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# Promoting Social Change in Asia and the Pacific: The Need for a Disability Rights Tribunal to Give Life to the UN Convention on the Rights of Persons with Disabilities

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**PROMOTING SOCIAL CHANGE IN ASIA AND THE PACIFIC:  
THE NEED FOR A DISABILITY RIGHTS TRIBUNAL TO GIVE  
LIFE TO THE U.N. CONVENTION ON THE RIGHTS OF  
PERSONS WITH DISABILITIES**

MICHAEL L. PERLIN\*

I. INTRODUCTION

There is no question that the existence of regional human rights courts and commissions has been an essential element in the enforcement of international human rights in those regions of the world where such tribunals exist. In the specific area of mental disability law, there is now a remarkably robust body of case law from the European Court on Human Rights (ECtHR), some significant and transformative decisions from the Inter-American Commission on Human Rights (Inter-American Commission), and at least one major case from the African Commission on Human Rights (African Commission). In Asia and the Pacific region, however, there is no such body. Although the Association of Southeast Asian Nations (ASEAN) charter refers to human rights, that body cannot be seen as a significant enforcement tool in this area of law and policy. Many reasons have been offered for the absence of a regional human rights tribunal in Asia, the most frequently cited of these is the perceived conflict between what are often denominated as “Asian values” and universal human rights. What is clear is that the lack of such a court or commission has been a major impediment in the movement to enforce disability rights in Asia.

The need for such a body has further intensified since the ratification of the United Nations’ Convention on the Rights of Persons

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with Disabilities (CRPD).<sup>1</sup> The CRPD clearly establishes, through hard law, the international human and legal rights of persons with disabilities, but in order for it to be more than a mere paper victory, it must be enforced. Only then, can we begin to be optimistic about the real-life impact of the CRPD on the rights of persons with disabilities in Asian and the Pacific region.

The empirical evidence is clear: in all regions of the world, persons with mental disabilities—especially those *institutionalized* because of such disabilities—are uniformly deprived of their civil and human rights.<sup>2</sup> The creation of a Disability Rights Tribunal for Asia and the Pacific (DRTAP) would be the first necessary step leading to amelioration of this deprivation. It would be a bold, innovative, progressive, and important step on the path towards realization of those rights. It would also be, ultimately, a likely inspiration for a full regional human rights tribunal in this area of the world. If it were created, however, it is also clear that it would be an empty victory absent available and knowledgeable lawyers to represent individuals seeking to litigate there.

This Article will first consider the existence and role of regional human rights tribunals in regions other than Asia. Part Two briefly discusses some of the important disability rights cases litigated in those tribunals so as to demonstrate how regional tribunals have had a significant impact on the lives of persons with disabilities. Part Three considers the need for a body like DRTAP, focusing specifically on the gap between current domestic law on the books and how such law is practiced in reality, as well as the importance of what is termed the “Asian values” debate. This section of the Article concludes that this debate leads to a false consciousness because it presumes a unified and homogenous multi-regional attitude towards a bundle of social, cultural, and political issues, and that the universality of human rights must be seen to predominate over differences in cultural values.

This Article then explain why the CRPD is a paradigm-shattering instrument that truly is the “first day of the rest of our lives” for anyone who works in this field, and why the creation of the DRTAP is timely, inevitable, and essential if the CRPD is to be given true

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1. Convention on the Rights of Persons with Disabilities, Jan. 24, 2007, 2515 U.N.T.S. 3, 46 I.L.M. 443 [hereinafter CRPD].

2. See Michael L. Perlin, *International Human Rights Law and Comparative Mental Disability Law: The Universal Factors*, 34 SYRACUSE J. INT'L L. & COM. 333, 335 (2007) [hereinafter Perlin, *The Universal Factors*]; MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD 25 (2011) [hereinafter PERLIN, WHEN THE SILENCED ARE HEARD].

effect. Finally, this Article briefly summarizes the work that has already been done on the creation of a DRTAP, and how this work needs to continue in the future. This Article concludes by looking at the role of counsel in the representation of persons with mental disabilities, the current lack of counsel experienced in this subject matter in Asia and the Pacific, and the importance of training lawyers to provide adequate representation before DRTAP, ensuring that this tribunal would have an authentic impact on social change.

