INTERNATIONAL LEGAL REGIME ON THE RIGHTS OF PERSONS WITH DISABILITY: ITS RELEVANCE TO NATIONAL LEGAL SYSTEM

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I. INTRODUCTION

In 1969, the United Nations General Assembly adopted the Declaration on Social Progress and Development[1], which started the movement relating to the rights of persons with disability. Pursuant to this, two very significant declarations were adopted by the General Assembly, specifically on the mentally disabled and physically handicapped persons: the Declaration on the Rights of Mentally Retarded Persons, 1971[2] and the Declaration on the Rights of Disabled Persons, 1975.[3]

The Declaration on Social Progress and Development, while proclaiming the right to live in dignity for all people and human beings, emphasized the need to assure disadvantaged or marginal sectors of the population equal opportunities for social and economic advancement in order to achieve an effectively integrated society. Further, it stated that social progress and development should aim at the protection of the physically or mentally disadvantaged.[4] It suggested that governments should institute appropriate measures for the rehabilitation of mentally or physically disabled persons[5], so as to enable them to the fullest possible extent to be useful members of society. These measures should include the provision for treatment and technical appliances, education, vocational and social guidance, training and selective placement and other assistance required, and the creation of conditions in which the handicapped are not discriminated against because of their disabilities.[6]

The Declaration on the Rights of Mentally Retarded Persons (1971) proclaims that a mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings. It also accepts the

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1. G.A.Res. 2542 (xxiv) of 11 Dec. 1969.
2. G.A.Res. 2856 (xxvi) of 20 Dec. 1971.
3. G.A.Res. 3447 (xxx) of 9 Dec. 1975.
4. Art. 11(c).
5. Art. 19.
6. Art. 19.

necessity of assisting such persons to develop their abilities in various fields of activities and of promoting their integration in normal life. A mentally retarded person has the right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance which will enable him to develop his ability and maximum potential. Such a person has a right to economic security and to a decent standard of living, to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his/her capabilities. He has a right to protection against exploitation, abuse and degrading treatment.

The Declaration on the Rights of Disabled Persons, defines the term "disabled persons" to mean "any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities." Like the Declaration on Mentally Retarded Persons, it also emphasizes that disabled persons have the inherent right to respect for their human dignity and the right to enjoy a decent life, as normal and full as possible. They are entitled to measures designed to enable them to become as self-reliant as possible; their special needs must be taken into consideration at all stages of economic and social planning. They should be protected against all exploitation, regulations and treatment of discriminatory, abusive or degrading nature. Qualified legal aid should be made available to them for the protection of their person and property.

In 1986, in the Declaration on the Right to Development,[7] it was stated that "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom".[8] States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.[9] Though this Declaration did not say anything specific on the rights of disabled person, but the right to development is the precondition of liberty, progress, justice and creativity. Being a *core right* from which all the rights stem,[10] it naturally covers the rights of disabled persons. This position has been further clarified in the Vienna Declaration and Programme of Action adopted on June 25, 1993 by the World Conference on Human Rights. Like the Declaration on the Right to Development, it also stated that the human person is the central subject of development.

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7. G.A.Res. 41/128 of 4 Dec. 1986.

8. Art. 2(3).

9. Art. 3.

10. Mohammed Bedjaoni, "The Right to Development" in Badjaoni (ed.) *International Law : Achievements and Prospects* 1177 at 1182 (1991).

Article 22 of the Vienna Declaration provides that the "special attention needs to be paid to ensuring non-discrimination, and the equal enjoyment of all human rights and fundamental freedoms by disabled persons, including their active participation in all aspects of society."

At the regional level, the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region was adopted at Beijing in 1992. The Meeting also launched the Asian and Pacific Decade of Disabled Persons 1993-2002.

But all these instruments on the human rights of disabled persons, brought out by the United Nations and other foras are merely declarations, which raise few pertinent questions. Being merely declarations, are they binding on the states on their own? If not, then what is the intrinsic value of the rules enshrined therein? Are they merely guidelines for the states, or can they create any binding obligations for the states? When can they be considered as binding rules of law?

The answer to these questions lies in the doctrinal controversy between the "hard law" and "soft law" at the international level.

II. 'Hard Law' – 'Soft Law' distinction

The Statute of the International Court of Justice (ICJ) enumerates the sources of international law as treaties, custom, general principles of law recognized by civilized nations, judicial decisions and juristic work on international law. Another source added under the modern international law is the resolutions and determinations/declarations of international organs or institutions. Whereas the first three are the law-creating processes, the others are the means for the determination of alleged rules of international law. In the case of law creating process, the emphasis lies on the forms by which any particular rule of international law is created. This is being done through the law–determining agencies (manifested in the form of other sources as judicial decisions or juristic writings), which verify an alleged rule.

