulates that: A student with a disability must be educated in a mainstream school unless that is incompatible with the wishes of his parent or the provision of efficient education for other children.⁸⁷⁶

⁸⁷⁶ (Her Majesty's Stationery Office, 2001)

However, in this case, the provision of efficient education for other children' is a significant let-out clause which would allow schools to refuse entry to a student with a disability if it was considered that the student would disrupt the class and interfere with the education of other children.

Although the Special Educational Needs and Disability Act 2001 legislation made access to mainstream schools easier, it did not guarantee this as an equal right for all students. On one hand the Government still sanctioned the exclusion of significant numbers of children, while segregation into separate special schools breached the underlying principles of the United Nations Convention on the Rights of the Child (1989). This contradictory situation presented a barrier to mainstream schools for the assumption of full responsibility for all students in their areas. To meet the education standards, education providers are expected to make reasonable adjustments' to meet the needs of students with a disability. In doing so they are expected to consider the views of students and the family; the effects of the adjustment on the students and on others in the school; and to utilize a cost-benefit analysis.⁸⁷⁷

By contrast, unreasonable' adjustments are not mandated. A provider can offer a defense that adjustments are unreasonable if they produce unjustifiable hardship. In judging whether the adjustments are reasonable or unreasonable, consideration can be given to the financial circumstances of the provider and the cost of the adjustment. For example, a small private school is likely to be more able successfully to plead hardship than a large state system.

Under the DDA, unjustifiable hardship' was a defense against non-enrolment, but could not be used as a reason not to provide services once the student was enrolled. However, since the adoption of SENDA, unjustifiable hardship' can be considered in relation to provision of ongoing services. Proclamations were made by the then Education Secretary, Charles Clarke that: All children have the right to the best possible education, the opportunity to fulfil their potential and play a full part in the life of their school and their community.'⁸⁷⁸ However, headteachers complaints of limited resources, excessive bureaucracy, and the impact of school league tables, exposed the deficiencies in the system. Illustrative of this were variations noticed to exist in provision of SEN to those who needed it in different parts of the country. Official statistics showed that 4.2 percent of children in Rotherham, for example, had formal statements' of special educational needs (SEN), while the prevalence in Hull, a similar-sized authority, was 2.4 percent.⁸⁷⁹ The education authority stressed that, This situation, where

⁸⁷⁷ DfES (1994) *The SEN Code of Practice*. Nottingham: DfES publications DfES (2001) *The Revised SEN Code of Practice*. Nottingham: DfES publications DfES (2003) *Every Child Matters*. London: The Stationery Office DfES (2003) *Primary National Strategy: Excellence and Enjoyment*. Nottingham: DfES Publications

⁸⁷⁸ DfES (2005) *Primary National Strategy. Excellence and Enjoyment: Social and Emotional Aspects of Learning (SEAL)*. Nottingham: DfES publications

⁸⁷⁹ DfES (2007) *Policy Review of Children and Young People (PRCYP): A Discussion Paper*. Norwich: HMSO

children still face real barriers to learning and parents lack confidence in the commitment and capacity of our schools to meet their child's needs, cannot be allowed to continue.⁸⁸⁰

Measures for reform were set in the consultation service called Every Child Matters,⁸⁸¹ with its focus on early intervention, preventative work, and integrated services would deliver real and lasting benefits⁸⁸¹ to children with SEN and their families. As disabled young people and children often require additional facilities and support to function successfully, they are often considered to be disruptive and difficult to educate.⁸⁸² In the regime of the education market,⁸⁸³ where one policy is to attract the ablest pupils, who are perceived to contribute the most to the wealth of the nation, the disabled child/young person may be perceived as having low value, or considered 'damaged goods.'⁸⁸⁴ So although there is pressure for schools to follow an inclusive agenda, they are also expected to meet statistical targets and normative comparisons. This conflict not only caused educationalists to have sleepless nights,⁸⁸⁵ but more importantly this continued the practice of informal exclusion of disabled children from mainstream schools.

Davis and Watson found one head teacher from a mainstream school who suggested that he could only have 15 percent of children with a learning difficulty in any year if the school was to meet its national targets.⁸⁸⁶ Thus exclusion within mainstream schools, on the basis of academic and other criteria, often continued to lead disabled children being educated in separate learning support units⁸⁸⁶ or impairment special units.

Burgess maintained that despite the ongoing policy drive towards inclusion, mainstream schools are not fully accessible, as those responsible for developing inclusion still think of accessibility in terms of ramps and rails. In her study of disabled secondary school students throughout the UK, Burgess found that their curriculum choices were severely curtailed: 36 percent of young disabled people she talked to could not study subjects of their choice due to poor access to the curriculum and the disabling environment, including attitudes of

⁸⁸⁰DfES (2004) *Removing Barriers to Achievement: The Government's Strategy for SEN*. Nottingham: DfES publications

⁸⁸¹ DfES (1994) *The SEN Code of Practice*. Nottingham: DfES publications DfES (2001) *The Revised SEN Code of Practice*. Nottingham: DfES publications DfES (2003) *Every Child Matters*. London: The Stationery Office DfES (2003) *Primary National Strategy: Excellence and Enjoyment*. Nottingham: DfES Publications

⁸⁸² Barnes, C., Mercer, G. & Shakespeare, T. (2003) *Exploring disability—a sociological introduction*. Cambridge: Polity.

⁸⁸³ Ball, S. J., Bowe, R. & Gerwitz, S. (1994) Market forces and parental choice, in: S. Tomlinson (Ed.) *Educational reform and its consequences*. London, Institute for Public Policy Research and Rivers Oram Press.

⁸⁸⁴ (John, 1996).

⁸⁸⁵ MacBeath, J., Galton, M., Steward, S., MacBeath, A. & Page, C. (2006) *The cost of inclusion*. Cambridge: University of Cambridge Faculty of Education.

⁸⁸⁶ Davis, J. M. & Watson, N. (2001) Where are the children's experiences? Analysing social and cultural exclusion in special and mainstream schools. *Disability & Society*, 16(5), 61–87.

teachers.⁸⁸⁷ It can be argued, then, that as long as mainstream schools do not embrace the full process of inclusion, their citizenship status is compromised. Furthermore, young disabled people still may have no real choice in deciding where to continue their education or what to do after school.

According to a survey commissioned by the DRC (2002–2003) on the aspirations of young disabled people, 24 percent of disabled people aged 16–24 have no qualifications compared with 13 percent of non-disabled people of the same age, bringing exclusion throughout their lifetime. As early as 16 years of age, disabled young people are twice as likely to be out of work, education or training as their non-disabled peers (15 percent compared with 7 percent).⁸⁸⁸ Evidence has suggested that young disabled people feel they receive insufficient support in school and are discouraged from taking standard educational qualifications required for university entrance.⁸⁸⁹ Too often, disabled students in secondary schools are being taught almost entirely by teaching assistants who are not fully qualified teachers, while non-disabled students are taught by the teacher.⁸⁹⁰

According to MacBeath et al, there is also a tendency for teaching assistants to isolate their child from group learning situations.⁸⁹¹ This means there could be very little interaction between the teaching staff and the disabled students, again reinforcing the disabled/non-disabled divide. Further, disabled students may not receive the same standard of tuition as their non-disabled peers.