## II. REGIONAL HUMAN RIGHTS BODIES OUTSIDE ASIA

### A. An Overview

A regional human rights court is an engine that provides real and practical meaning to each provision of an international human rights instrument to citizens, and that universalizes these meanings.<sup>3</sup> These universalized meanings can be adopted and incorporated in an almost symbiotic way by other regional courts and tribunals. This engine of social and political change thus dynamically sharpens and clarifies a normative and practical meaning of international human rights law.

Asia and the Pacific is the only area of the world that does not have a regional human rights court or commission. The countries of Europe established the ECtHR in 1956 and renewed its charter

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3. Michael L. Perlin, *The Convention on the Rights of Persons with Disabilities, the Disability Rights Tribunal for Asia and the Pacific, and the Future of Online Legal Education in Chinese Schools as a Means of Training Lawyers to Represent Persons with Disabilities* 2 (N.Y. Law Sch., Legal Studies Research Paper No. 10/11 #16, 2011) [hereinafter Perlin, *CRPD*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1743730](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1743730); see also Karen Alter, *The Evolving International Judiciary*, ANN. REV. L. & SOC. SCI., Dec. 2011, at 387, 387 (discussing international tribunals and stating that “there are currently 26 permanent international courts and well over a hundred quasi-legal and ad hoc systems that interpret international rules and assess compliance with international law”). There is a wealth of scholarship on the empirical impact of human rights instruments on actual human rights behavior. See generally Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95 (1999) (cautioning against expectation that being a treaty party would produce directly observable effect on behavior); Li-ann Thio, *Reading Rights Rightly: The UDHR and Its Creeping Influence on the Development of Singapore Public Law*, 2008 SING. J. LEGAL STUD. 264 (2008) (discussing impact of Universal Declaration of Human Rights (UDHR) on Singapore law); Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925 (2005); Mashood A. Baderin & Manisuli Ssenyonjo, *Development of International Human Rights Law Before and After the UDHR*, in INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 3 (Mashood A. Baderin & Manisuli Ssenyonjo eds., 2010) [hereinafter *SIX DECADES*] (compiling various works discussing UDHR’s impact on behavior).

in 1998.<sup>4</sup> The Organization of American States (OAS) created the American Convention on Human Rights (American Convention) in 1980, and that instrument established both the Inter-American Court of Human Rights and Inter-American Commission.<sup>5</sup> Africa established the African Court of Human Rights and People's Rights in 2006.<sup>6</sup> The ECtHR has been at the forefront of regional human rights protection; other international tribunals regularly rely on its precedents as a basis for the interpretation of international human rights law.<sup>7</sup>

The Inter-American Court of Human Rights has played a similar precedent-creating role for its region and international society. Its greatest contribution to the inter-American system has been in delegitimizing nondemocratic governments by means of conducting monitoring during its on-site visits and presenting its country reports to the OAS political organs and to the hemispheric public in general.<sup>8</sup> These country reports have dominated the agendas of the OAS General Assemblies for many years. The documentation presented by an intergovernmental organization of human rights violations committed by states against their own populations has a credibility not achieved by reports issued by non-governmental organizations, and every state will fight not to be censured by its peers.<sup>9</sup> Professor Claudio Grossman concluded “[t]he Inter-American system has contributed significantly to the

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4. European Union, Charter of Fundamental Rights of the European Union pmbl., Dec. 7, 2000, 2000 O.J. (C 364) 8.

5. Organization of American States, American Convention on Human Rights pmbl., Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

6. See Organization of African Unity, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III); MICHAEL L. PERLIN ET AL., INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: CASES AND MATERIALS 249–83 (2006); see also Olufemi Amao, *The African Regional Human Rights System, in SIX DECADES*, supra note 3, at 235, 235.