Those rules of international law which fall under the category of law creating processes are considered to be 'hard law' and others in the category of 'soft law' since they cannot be classified as full-fledged rules of international law like custom, treaties or general principles of law. They have their set mechanism for coming into force as a full-fledged rule of law and they are binding and enforceable against a state. There is always a set procedure for its enforceability and compliance. If any violation of the rule takes place, the consequences will ensue there from. For example, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, 1966, there is a set machinery for monitoring the compliance of a state-party under these Covenants, i.e., Human Rights Committee under the

Covenant on Civil and Political Rights, and Committee on Economic, Social and Cultural Rights. There is no such mechanism existing under the different declarations on human rights, though there is the UN Human Rights Commission whose main task is of standard-setting in human rights and spreading the culture of human rights and not of monitoring.

Declarations are mere evidence of practices and usages and unless they go through the process of law-making as of custom, treaty or generalized principles of law, they lack the binding force of the rule of law. Nevertheless, they fulfill to a great extent the criteria to be termed as law.[11] They are increasingly becoming important in the development of international law. New rules of international law are initiated through declarations, determinations or decisions of the international organizations, which subsequently crystallize into the binding rules of law.

The UN General Assembly, since its inception in 1945, has adopted about 7000 resolutions/declarations, on areas as wide as from human rights to consumer's rights. These declarations/ resolutions, though are not legally enforceable or binding *per se*, can spell out, and to some extent, elaborate existing customary rules or contribute to the rapid formation of new ones. In this sense, they have great evidentiary value and proved to be very valuable when it comes to the interpretation of the provisions of the Charter or developing new law for maiden areas.

These resolutions/declarations have also been accorded considerable weightage by the international judicial tribunals, as evidence of state practice underlying a customary rule. The International Court of Justice (ICJ) had relied heavily on the General Assembly Declaration on Friendly Relations and Cooperation among States[12] in the *Nicaragua case*[13] for the law on the use of force and intervention under international law. The UN declaration on right of self-determination and rights of people of non-self governing territories (Resolutions 1514 (xv) and 1541 (xv) of 1960) were made applicable in *Western Sahara Case*[14] and *Namibia Case*.[15] A significant number of these declarations have culminated into conventions on the same subject-matter, such as the 1963 Declaration on the Elimination of All Forms of Racial Discrimination led to the adoption of the 1965 Convention on the Elimination of All Forms of Racial Discrimination, or the Convention on the Elimination of All Forms of Discrimination against Women, 1979, which followed the 1966 Declaration on the same subject matter.

The declarations/resolutions are collective pronouncements of states and manifest strong evidence of state practice and helps in the formulation

11. Van Hoof, *Rethinking the Sources of International Law*, pp. 183-189 (1983).
12. Res. 2625 (xxv) of 24 Oct. 1970.
13. ICJ Rep. (1986) p. 14.
14. ICJ Rep. (1975) p. 12.
15. ICJ Rep. (1971) p. 16.

of new rules of international law. But their pursuasive or evidentiary or precedential value depends upon numerous factors, viz., the language and the pattern of voting in their adoption and the statements made by members nations at the time of their adoption and subsequently. If a declaration/resolution is framed in precise language, it will carry a considerable weight. Resolutions adopted unanimously or near unanimously or by consensus (not accompanied by reservations) would lead to the emergence of customary rule. They may be in the nature of quasi-judicial determination. Abstention from voting by important nations for their implementation or adoption may affect their enforceability. They may set the standards for states, which can follow them in their practice and thus would subsequently crystallize into a customary rule of international law, binding on states.

Repetition or recitation of a resolution/declaration in subsequent resolutions/declaration adds further weight and helps in the formation of a new rule. Repetition demonstrates continuity, consistency and uniformity of states conduct and practice in conformity with the rules stated therein. This may lead to formulation of the "instant customary international law."[16] The subsequent conduct of a state after the adoption of the declaration/resolution, is similarly important in the formulation of a new rule. The subsequent conduct provides it with the requisite evidentiary value to mould it into a customary rule, by giving it the requisite *opinio juris* for the creation of the rule. This *opinio juris* will be evidenced in the statements made by states prior or after the adoption of the resolution or later as an explanation. The state practice is particularly relevant where the resolutions are in the nature of *de lege ferenda*. In the case of resolution in the nature of *lex lata*, the state practice enhances its normative effect. Nevertheless, the gestation period for the emergence of a customary rule is less in case of resolution than in the case of traditional process of customs formation, because the states' will has already been manifested in the adoption of the declaration.