The evidence then, that disabled people are denied the full rights of citizenship is persuasive: it is not unreasonable to agree that this denial constitutes a denial to disabled people of their basic human rights. Given this evidence, it is perhaps not unreasonable to suppose that the current political fashion for talking about citizenship in general offers the opportunity to put disability rights back onto the political agenda.

Education for the Disabled and Human Rights a way forward?

Given the Problems of the medical and social models of disability, the classic and contemporary notions of citizenship and UN human rights regimes prior to the 2006 CRDP, is the CRPD the way forward for disabled people? The idea that political morality and social choice can be based wholly or partly on some sort of account of the rights of individuals is familiar. Theories of rights can be found in the work of John Locke and Thomas Paine, as

⁸⁸⁷ Burgess, E. (2003) *Are we nearly there yet: do teenage wheelchair users think integration has been achieved in secondary schools in the UK?* (Whizz-Kidz No Limits Millennium Award).

⁸⁸⁸ DRC 2002-2003

⁸⁸⁹ Martin, A. (2004) Do the right thing, *Care & Health Magazine*, September, 24–25.

⁸⁹⁰ (Warnock, 2005).

⁸⁹¹ MacBeath, J., Galton, M., Steward, S., MacBeath, A. & Page, C. (2006) *The cost of inclusion*. Cambridge: University of Cambridge Faculty of Education.p 45

well as in that of Jean-Jacques Rousseau and John Stuart Mill.⁸⁹² However, the idea that there might be human rights valid for all peoples in all times and places is controversial and has been challenged by the claim that to assert something as a right is no more than an expression of emotion.⁸⁹³ There is a sense in which the language of rights has been manipulated by political groups. Nevertheless, the use of rights-based models has been used successfully to challenge exclusionary practices. The disabled people's movement has drawn heavily on a rights-based discourse. Indeed, the development of a disability rights movement has had benefits for disabled people in the form of anti-discrimination legislation and opportunities to participate in mainstream life in general.⁸⁹⁴

A rights discourse is also evident in international law. Not only has the United Nations adopted a Convention on the Rights of the Child (UN, 1989), but on 13 December 2006 the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities (UN, 2006). In education, rights based discourses have also played their part, as the Centre for the Study of Inclusive Education claims inclusive education is a human right.⁸⁹⁵ Indeed, UNESCO has invoked a Human Rights Action Plan to address education and training.⁸⁹⁶

Despite the philosophical difficulties of a rights-based discourse, it is suggest that the assertion of educational rights, 'not special educational needs,' may prove to be a powerful tool to support all children in their education and for equal citizenship.

The debate regarding the education of students with disabilities was taken to mean full inclusion.⁸⁹⁷ Full inclusion enthusiasts seek to completely remove the distinction between special and regular education, and to provide an appropriate education for all students, despite their level of disability, in their local school. It involves a complete restructuring of the educational system so that all schools would have the responsibility of providing the facilities, resources, and an appropriate curriculum for all students irrespective of disability. It is a philosophical move away from the accommodation of students with special needs into a

⁸⁹² Shakespeare, T. (1998). Choices and rights: eugenics, genetics and disability equality, *Disability & Society*, 13(5), 665–682.

⁸⁹³ Ward, L., & Flynn, M. (1994). What matters most: Disability, research and empowerment. In M. H. Rioux, & M. Bach (Eds.), *Disability is not measles : New research paradigms in disability* (pp. 29-48). North York, Ont: Roeher Institute.

⁸⁹⁴ Shakespeare, T. (1998). Choices and rights: eugenics, genetics and disability equality, *Disability & Society*, 13(5), 665–682.

⁸⁹⁵ (CSIE, 2002)

⁸⁹⁶ UNESCO Educational policies should promote a rights-based approach; Policy implementation should be consistent and regularly monitored; The learning environment should enable the practice of human rights in the whole school community; Teaching and learning should be holistic and reflect human rights values; Education and training of school personnel should allow them to transmit human rights values.

⁸⁹⁷ NORWICH, B. (1999) Inclusion in education: from concepts, values and critique to practice. In H. DANIELS (ed.) *Special Education Re-formed: Beyond Rhetoric?* (London, Falmer Press).p.54

normal' system, towards a full inclusion model where everyone is considered normal, and where the needs of all can be met.

This trend is situated within a broad social justice agenda, which argues that equality for all must include access for all students to their local school. This trend has been supported by United Nations policies which affirm the rights of children: the United Nations Convention on the rights of the Child, 1989; the United Nations Standard Rules for the Equalisation of Opportunities for Persons with Disabilities, 1993; the UNESCO Salamanca Statement, 1994.

In England, the Warnock Report (1978) led directly to the Education Act (1981), and the subsequent amendment to the Education Act (1993) and Special Educational Needs and Disability Act (2001) were a step in this direction. They established the rights of students with disabilities to be included in regular schools but there were limits to their inclusion.

Inclusive Education departs from Special Education by focusing on the transformation of education systems to increase their ability to respond to the diversity of all learners in both formal and non-formal education. The basis of inclusive education philosophy is threefold; firstly it is based on the premise that exclusion is a social process; secondly, that each student must be viewed holistically; and thirdly on the principle of non-segregation.⁸⁹⁸

Inclusion is seen as a process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education. It involves changes and modifications in content, approaches, structures and strategies, with a common vision which covers all children of the appropriate age range and a conviction that it is the responsibility of the regular system to educate all children.⁸⁹⁹

As discussed in the previous chapter on human rights, inclusive education has explicit links to the international human rights framework. The right to education was established in the initial inception of the international human rights framework in the 1948 UDHR and was reiterated in the 2006 CRPD. The conceptualisation of Inclusive Education is that it is a rights-based process of decreasing exclusion from, and increasing participation in, the culture, curriculum and community of mainstream schools.⁹⁰⁰ Therefore, inclusive education is a vital tool for mainstreaming a human rights approach to development.⁹⁰¹

Educational Rights as an Alternative to the Dilemma of Difference

⁸⁹⁸ (UNESCO, 1994).

⁸⁹⁹ (UNESCO, 1994).

⁹⁰⁰ KIESLER, D.J. (2000) *Beyond the Disease Model of Mental Disorders* (Praeger Publishers). LOW, C. (1997) Is inclusivism possible? *European Journal of Special Needs Education*, 12 (1), 71–79.