7. See Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 133 (2008); Laurence R. Helfer & Erik Voeten, *Do European Court of Human Rights Judgments Promote Legal and Policy Change?* 2–3 (May 23, 2011) (unpublished manuscript), available at [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3025&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3025&context=faculty_scholarship). See generally Alastair Mowbray, *The European Convention on Human Rights, in SIX DECADES*, supra note 3, at 271.

8. See Christina Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FLA. J. INT'L L. 195, 201 (2004); see also Jo M. Pasqualucci, *The Inter-American Regional Human Rights System, in SIX DECADES*, supra note 3, at 253, 264, 268–69.

9. Cerna, supra note 8, at 201; see also Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493, 501 (2011); Lea Shaver, *The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?*, 9 WASH. U. GLOBAL STUD. L. REV. 639, 665 (2010); Diego

development of human rights in the region as well as to broader democratic values.”<sup>10</sup>

### B. Disability Rights Cases Litigated in Regional Courts and Commissions<sup>11</sup>

Several important cases litigated in existing interregional human rights courts and commissions have had a tremendous impact on the human rights for persons with disabilities. Not only do they serve as an example for other nations to follow in assuring human rights to every person, but these cases also demonstrate the effectiveness of regional tribunals. One such case is *In the Matter of Victor Rosario Congo*,<sup>12</sup> involving a 48 year-old Ecuadorian man who, as a result of the state’s gross negligence and willful acts died of malnutrition, hydro-electrolitic imbalance, and heart and lung failure.<sup>13</sup> Specifically, a guard beat Mr. Congo with a club on the scalp, deprived him of medical treatment, kept him naked, and forced him to endure complete isolation.<sup>14</sup>

The Inter-American Commission<sup>15</sup> found that the state was responsible for its agents conduct that violated Mr. Congo’s right to humane treatment under Article 5 of the American Convention.<sup>16</sup> According to the Inter-American Commission, Article 5 of the American Convention must be interpreted in light of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (MI Principles).<sup>17</sup> This is par-

Garcia-Sayán, *The Inter-American Court and Constitutionalism in Latin-America*, 89 TEX. L. REV. 1835, 1839 (2011).

10. Claudio Grossman, *Latinos and Latinas at the Epicenter of Contemporary Discourses: Gender and Human Rights: The Inter-American System: Challenges for the Future*, 83 IND. L.J. 1267, 1282 (2008).

11. PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 2, at 46–57. On the proliferation of international courts in general, see Alter, *supra* note 3.

12. *Congo v. Ecuador*, Case 11.427, Inter-Am. Comm’n H.R., Report No. 63/99, OEA/Ser.L./V/II.95, doc. 7 ¶¶ 6–27 (1999) [hereinafter *Matter of Congo*].

13. *Id.*

14. *Id.* ¶¶ 9–10.

15. On the differences between the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, see Terrence Rogers, *Using International Human Rights Law to Combat Racial Discrimination in the U.S. Criminal Justice System*, 14 SCHOLAR 375, 432–35 (2011).

16. *Matter of Congo*, *supra* note 12, ¶¶ 59, 62, 68.

17. *Id.* ¶ 54. The Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care are widely referred to as the “MI Principles.” See G.A. Res. 119, Annex, U.N. GAOR, 46th Sess., Supp. No. 49, U.N. Doc. A/46/49, at 189–92 (Dec. 17, 1991). The MI Principles are the predecessor to the CRPD. Their publication “inspired lawyers, advocates, professors and progressive mental health professionals to begin thinking seriously about the intersection between international human rights law

ticularly important because it makes the MI Principles “hard law,” or in other words, binding upon the U.N. members who have signed it.<sup>18</sup> Thus, it guarantees more extensive rights for persons with mental disabilities.