In the *South West Africa Cases*, Judge Tanaka, in his dissenting opinion, remarked:

> Of course, we cannot admit that individual resolutions, declarations, judgements, decisions, etc. have binding force upon the members of the organization. What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc... This collective, cumulative and organic process of custom generation can be characterized as the middle way between legislation by convention and the traditional process of custom making, and can be seen to

16. The term has been coined by B.Cheng, 5 IJIL 23 (1965).

have an important role from the viewpoint of the development of international law.[17]

Strictly speaking, the resolutions of the General Assembly are not binding as such and the United Nations Charter does not envisage this. However, with the tremendous horizontal and vertical expansion of international law, and keeping in view the present day status of international law, it is difficult to deny the effective legislative force behind these resolutions, which manifest the consensus of nations on particular rules.

'Soft Law' and Rights of Persons with Disability

The movement relating to the protection of the rights of disabled persons have so far remained only through the different declarations of the General Assembly and other foras. Unlike declarations on many other subjects, the specific declaration on handicapped persons, 1975 has not so far concretized into a convention, i.e. the 'hard law'. Whether it has crystalised into a customary rule has to be seen from the state practice.

By adopting it as a convention would increase the accountability of the states–parties to it, who would be required to comply with the norms set in the convention to protect the rights of disabled persons. The convention would have its monitoring and reporting system as indicated under the convention. Once a state becomes a party, it has to comply with its provisions. For example, the Convention on the Elimination of all Forms of Discrimination against Women, 1979 has been ratified by India in July 1993. India is required to submit regular reports to the Committee on Women's Convention at a regular interval of four years, after the submission of its first report within one year from the date of becoming the party to the Convention. Unless reservations are permitted and sought, the state-parties are mandated to carry out their obligations under the Convention in full.

Thus, under conventions, there are better prospects for ensuring the rights. But conventions are not the only mode to protect the rights of a particular section of the humanity. The very movement for the protection of human rights started with the Universal Declaration of Human Rights, 1948, though the UN Charter, which is a convention, contained ample references to the protection of human rights, viz. articles 1(3), 13, 55, 56, 62 and 72, beside the Preamble. The Universal Declaration elucidated these Charter provisions and defined expressly certain human rights and fundamental freedoms which need to be protected. The Declaration became the trend-setter in the movement for the protection of human

17. *South-West Africa Cases*, ICJ Rep. (1966), p. 34, at 292.

rights, even though it is non-mandatory in nature. It has emerged into a rule of customary international law. All the UN instruments on human rights are measured in the context of the Universal Declaration and the states are primarily measuring themselves against the Universal Declaration for their record on the protection of human rights. Hence, a Declaration, though considered to be a 'soft-law', may nevertheless result into a 'hard-law', and a violation of the standards set therein may call for serious public rebuke by international community. It is also to be noted that India at the time of adopting its Constitution in 1950, incorporated 23 articles out of thirty of the Universal Declaration in Parts III and IV of the Constitution. Though there is no specific provisions in the Constitution relating to the rights of disabled persons, but reading through Articles 14 (right to equality), 15 (prohibition of discrimination on grounds of religion, race, caste, sex or place of birth), 21 (equality of opportunity in matters of public employment), 21 (right to life and personal liberty), 39(e), 39A (free legal aid) etc. provide ample scope for the rights of disabled persons in the constitutional scheme at par with other persons. This goes beyond the realm of "soft law" and "hard law" and makes the rights of disabled persons enforceable.

At the same time, it may be noted that the declaration on disabled persons, though not binding and there is no accountability of states at the international level, but it has certainly evidenced the emerging rules in this context. It is also kept in sight that the declaration was adopted by consensus, which shows the deep commitment of the international community to give effect to the obligations enshrined therein. Furthermore, it is a standard setting instrument. The Government of India, though not bound by any treaty commitment, after the adoption of the declaration on disabled persons by the UN General Assembly, framed the "Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995" which was promulgated in February 1996. The Act is presently under amendment. It was also in furtherance of the Proclamation of the Asian and Pacific Region on the Full Participation and Equality of the People with Disabilities.

The Act, however, is not the first one in the area. In 1987, the Mental Health Act was enacted, followed by the Rehabilitation Council of India Act, 1992. More recently Parliament has enacted the National Trust for Welfare of Person with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. These Acts have been enacted by the Government more from its commitment to social justice under the Constitution rather than as a part of its fulfillment of international obligations. The various Declarations on disability, of course, helped in the formulation of the national laws.

Once the non-binding obligations of the Declarations are legislated at the municipal level by a state, they create the binding obligations for the

state, at least at the municipal level and that is the aim of the movement of human rights that they should percolate through state actions to its beneficiaries who in this case are disabled persons. In this respect, the Declaration on the Rights of Disabled Person is no less a 'hard law' than any other convention or customary law on human rights.