⁹⁰¹ Swain, J. (2005) Inclusive education: readings and reflections (Book review), *Disability and Society*, 20(7), 787

Warnock drew attention to the binarism associated with the notion of handicap, which meant that there are two types of children.⁹⁰² The Committee sought to eliminate this notion and proposed replacing the statutory categories with the notion of a continuum of need. However, at the same time as arguing for the abandonment of categorisation, the Committee defended the retention of categories for some pupils:

We have found ourselves on the horns of a dilemma. On the one hand we are aware that any kind of special resource or service for such children runs the risk of emphasising the idea of their separateness, an idea which we are anxious to dispel, and of limiting the notion of special education to the provision made for such children. On the other hand, unless an obligation is clearly placed on local education authorities to provide for the special needs of such children, there is a danger that their requirement for special resources will be inadequately met.⁹⁰³

The attempt to resolve this dilemma merely replaced one set of categories with another and that this was inevitable:

The use of categories is an inherent part of the practical administrative arrangements for special educational needs. What has changed with the 1981 Act is the terminology used and the way categories are used in the context of integration.⁹⁰⁴

Children continued to be assessed by clinically based procedures and medically categorisation. This process of categorisation reinforced the discriminatory categories of normality and abnormality. Disabled students identified as abnormal were therefore placed in segregated schools and provided with special education.⁹⁰⁵ This nature of categorisation is certainly problematic for full citizenship, especially when referred to education and when concerning those categories arising from medical definitions and connected to the area of intellectual disabilities.

In effect little appeared to have changed. The Committee acknowledged the risk that it was merely replacing one label with another, but defended their alternative and euphemising conceptualisation:

The term we have proposed, which will be used for descriptive purposes and not for any purpose of categorisation, is preferable to the existing label because it gives more indication of the nature of the child's difficulties and is less likely to stigmatise the child.⁹⁰⁶

⁹⁰² Warnock 1978 (p37).

⁹⁰³ Warnock 1978 P.45

⁹⁰⁴ NORWICH, B. (1990) *Reappraising Special Needs Education* (London, Cassell). p.38

⁹⁰⁵ Borsay, A. (2002). History, identity and power. In C. Barnes, M. Oliver & L. Barton (Eds.), *Disability studies today* (pp. 98-119). Cambridge, UK: Polity Press in association with Blackwell Publishers.

⁹⁰⁶ Warnock1978 pp43-4

It is not clear what distinction was being made between description and categorisation, but it appears that categorisation had the function of removing a child from mainstream education into special schools which matched the category to which they had been assigned. Warnock offered two concepts,

- a. special educational needs
- b. and learning difficulty.

The latter referred to those who had previously been categorised as educationally sub-normal' and those who were the objects of remedial education.' The term special educational needs has come to include only those with severe complex and long-term difficulties,' whom Warnock saw the need to protect and for whom Records of Needs have been opened. It was suggested that these would account for approximately two percent of the school population, while the others, within Warnock's notion of one in five,' would be considered to have learning difficulties.

The necessarily arbitrary nature of the cut-off point of special,⁹⁰⁷ and the influence of social interests and vested power on the consideration of special' presents an apparently implacable paradox.⁹⁰⁸

While the demedicalisation of the labelling of disabled individuals within the educational context must be viewed positively it represents little more than a cosmetic exercise. The concept of SEN retains the assumption that people categorised in this way are somehow less than human.' The emphasis is still on the inadequacy of the individual: it is s/he who is different; it is s/he who is at fault; and, most importantly, it is s/he who must change.

The Committee did not seriously question the general philosophy and organisation of the education system although by implication it acknowledged that it is incapable of meeting adequately the educational needs of up to a fifth of its users.

Their solution to the problem of SEN was a further expansion of professionally dominated support services. Within the present educational context this can only reinforce the perceived difference between pupils and students with SEN and the rest of the school population, as well as the general view that people with impairments are incapable of looking after themselves without professional help.

⁹⁰⁷ Gipps et al, 1985 Christie, I., & Mensah-Corker, G. (1999). *An inclusive future: Disability, social change and opportunities for greater inclusion by 2010*. London:p2

⁹⁰⁸ see Wolfendale 1990, also see Swann, Swann (Eds) *Policies for diversity in education*. London: Routledge. Lewis, A (1994) What Katy did; a case study in communication between a pupil with disabilities, p 54

The affect this had on the language of current policy which focuses on children who are special and in need emphasises individual deficits and, therefore, plays a part in constructing and sustaining exclusionary practices. Research continues to show that, within schools, practices operate that exclude pupils described as having special educational needs.⁹⁰⁹ Indeed, the term special educational needs can be seen to contribute to the exclusion of children so labelled as they are othered by professionals and, in turn, by children who see the special needs as different and deficient.⁹¹⁰ From my personal experiences, having a child with SEN I have regularly heard children described by teachers and teaching assistants as the special needs (for example, we're taking the special needs to the supermarket tomorrow).

I have also heard this language adopted by children within schools where they asked my daughter, Is your brother a special need? It is not surprising that this is the language of the classroom and the playground, as this is also the language adopted in the popular press. A 2007 article in *The Times* described how children born in the summer can be wrongly classed as special needs.⁹¹¹ The book *Balderdash and Piffle*, which accompanies the BBC television series of the same name, includes the term special needs in the chapter entitled Put-Downs and Insults.⁹¹² Special needs is sandwiched in between plonker and Joey, a term used in the 1980s to describe disabled people following Joey Deacon's appearance on the children's television programme *Blue Peter*. The evidence from the classroom, the playground and popular culture suggests that the term special needs cannot be seen as benign or neutral. The term special needs contributes to the loss of a child's identity behind the veil of a syndrome or condition. Just as the Warnock Report in 1978 rejected the language of the 1940s and the classification of children by their handicap, thirty years later it seems timely to consider rejecting the term special educational needs as outdated and exclusionary language. Having rejected the term special educational needs, it may be that the work of early educators in Reggio Emilia in Italy offers a way forward and, perhaps, an alternative.

Lessons from Reggio Emilia

The Reggio Emilia philosophy and approach to early childhood education evolved within a system of municipal infant-toddler centres and pre-schools in Reggio Emilia, in northern Italy. Parents, who started the schools in the 1940s, continue to participate fully in the life of the

⁹⁰⁹ (Cole, 2004; Hodge, 2006; Runswick-Cole, 2007)

⁹¹⁰ Hurt, J. (1988) *Outside the mainstream: a history of special education* (London, Batsford).