The Inter-American Commission found that the solitary confinement of Mr. Congo constituted inhuman and degrading treatment in violation of Article 5(2) of the American Convention, especially in light of the fact he was left in isolation unable to satisfy his basic needs.<sup>19</sup> Thus, the state violated Mr. Congo’s right to “be treated with respect for the inherent dignity of the human person.”<sup>20</sup> Further, the Inter-American Commission found that there is a duty upon the state to ensure the physical, mental, and moral integrity of persons suffering from mental illness.<sup>21</sup>

The Inter-American Commission further found that the state had violated Article 4(1) of the American Convention because it had failed to take measures in its power to ensure the right to life of a person who, “partly because of his state of health and in part owing to injuries inflicted on him by a State agent, was defenseless, isolated and under its control.”<sup>22</sup> Under Article 25(1) of the American Convention, Mr. Congo had a right to judicial protection, a right that the state violated because there were no judicial avenues available to establish the responsibility for his sustained injuries and death.<sup>23</sup> As a result of this case, the Inter-American Commis-

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and mental disability law.” See Michael L. Perlin, “*There Must Be Some Way Out of Here*”: Why the Convention on the Rights of Persons with Disabilities Is Potentially the Best Weapon in the Fight Against Sanism 4 (June 2004) [hereinafter Perlin, “*There Must Be Some Way Out of Here*”] (paper presented to conference at Deakin University, Melbourne, Australia, that was co-sponsored by the Australasian Society for Intellectual Disability) (on file with author). But see Tina Minkowitz, *The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions*, 34 SYRACUSE J. INT’L L. & COM. 405, 407 (2007) (criticizing the CRPD for not being sufficiently protective of the rights of persons with psychosocial disabilities, especially in the context of the right to refuse treatment); T.W. Harding, *Human Rights Law in the Field of Mental Health: A Critical Review*, 101 ACTA PSYCHIATRICA SCANDINAVICA 24, 24 (2000) (discussing how the MI Principles are “basically flawed” and specifically referring to the right to refuse treatment). The MI Principles retain significance today in those nations that have neither signed nor ratified the CRPD. See PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 2, at 9–10 n.13.

18. On how soft law becomes hard law via court decisions, see Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT’L L. 101, 111 (2008); see also Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 B.C. L. REV. 1147, 1165 (2011).

19. *Matter of Congo*, *supra* note 12, ¶ 59.

20. *Id.*

21. *Id.* ¶ 62.

22. *Id.* ¶ 84.

23. *Id.* ¶ 97; see also American Convention, *supra* note 5, art. 25(1).

sion recommended that the state punish persons responsible for the violations, compensate the family of Mr. Congo, provide medical and psychiatric care for persons suffering from mental illness, and assign specialists to identify psychiatric disorders in individuals confined to the penitentiary system.<sup>24</sup>

In *Purohit and Moore v. The Gambia*,<sup>25</sup> the African Commission<sup>26</sup> found that Gambia violated various provisions of the African Charter on Human and Peoples' Rights (African Charter).<sup>27</sup> Although the African Commission generally does not receive communications until local remedies are exhausted, the Commission found that in this case, the existing remedies under Gambian law were not realistic for persons with mental disabilities.<sup>28</sup>

In determining the merits of *Purohit and Moore*, the African Commission found that when states ratify the African Charter, they undertake a responsibility to bring their domestic laws and practice in conformity with the African Charter.<sup>29</sup> In detailing the specific violations, the African Commission found that Articles 2 and 3, guaranteeing equal protection and anti-discrimination, are non-derogable rights, meaning that a state party cannot, under any circumstances whatsoever, justify its non-compliance.<sup>30</sup> The implementation of the Lunatic Detention Act (LDA) resulted in a higher rate of detention of people from poor backgrounds and only provided legal assistance to those charged with capital offenses, and thus violated the guaranteed rights of Articles 2 and 3.<sup>31</sup>

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24. *Matter of Congo*, *supra* note 12, ¶ 98. On how Congo "[broke] new ground" in this area of the law, see PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 2, at 12.

25. *Purohit & Moore v. The Gambia*, Afr. Comm'n on Hum. and Peoples' Rts., Comm. No. 241/2001, ¶ 85 (2003) (finding unlawful both the way that persons with mental disabilities were treated in Gambia as well as prevailing sections of the Lunatic Detention Act of Gambia).