⁹¹¹ (Woodcock, 2007), Booth, T. & Ainscow, M. (eds) (1998). *From Them to Us: An International Study of Inclusion in Education*. London: Routledge. P.26

⁹¹² (Games, 2007), Bickebach, J. E. (2001). Disability human rights, law and policy. In G. L. Albrecht, K. D. Seelman & M. Bury (Eds.), *Handbook of disability studies* (pp. 565-568). Thousand Oaks, California: Sage Publications.

school in order to ensure the schools reflect the values of the community. From the beginning, Reggio Emilia schools were guided by the late Loris Malaguzzi, a young teacher, who directed the energies of parents and teachers in the development of an education based on relationships.⁹¹³ The Reggio Emilia approach draws upon the work of early childhood psychologists and philosophers, including Dewey, Piaget, Vygotsky, Garner and Bruner, in conjunction with extensive experience. However, supporters of the Reggio approach do not claim that it is either childhood method or a set curriculum, rather it is a set of community-constructed values.⁹¹⁴ Significantly, the pre-schools in Reggio Emilia operated inclusive practices in education before it became a legal requirement in Italy in 1971.⁹¹⁵

Fundamental to the Reggio approach is the relationship between the child, the teacher and the knowledge to be learned.⁹¹⁶ All children are viewed as having the ability to construct knowledge, and, crucially in this case, as having rights. The Reggio approach draws on the concepts of children's rights as described within the United Nations Convention on the Rights of the Child.⁹¹⁷ The United Nations' convention groups children's rights under four categories: prevention, provision, protection and participation. It is the right to participation that the Reggio approach sees as crucial for the inclusion of all children.⁹¹⁸

As a result of the rights-based approach, children in Reggio schools have special rights, 'not special needs.' In contrast to the system of pupils' Individual Education Plans (IEPs) in England, Reggio school pupils have a Declaration of Intent, which includes ideas and materials to be used for learning as well as suggestions for how the work is to be carried out.⁹¹⁹ Individualised targets are set without reference to normative standards in the early years.⁹²⁰

Whereas in England, the IEP has been seen as necessary only for pupils with special educational needs, the Reggio approach emphasises the value of documentation of *all* children's experiences and learning, assuming a multidimensional view of intelligence that

⁹¹³ (Edwards, Gandini & Forman, 1993), Bérubé, M. (2003). Citizenship and disability. *Dissent*, 50(2), 52.

⁹¹⁴ (Edwards et al., 1993). Barrett, M. & Trevitt, J. (1991) *Attachment Behaviour and the Schoolchild* (2nd edition). London: Routledge

⁹¹⁵ (Palsha, 2002, cited in Vakil, Freeman & Swim, 2003)

⁹¹⁶ (Palsha, 2002, cited in Vakil et al., 2003). Bickebach, J. E. (2001). Disability human rights, law and policy. In G. L. Albrecht, K. D. Seelman & M. Bury (Eds.), *Handbook of disability studies* (pp. 565-568). Thousand Oaks, California: Sage Publications.

⁹¹⁷ Gardner, H. (1993) *Frames of Mind*, London: Fontana Press Geddes, H. (2006) *Attachment in the Classroom*. London: Worth Publishing p.213

⁹¹⁸ (United Nations Convention on the Rights of the Child, 1989, cited in Philips, 2001).

⁹¹⁹ (United Nations Convention on the Rights of the Child, 1989, cited in Philips, 2001)

⁹²⁰ Phillips, D. C., & Soltis, J. F. (1998). *Perspectives on learning*. NY: Teachers College Press. p. 48

focuses on the child's strengths.⁹²¹ The Reggio Emilia approach highlights *The Hundred Languages of Children* so that children are encouraged to draw, sculpt, paint, dramatise or write to demonstrate their understanding.⁹²² The Reggio approach stresses the value and strengths of all learners and celebrates a breadth of learning styles. In Reggio schools, documentation is collected not only to inform practitioners about children's learning, but to allow practitioners to reflect on their own practice.

The concept of 'special educational rights' is key to constructing an inclusive educational environment. The 'Declaration of Intent' shifts the focus onto what can be done to facilitate children's learning, away from a focus on an individual child's perceived deficits. Valuing multiple forms of intelligence and giving practitioners time to reflect on their own practice are key to the schools' inclusive approach.⁹²³ The use of the term special *rights*, not *needs*, is consistent with the Reggio approach to valuing all children.⁹²⁴ The Reggio Emilia experience leads us to consider what the impact of the adoption of a rights-based discourse might have on the special education system in England.

Educational rights – more than a discursive turn

Reggio educators have been keen to stress that the Reggio approach cannot simply be transplanted into another culture and that the context of education is key.⁹²⁵ It is argued here that, in England, the word 'special' has also been used to maintain a deficit or medical discourse in education.⁹²⁶ So we suggest that the language of 'need' and the term 'special' be rejected in favour of the term 'educational rights.' The above discussion of inclusive practice in Reggio Emilia schools reveals that inclusive practice is about more than the adoption of a rights-based discourse. However, it is worth considering for a moment what the impact would be on the English education system if the term 'special educational needs' were replaced by the phrase 'educational rights.' The consequence of children having 'educational rights' would be wide-ranging. The Code of Practice for the Identification and Assessment of Special Educational Needs would become the Code of Practice for the Affirmation of Educational Rights. Parents would find themselves campaigning for their children's rights (not needs) to be met at the Educational Rights and Disability Tribunal, not the Special Educational Needs and Disability Tribunal (SENDIST).

⁹²¹ Gardner, H. (1993) *Frames of Mind*, London: Fontana Press Geddes, H. (2006) *Attachment in the Classroom*. London: Worth Publishing, p 97

⁹²² (Edwards et al., 1993)

⁹²³ Gardner, H. (1993) *Frames of Mind*, London: Fontana Press Geddes, H. (2006) *Attachment in the Classroom*. London: Worth Publishing, Edwards et al., 1993) p, 76

⁹²⁴ Phillips, D. C., & Soltis, J. F. (1998). *Perspectives on learning*. NY:Teachers College Press.p, 48

⁹²⁵ Nurse, 2001

⁹²⁶ Phillips, D. C., & Soltis, J. F. (1998). *Perspectives on learning*. NY:Teachers College Press.p, 48

A brief review of the impact of a rights-based discourse on the language of the policies and systems of special education suggests that a change in the use of language may impact on the policy and practice of education. Claiming 'educational rights' may be seen as a big statement and some may question whether the word 'right' is being used appropriately here.

The CRDP as a Way Forward?

To remedy the limitations of the models of disability, models of citizenship and human rights prior to 2006 and thereby ensure social inclusion and equality, perhaps adopting the 2006 Convention of the Rights of People with Disabilities as a Framework for inclusion is a better way forward in education. This framework moves beyond the social model's emphasis on formal equality by acknowledging that disabled persons are entitled to equality by virtue of their equal humanity, not because they satisfy sameness norms. Consequently, it acknowledges that variation exists among all individuals, including those conventionally categorized as disabled. Under this CRPD approach, all individuals with disabilities are entitled to civil rights measures combined with equality measures.

As seen in the Warnock Report, to access ordinary schools a disabled person requires levels of minimal function as a condition precedent to acknowledging an individual's equal humanity and social participation, it is fundamentally under-inclusive of some people with intellectual disabilities and those with complex disabilities, which conditions the inclusion of others through proxies, and inadequately accounts for the development of individual talent.

There is a continued debate about whether special schools or regular schools are the best option for educating children with additional needs. Vygotsky believes that all children, regardless of ability, can be educated through existing educational pedagogies and asserts that special schools are inherently antisocial and isolating.⁹²⁷ Others state that as well as social benefits, it is economically more viable to include children with disability in regular education.⁹²⁸ Inclusive Education advocates for children with disability to be included in regular or mainstream schools. This is seen as the best way of 'combating discriminatory attitudes, building an inclusive society and achieving education for all.'⁹²⁹ Farrell believes that an inclusive orientation can also be characteristic of special schools and that parents ought to be able to choose their preferred option.⁹³⁰

There is confusion about the research base for inclusive education with many inclusionists appearing to believe that an adequate research base for inclusion is unnecessary or already

⁹²⁷ (in Rieber & Carton, 1993, p. 85-6)

⁹²⁸ Lynch (1994) and Jonsson & Wiman (2001) Barrett, M. & Trevitt, J. (1991) *Attachment Behaviour and the Schoolchild* (2nd edition). London: Routledge p.67

⁹²⁹ (UNESCO, 1994).

⁹³⁰ Warnock 2005

exists. However, Lindsay's 2007 review concluded that the research evidence in support of inclusion to date have been inconclusive, suggesting that an adequate research base for inclusion has not been established.⁹³¹ Farrell in his recent book cites a raft of relevant studies, many of which report negative findings regarding the impact of inclusive education.⁹³² Norwich concludes that there needs to be more intensive research to provide evidence regarding the policy and practice of inclusive education.⁹³³ Such research needs to take a long-term view of outcomes for children with SEN who experience either inclusive or segregated schooling. The findings of two long-term follow-up studies of children with SEN, who were included in mainstream schools following periods of time attending special schools, suggests that children with SEN who experience inclusive education may often be disadvantaged in the long term.⁹³⁴

As Warnock has concluded, What we really need is evidence of where different children with different disabilities thrive best, and how the pitiful casualties of some inclusive comprehensive schools can be best avoided.⁹³⁵

By harnessing the assets of the social model and the CRPD the Convention overcomes the foregoing limitations. It both acknowledges the role that social circumstances play in creating disabling conditions and insists on the inclusion of all individuals in social settings based on their humanity.⁹³⁶ A positive example in the Reggio schools which were a result of the rights-based approach, all children have special rights, not special needs. If contrasted with the education policies and reports discussed in this thesis, the Reggio approach emphasises the value of documentation of *all* children's experiences and learning, assuming a multidimensional view of intelligence that focuses on the child's strengths.⁹³⁷ The Reggio approach stresses the value and strengths of all learners and celebrates a breadth of learning styles. The concept of special educational rights is key to constructing an inclusive educational environment. These positions situate inclusive education in a larger political movement, while questions the organisation of society and declares the celebration of differences as its fundamental political aim.

This is not to argue that the social model is redundant, rather the social model positively stresses society's role in constructing disability and its responsibility to rectify disability-

⁹³¹ Lindsay's (2007), Barnes, C. (December 9, 1999). A working social model? disability and work in the 21st century. Disability Studies Conference and Seminar, Edinburgh p.21

⁹³² Farrell (2010), Barnes C (1991). *Disabled People and Discrimination in Great Britain*. London: Hurst and Co. p.91

⁹³³ (Terzi, 2010 p.130

⁹³⁴ (Hornby & Kidd, 2001; Hornby & Witte, 2008).

⁹³⁵ Warnock (Terzi, 2010, p. 139).

⁹³⁶ UN CRPD Article 24 supports inclusive education for all children in the same education setting.

⁹³⁷ Gardner, H. (1993) *Frames of Mind*, London: Fontana Press Geddes, H. (2006) *Attachment in the Classroom*. London: Worth Publishing

based exclusion. Yet, because advocates have justified this scheme exclusively through formal justice notions, the model has neglected economic, social and cultural rights. The CRDP seamlessly combines first- and second- generation rights, thus avoiding a major shortcoming of the social model of disability. At the same time, this framework is as vulnerable to monitoring, content, and resource prioritization concerns as are more traditional versions of human rights. This creates a fertile space within which to understand the reach and content of the human right to access schools for all and equal outcome of education opportunity for disabled children.

Can inclusion actually work?

Inclusion by Warnock 1978 is regarded to be very expensive and impractical to apply she states: Nevertheless, we recognize that some of our key proposals will require substantial additional expenditure over the next few years and beyond.⁹³⁸

She went on:

Thus we are proposing a general framework of special education which is much wider than the present statutory concept, and within that, though an integral part of it, the means of safeguarding the interests of the minority of pupils whose needs cannot be met within the resources generally available in ordinary schools. This framework is intended to establish once and for all the idea of special educational provision, wherever it is made, as additional or supplementary rather than, as in the past, separate or alternative provision.⁹³⁹

Other views conceive that inclusive educational systems are less expensive than maintaining two systems; a segregated and an inclusive one. This last view is based on observations of the success of many countries in developing cost effective programmes using limited available resources. It is generally accepted that denying inclusive education of funding will have an adverse impacts on both individuals and the policy of inclusion. Experience indicated that up to ninety percent of children having SEN could be integrated into regular schools and classrooms under the provision of support for their inclusion.⁹⁴⁰

International work by both the World Bank and OECD has shown that it is far more expensive to operate dual systems of ordinary and special education than it is to operate a single inclusive system. In Reykjavik, Iceland, local authority staff calculated that the cost of educating a child requiring the most intensive support in a mainstream school was no greater than the average cost of sending students to special schools.⁹⁴¹

Apparently the real problem implementing inclusion is a conceptual one which has led to the historical investment in separate, segregated systems of special schools, the lack of political will to make inclusive education available to all, and the uncertainties of some parents that

⁹³⁸ Warnock report 1978 p.339

⁹³⁹ Warnock report 1978p. 63

⁹⁴⁰ <http://www.un.org/disabilities/default.asp?id=240>

⁹⁴¹ <http://inclusion.uwe.ac.uk/inclusionweek/articles/worldwide.htm>

inclusion will benefit their children. Overcoming these conceptual problems is only possible through debates and deliberation that take it to change hearts and minds, encourage openness to the values and aims of inclusive education and a commitment to the human rights of all children and young people. Non-government organisations and individuals must also continue to lobby governments, and raise awareness among teachers and parents of the advantages of inclusion. People directly involved in inclusive education need to share their knowledge and experiences with those just starting out. The approach to inclusive education is regarded not only as the provider of the best educational environment but also the best way to break down barriers and challenge stereotypes. When children with and without disabilities are offered the chance of growing up and learning together they would be in a better chance to develop greater understanding and respect for each other.⁹⁴²

To achieve objectives, progress needs to be established on fronts including legislation by government, policy formulation, professional educators and concerned public organizations. As expressed by one school director in Swaziland:

I had thought the problem of integration of children with difficulties was difficult to solve, and a problem of the state. But all my conversations have now confirmed my opinion that someone had to start, to break the mould, and fight against the isolation of children with special needs.⁹⁴³

Exchange of information pertaining to examples of good practice in the restructuring of mainstream schools in the UK and overseas is seen as an essential step towards modelling and devising strategies for ending discrimination in education.