26. In 1998, the Organization of African Unity adopted a protocol to the African Charter that established an African Court on Human Rights to complement the work of the preexisting African Commission on Human and Peoples' Rights. See Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT'L & COMP. L. 1, 19–20 n.54 (2006).

27. See Organization of African Unity, African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter African Charter].

28. *Purohit* is praised as a "landmark case" in Mashood A. Baderin, *Recent Developments in the African Regional Human Rights System*, 5 HUM. RTS. L. REV. 117, 137 (2005).

29. *Purohit & Moore*, Comm. No. 241/2001, ¶ 43.

30. *Id.* ¶ 49.

31. *Id.* ¶¶ 53–54.



The African Commission further found that LDA violated Article 5<sup>32</sup> of the African Charter by classifying persons with mental disabilities as “lunatics” and “idiots.”<sup>33</sup> Like the Inter-American Commission, the African Commission turned to the MI Principles, and concluded that the terms “lunatic” and “idiots” were dehumanizing and deprived persons of the inherent right to human dignity in violation of Article 5.<sup>34</sup> In addition, the African Commission found that the LDA violated Article 6 of the African Charter because the LDA authorized detention on the basis of opinions by general medical practitioners, did not have fixed periods of detention, and did not provide for review or appeal.<sup>35</sup> The African Commission found that the right to health is crucial and persons with mental disabilities, as a result of their condition and by virtue of their disabilities, should be accorded special treatment to enable them to sustain the optimum level of independence in accordance with both the African Charter and MI Principles.<sup>36</sup>

Another success story of the effectiveness of the rights of persons with mental disabilities arose in Paraguay in 2003. In this unreported case, the Inter-American Commission granted immediate, life-saving measures to protect the lives and physical, mental, and moral integrity of 460 individuals detained in the state-run Neuro-Psychiatric Hospital.<sup>37</sup> Mental Disability Rights International (MDRI) investigated the abuses in Paraguay’s Neuro-Psychiatric Hospital and documented the atrocious treatment and conditions for all 460 people.<sup>38</sup> The investigation included the cases of two teenage boys, Julio and Jorge, who had been detained in “six-by-six feet isolation cells, naked, and without access to bathrooms for

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32. “Every individual shall have the right to the respect of the dignity inherent in a human being.” African Charter, *supra* note 27, art. 5.

33. *Purohit & Moore*, Comm. No. 241/2001, ¶ 43.

34. *Id.* ¶ 59.

35. *Id.* ¶ 68.

36. *Id.* ¶ 81. *But see* Baderin, *supra* note 28, at 122 (alleging that state parties did not implement the African Commission’s recommendations); Frans Viljoen & Linette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights, 1994–2004*, 101 AM. J. INT’L L. 1, 5 (2007); Frans Viljoen, *State Compliance with the Recommendations of the African Commission on Human Rights, in SIX DECADES, supra* note 3, at 411.

37. See Alison A. Hillman, *Protecting Mental Disability Rights: A Success Story in the Inter-American Human Rights System*, HUM. RTS. BRIEF, Spring 2005, at 25–28 (describing the case); Tara J. Melish, *Rethinking the “Less As More” Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. INT’L L. & POL. 171, 284–85 (2006). For a discussion of the hospital conditions, see Perlin, *The Universal Factors, supra* note 2, at 345–46.