Although a big gap separates contemporary society from the days of eugenic thinking, mass sterilizations and other forms of acutely discriminating practices, there is a long road to walk to reach total acceptance, inclusion and citizenship. Despite the fact that the UK Disability Discrimination Act (DDA) (1995) and its amendment in the DDA 2005 Act have alleviated some of the grievances of disabled persons there is still a lot to be done to ensure their full social acceptance, full citizenship and inclusion. The state's commitment in insuring legal and formal rights for disabled people is evident in policy measures, for example the government has well acknowledged that the Disability Discrimination Act (DDA) needs further support if it is to provide reasonable opportunities for disabled persons. Therefore the Disability Equality Scheme has been devised and fully incorporated since April 2007 to bring in the needed support to the DDA. Yet despite these measures and legislative actions, the gap remains between disabled and non-disabled persons in terms of employment and education.

⁹⁴² <http://www.un.org/disabilities/default.asp?id=240>

⁹⁴³ in Köchler, Hans, Democracy and Human Rights, International Progress Organization, 1990

Conclusion

Chapter Six looked at how models of disability are expressed in the 1978 Warnock Report. The report conflated the social model and the medical model, but failed to escape the deficiencies of either. In the decades which followed, disabled children continued to be denied full inclusion in schools. In 2005, Baroness Warnock revisited her 1978 report and, while accepting the need for some rethinking, argued that the failures and half-measures in education for the disabled during the intervening years were the result of poor implementation and misunderstanding of her original position. However, the analysis in Chapter Six shows that the understanding of disability which underpinned the report was equally insufficient. Indeed, that conflation—specifically the failure to move away from the medical model in education—contributed to the policymaking and practice that followed.

In Chapter Seven the report's reliance on exclusory citizenship models was demonstrated. The report is wedded to a discourse which takes autonomy, rationality, participation and contribution as the requirements of citizenship. Hence the inclusionary vision is undermined by notions of citizenship which exclude many disabled people from the outset, consigning them to the domain of charity, to the domain of *needs* and not *rights*. Given the shortcomings of all the models of citizenship and disability discussed in this thesis, a human rights approach was considered as a possible way forward. The CRPD, especially Article 12, grants unprecedented legal rights to the disabled, filling the gap left by the models discussed. And in filling that gap, and providing full equality before the law for disabled people, we should ask if it supercedes them. Article 24 addresses educational rights. As demonstrated by the case of Reggio Emilia, such a human rights approach has the potential to transform the education landscape for disabled people. If Article 24 of the CRPD were implemented by the British government without reservations, education for the disabled in the UK might be similarly transformed.

Chapter Eight

Conclusion

The purpose of this study was to analyse the watershed Warnock Reports 1978 and 2005 and subsequent education policies by relating them to models of disability and models of citizenship. Such an analysis necessitated first highlighting and analysing models of disability, models of citizenship and human rights, which were subsequently used as tools of analysis.

The failure of the models of disability, models of citizenship and UN human rights prior to the 2006 CRPD identified in the thesis are all reflected in the policy and practice of education for the disabled in England. The 1978 Warnock Report and subsequent reports and legislation expressed how the limits and failure of the models of disability and citizenship expressed this in theory and practice. Further the thesis identified the UN Human Rights framework particularly the CRPD as a way better forward for disabled people. Yet the CRPD is not without its challenges.

Given the problems identified in the thesis, – the problems of the medical and social models and the problems in formulating and applying liberal and civic republican models of citizenship and human rights conventions to disability – if disability varies and we cannot essentialise it, can we say there is a clear-cut path to citizenship for the disabled? The paradox is the more progress in terms of refinements on notions of disability, citizenship and human rights in trying to make citizenship more inclusive, the more problems have arisen regarding disability.

Some old problems return, others continue, and still new ones arise. Efforts by legislation and these evolving models to remedy have produced a series of ongoing and new issues regarding disability and the place and accommodation of the disabled in society. The more things change and improve the more they morph into both ongoing old and new problems.

In conclusion, one can discern a number of linkages and overlaps in theory and practice among the notions of disability, citizenship, and human rights. These connections have been increasing as models of disability, citizenship and international human rights legislation has become more sensitive to the difficulties of disabled people in their societies. Consequently, this increased awareness has been reflected in the evolution of the models of disability, citizenship and international human rights legislation to accommodate the disabled.

While many inconsistencies remain among and between the medical and social models of disability and result often in a fragmentation of rights for the disabled community through either confined medical diagnostic practices and regulations versus social legislation based on the social model for disability, significant efforts at improving the understanding of disability in both models has occurred in the past several decades. Still, large gaps and

inconsistencies exist. The social model succeeded the medical model, and was more efficacious in progressing and highlighting the abilities of disabled persons rather than their limitations.

However, the social model also has its limitations. Firstly, it must overcome inaccurate notions that the world invariably excludes disabled people. Secondly, the social model is prevented from developing on first-generation rights to invoke second-generation rights. Hence, these models are not sufficient on their own in differentiating between some major aspects of disability, such as the cultural, social and political aspects. More important to viewing disability through the perspective of these models is the removal of barriers and social change. This is not to say that either the social or medical models are too flawed to exist independently, rather that they complement each other and rely on each other to further improve the understanding of the disabled community's issues and, together, help set out how to deal with them.

Further, as chapter 3 discusses regarding models of citizenship, there are many ambiguities in the definitions of citizenship in the classical and liberal schools on citizenship, which limit comprehensive application to disabled communities and to the disabled individuals within them. The classical liberal notion of citizenship and its rational clause formulated by Locke excludes many people with cognitive disability and it remains unclear in the writings by Locke, Kant, Hume, Rawls and Marshall that the other forms of disability qualify for full citizenship. Both classical and contemporary models of civic republican and liberal notions of citizenship are restrictive for disabled people. As Lister notes, because the disabled are not able fully to participate in the key areas of mainstream society as able and participatory citizens, they inherently remain on the periphery. Said notes that members of society are no longer defined by one single label, rather, people are now a mixture of complementing and coexisting labels. This highlights a limitation in the difference model; the breakdown in the borders between labels, leading to a salient amalgamation of facets to form the person'. As such, any individual disabled person may contextually identify, at different times, as a person with a particular impairment, as a disabled person, or by their particular gender, ethnicity, sexuality, occupation, religion, and even down to preferences such as the football team they support.

The equal but different model of citizenship is also problematic because liberal societies do not differentiate between citizens. Because the notion of the citizen is universal and therefore to incorporate difference potentially conflicts with the core liberal notion of the universal citizen, this can be troublesome on many theoretical and practical levels for disabled individuals and in the ways and the extent that society can accommodate them without trampling on the rights of other citizens. An alternative framework is offered by which to re-consider disabled people's citizenship rights through application of both a liberal notion of citizenship - largely as an extension of human rights. A synthesis of the rights and a redefined participatory tradition is recommended, linked through the notion of human agency

which can stay true to the wider definition of citizenship underpinned by a wide notion of human rights. This alternative is not seen as being definitive; it comprises a starting point in a discussion which hopefully will be generative in re-envisaging disabled people's citizenship rights.

Chapter 4 raises the limits in human rights as a framework for the disabled and sets out the limitations which remain to be filed regarding the application of human rights theory and law to classical and liberal notions of citizenship so that they may be harmonized towards establishing clear standards for disability rights. The human rights regime is seen as a development of contemporary citizenship, in that it is spelling out the requirements of inclusion in communities. It build on the classical liberal regime of natural/human rights, but is more specific in spelling out the needs of defined individuals, such as the disabled, who have been left out of the picture. Hence, UN human rights advocates lead to a focused way of theorizing what the disabled require. The chapter compares human rights to citizenship, and while superficially they share many qualities and characteristics, they have subtle and nuanced differences. Chief among these is the fact that human rights apply on an international scale, while citizenship applies to a domestic front. The former has its limit in the form of a lack of consistency between nations. The latter, however, weakens national identification in its cosmopolitan guise.

Similarly, chapter 5 which examines CRPD shows that the development of disability rights specifically Article 12 and Article 24 of the CRPD, and the attempt to harmonize these with human rights in international law is a laudable effort tackled by the General assembly of the United Nations, but the CRPD legislation still possesses large gaps. The underpinning of human rights legislation is a start, but remains thinly spread and not comprehensive for many disability rights issues.

Chapter six and seven consider how in education the Warnock report expresses the flaws of the models of disability and citizenship showed how all groups are not accorded the full rights of citizenship in education and accepting that particular groups are denied their basic human rights. Disability is a human rights issue and to be a disabled student in Britain today is to be denied the rights of citizenship. The reality of the denial was demonstrated with ample evidence throughout this chapter in how the Warnock report and subsequent legislation express failures of disability models and citizenship models to provide equal citizenship rights in education both in theory and practice. In contrast to abundant good intentions and compensatory investments, special education settings authorized to offer different educational opportunities seem to legitimately reduce individual access to opportunities to learn and to equal citizenship. These reduced opportunities, may reduce educational attainment. Individuals' risk of low (or no) attainment increases in special education, with its students significantly overrepresented in the group of less educated youth in the UK. Ironically, educational expansion has increased stigmatization of less educated youth because they constitute the lowest educational category that has become smaller and

more socially selective over time while ever more of their peers have earned certificates ⁹⁴⁴In general, there appears to be a cohesive emergent argument about the necessity of creating room for children and adolescents with special needs to be able to exercise more agency in their daily lives, for those who work with them to be less limited by the individualizing and pathologizing discourses that conflict with working toward equity.

From these chapters, one can conclude that for the several hundred years since disability rights have been considered in the context of medical and social models, citizenship, human rights and international legislation that there has been a running paradox. From a twin track perspective, the more progress is made in terms of revising and refining notions of disability and in making citizenship more inclusive, the more issues continue to arise concerning disability and the place of the disability community and its disabled individuals within their respective societies. As more detailed models and legislation evolve, some of the old problems re-appear and some new ones emerge which require further deliberation by State governments, disability organizations and by international bodies. The limitations of the social and medical models, along with the limited domestic scope of human rights and the distortion citizenship theories create on a cosmopolitan scale has meant that while efforts have undeniably been made to improve the lives of the disabled, large problems still exist. It could be argued that this endless chase involving the development of models and theories to mollify discontent and issues regarding disabled people has led to the creation of fresh problems. Thus, full citizenship for the disabled, can never truly be completely achieved using current models of disability and citizenship, the analysis of the Warnock Report and subsequent legislation highlight these limitations.

This thesis concluded that there are flaws and inadequacies in the way the models of disability, citizenship and human rights treat and construct disabled people. Given that a rights-based society is meant to effectively support people with disabilities, one should ask if society's current treatment of people with disabilities is effective in addressing the disability divide, and which elements can be improved to significantly reduce the impact of this divide and achieve full citizenship. In what is deemed to be an enlightened rights-based society, most people, both able-bodied and disabled alike, are willing to accept that the treatment of people with disabilities has improved significantly in recent decades. Yet despite these improvements, difficulties remain. Disabled people continue to face significant barriers in relation to poverty, unemployment and a lack of educational opportunities. A central issue presented in the British Social Attitudes (BSA) report of 2007, indicates that despite over a decade of legislative action to apprehend discrimination, disabled persons are still struggling to eradicate their classification as second-class citizens. ⁹⁴⁵

⁹⁴⁴ Solga 2002: 164, 2005

⁹⁴⁵ 24/01/2007,

Promises of inclusion may give way to a compounding of existing difficulties. This disability divide describes the gap between the able-bodied population and people with disabilities in gaining access to education and employment. As Barton states, modern disability is, in itself, an exploration of issues of power, social justice, citizenship and human rights.⁹⁴⁶

Sir Bert Massie, chairman of DRC (Disability Rights Commission) declared that:

The DRC's Disability Agenda calls on the government to introduce policies aimed at integrating disabled people more closely into society. This will not only help disabled people themselves, but serve to reduce prejudice and combat ignorance about disability in the long term by fostering greater contact between disabled and non-disabled people. I believe this approach is vital for the future and should be a key aim of the new Commission for Equality and Human Rights (CEHR) when it comes into being later this year.⁹⁴⁷

Furthermore, it was stressed by Sir Bert Massie that: We have brought in legislation to help end this, but legislation can only go so far.⁹⁴⁸

Disabled people have always believed that social change is needed to achieve full rights for them. And the disability movement has aspirations. Because any development of disability theory requires disabled people to ask fundamental questions about the origins of their oppression, including cultural and physiological definitions of human nature.

It has been suggested in the British Social Attitudes (BSA) report that knowing disabled people has a consistent impact in reducing prejudice against them. People who have first or second hand experience of disability tend to hold less negative attitudes towards disabled people. Another major study in citizenship in contemporary Britain, has recently found that citizens have worryingly low level of political knowledge and lack trust in the democratic process.⁹⁴⁹ A voter turnout of just 61 percent at the 2005 general election is a stark reminder of the high levels of disengagement with traditional political institutions.

Further, as models of citizenship continue to become more reliant on employment and participation as prerequisites of citizenship, there is a dangerous probability that a key disability group will find it increasingly difficult to operate equitably in society. Promises may give way to a compounding of existing difficulties. This disability divide describes the gap between the able-bodied population and people with disabilities in gaining access to meaningful employment and education. Although the issue of the disability divide revolves around the exploration of issues of power, social justice, citizenship and human rights. The

⁹⁴⁶ (1996, p14)

⁹⁴⁷ Sadlers Wells, London, January. Available online at: <http://www.drc-gb.org> (accessed 10 October 2004).

⁹⁴⁸ United Nations (1989) *United Nations Convention on the Rights of the Child*. Geneva: Office of the High Commissioner for Human Rights.

⁹⁴⁹ (Pattie et al., 2004).

perception of disability in the community, along with the provision of resources, corporate motivations and government policies, all contribute to the ways in which people who are disabled might gain access to education and employment. For the position of some disabled people at work was in part shaped by their early education, which limited them in competition for jobs and tended to direct them towards traditionally lesser, low status types of work.

Marshall's analysis becomes of interest to this study not because it is the definitive statement upon the structures of UK citizenship, but since it may be argued to be a litmus test not only of the underlying philosophies which have helped to shape relations between citizens and their state, but also of certain of the institutional facets of UK citizenship. It is primarily reflective of the vital role played by a desire for social order in the history of UK citizenship evolution, but also hints that the interests of the state are neither logically nor immediately commensurate with those of the national community or individual citizen.

One could then argue that, we cannot understand variations in access to rights through simple dichotomies such as male/female, disabled/non-disabled. These categories often fall apart in the practice of rights, and persons within each category may experience significant variations in access to rights. In fact, it would seem that not all persons with disabilities experience the same level of restriction or exclusion. Perhaps economic power mediates such vulnerability so that those who are economically independent avoid threats or, on the other hand, perhaps those with economic power are most likely to be subject to control in order to protect them from exploitation. Perhaps those with strong family networks are shielded from stigma, or perhaps those with strong family networks are the most isolated from social systems that could have liberated them from patriarchal domination.

Drawing upon mainstream citizenship theory to examine disability, however, does not necessitate ignoring the unique historical path or squeezing disability into a mold that is designed for another population. Optimally, broad theoretical concepts can expose common processes and dynamics, while allowing for historical variation such that the significant history of disability can be meaningfully included in retaining its distinct history. Furthermore, an examination of broader institutional and relational contexts allows us to move beyond the unique history of people with disabilities to conceptualize this history in terms of a greater history of national citizenship development. In doing so, we begin to see many parallels, such as the impact of the legal system on minority groups portrayed as incompetent and dependent, and the role of relational vulnerability to exclusion.

We also see the impact of citizenship development for people with disabilities on other populations. For example, because the category of handicapped provided a secure and flexible basis for exclusion, potentially this category made it more feasible to extend the rights to citizenship to the fit among marginalized populations. To speculate further, it may well be that the exclusion of people with intellectual disabilities from citizenship was central to the inclusion of other marginalized populations. As women and African-Americans fought

for the rights of citizenship, in general they did not fight to overturn the liberal narrative. Rather, they argued that definitions of incompetence had been misapplied to their population; the liberal narrative could remain dominant as long as some populations, including those with disabilities, remained defined as incompetent and outside the realm of practicing citizenship. The perception of disability in the community, along with the provision of resources, individual and corporate motivations and government policies, all contribute to the ways in which people who are disabled might gain access to inclusion and full citizenship.

In conclusion it is suggested here that the medical and social models and both classic and recent models of citizenship are reductionist in their interpretation of disability and SEN. Thus a UNCRPD human rights alternative model has been proposed that suggests a combination of biological, psychological and social factors all play a significant role in human functioning. Also for the first time in history the UNCRPD extends equal rights to people with intellectual disabilities as a matter of law and grants equal legal capacity and recognition for all disabled people. It has been further argued that, in England, the word 'special' has also been used to maintain a deficit or medical discourse in education.⁹⁵⁰ So perhaps that the language of 'need' and the term 'special' be rejected in favour of the term 'educational rights.'

The Reggio approach draws on the concepts of children's rights as described within the United Nations Convention on the Rights of the Child (1989). The United Nations' convention groups children's rights under four categories: prevention, provision, protection and participation. In a departure from classic models of citizenship ideas about personhood and citizenship, it is the right to participation that the Reggio approach sees as crucial for the inclusion of all children.⁹⁵¹ As a result of the rights-based approach, children in Reggio schools have 'special rights,' not 'special needs.' The UK could benefit from adopting the Reggio approach, which is seen to benefit all children, not only disabled people.

The limitations of the social and medical models, along with the limited domestic scope of human rights and the distortion citizenship theories create on a cosmopolitan scale has meant that while efforts have undeniably been made to improve the lives of the disabled, large problems still exist. It could be argued that this endless chase involving the development of models and theories to mollify discontent and issues regarding disabled people has led to the creation of fresh problems. Education in England serves as a case study to show the failings of these models both in theory and in practice and indeed of society regarding the lack of inclusivity for the disabled. Efforts at most or all levels of education historically has fallen short, just like the efforts in other fields in establishing full rights of inclusivity for disabled people.

From these chapters, one can conclude that for the several hundred years since disability

⁹⁵⁰ see(Philips, 2001).

⁹⁵¹ (United Nations Convention on the Rights of the Child, 1989, cited in Philips, 2001).

rights have been considered in the context of medical and social models, citizenship, human rights and international legislation, there has been a running paradox. From a twin track perspective, the more progress is made in terms of revising and refining notions of disability and in making citizenship more inclusive, the more issues continue to arise concerning disability and the place of the disability community and its disabled individuals within their respective societies. As more detailed models and legislation evolve, some of the old problems re-appear and some new ones emerge which require further deliberation by state governments, disability organizations and by international bodies.

The thesis structure is organized by looking at medical and social models of disability, and how they advance yet do not fully address the issues of the problems of disabled people. Both classical and contemporary models of citizenship exclude disabled people from full citizenship. Human rights do advance the models of disability and human rights by according disabled people legal protection. However, UN legislation prior to 2006 fails to achieve this aim. The 2006 UN CRPD attempts to bridge these gaps by legally binding legislation particularly Article 12 and Article 24 but leaves us with the question of how important are models of disability and models of citizenship after the CRPD highlighted their limitations? Should we abandon all models of disability and citizenship--perhaps yes, and the CRPD is all we need to empower disabled people in achieving full citizenship rights? The CRPD, especially Article 12, grants unprecedented legal rights to the disabled, filling the gap left by the models discussed. And in filling that gap, and providing full equality before the law for all disabled people, the CRPD appears to supersede them. An alternative framework is offered here by which to reconsider disabled people's citizenship rights through an application of the CRPD. A synthesis of the rights and a redefined participatory traditions, linked through the notion of human agency. This alternative is not seen as being definitive; rather, it comprises a starting point in a discussion which hopefully will be generative in re-visioning disabled people's citizenship rights. Many of the limitations of the models of disability and citizenship can potentially be resolved by the United Nations Convention on the Rights of People with Disabilities (CRPD), particularly Articles 12 and 24 which deal with legal capacity and inclusive education respectfully. While the thesis identifies the CRPD as a starting point we have to do so with the shortcomings of the CRPD in mind. For example the reservation the UK government put on Article 24 could make the full realization of citizenship rights in education problematic. This reflects the general criticism of UN legislation that structures cannot be specified by rights which is also problematic in according disabled people their CRPD rights in practice.

Although there have been significant advances for disabled people and their specific legal rights have been greatly strengthened, these gains are, however, still precarious and there is still a long way to go before disabled people achieve full equality and secure policies which meet their particular needs in practice. Indeed with poor education, low wages or inadequate benefits the position appears not to be getting better. Many disabled people still face great

problems in their citizenship status. Thus, the plight of the disabled, while being recognized, can never truly be completely solved using current models of disability and citizenship and this is evident in what is expressed and reflected in education policies for the disabled in England.

This thesis concludes with the view that disabled people have progressed in achieving rights of inclusive citizenship, but that the medical, social, political and legislative efforts have consistently fallen short in remedying significant defects.

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