38. *Paraguay*, DISABILITY RTS. INT’L, <http://www.disabilityrightsint.org/work/country-projects/paraguay> (last visited June 5, 2012).

more than four years.”<sup>39</sup> The conditions were found to violate the right to community integration, the right to life, the right to humane treatment, the right to personal liberty, and the rights of the child.<sup>40</sup>

As a result of this case, MDRI and Center for Justice and International Law (CEJIL) “worked through the [Inter-American] Commission . . . to ensure that Paraguay develops a system of community-based mental health” in order to prevent “such abuses in the future.”<sup>41</sup> In late February 2005, MDRI and CEJIL signed a groundbreaking agreement with the Paraguayan government “requiring the state to develop a plan for deinstitutionalization and creation of community-based mental health services, along with the guarantees of funding for such a plan by Paraguay’s President and Minister of Health.”<sup>42</sup>

Multiple cases litigated in Europe have had a significant impact on mental disability rights.<sup>43</sup> In *Winterwerp v. Netherlands*, the ECtHR found that in order to detain “persons of unsound mind” in accordance with Article 5 of the European Convention on Human Rights and Fundamental Freedoms (European Convention),<sup>44</sup> there must be a diagnosis made using “objective medical expertise” finding that the disorder required confinement.<sup>45</sup> The ECtHR also found that it is “essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation.”<sup>46</sup> In *Herczegfalvy v. Austria*, the ECtHR noted that the position of inferiority and powerlessness typical of patients confined to psychiatric hospitals calls for increased vigilance.<sup>47</sup> Although ultimately the ECtHR did not find a violation of Article 3, which prohibits torture and inhuman treatment, it noted that use of “handcuffs and security bed . . . appears worrying.”<sup>48</sup>

Scholars are divided on the ultimate impact of the ECtHR’s case law on the population in question. Looking specifically at *Herczegfalvy*, Professor David Hewitt has concluded that that the

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39. *Id.*

40. Hillman, *supra* note 37, at 26.

41. *Id.* at 28.

42. *Id.*

43. *See generally* PERLIN ET AL., *supra* note 6, at 451–789 (describing the case law).

44. Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

45. *Winterwerp v. Netherlands*, 33 Eur. Ct. H.R. (ser. A) at 18 (1979).

46. *Id.* at 24.

47. *Herczegfalvy v. Austria*, 24 Eur. Ct. H.R. (ser. A) at 25–26 (1992).

48. *Id.* at 26.

ECtHR has interpreted the European Convention “very restrictively in psychiatric cases.”<sup>49</sup> On the other hand, Professor Gerard Quinn has concluded that the due process protections of the “negative right to liberty . . . are very robust under the Convention.”<sup>50</sup> The focus here is not on whether or not rights have been granted to their fullest capacity, but rather, on whether there is an opportunity to have a debate about those rights, and to consider the extent to which human rights have been protected. In order to fully explore the rights and rights violations of persons with mental disabilities, there must first be a door open to uniformity and accountability. Only through litigation, particularly in regional tribunals, and the resulting case law can we enter into an environment geared towards further defining and enforcing human rights.<sup>51</sup>

### III. THE NEED FOR A DRTAP

#### A. *The Absence of Such a Body in the Pacific*

Asia and the Pacific have not established a regional human rights court.<sup>52</sup> Although there have been some historical attempts to establish a regional human rights *body* in this region,<sup>53</sup> no move-

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49. David Hewitt, *Do Human Rights Impact on Mental Health Law?*, 151 *NEW L.J.* 1278, 1278 (2001).

50. Gerard Quinn, *Civil Commitment and the Right to Treatment Under the European Convention on Human Rights*, 5 *HARV. HUM. RTS. J.* 1, 48 (1992). Professor Bruce Winick bridges the gap between Hewitt and Quinn by arguing that, even in the absence of case law, many of the ongoing “abusive practices” of commitment, treatment, and institutional conditions still common in Eastern Europe “can be understood to violate the [European Convention] and other evolving principles of international human rights law.” Bruce Winick, *Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law*, 21 *N.Y.L. SCH. J. INT’L & COMP. L.* 537, 572 (2000).

51. On the salutary impact of such courts in another area of human rights (judgments involving lesbian, gay, bisexual, and transgender issues), see Helfer & Voeten, *supra* note 7, at 3–4 (concluding that European Court of Human Rights decisions “have a significant and positive effect on the probability that lagging countries will adopt [rights-expanding] reforms”). In contrast, others have concluded that the judicial process has not “served as a full palliative for conditions in European communities and psychiatric institutions,” referring to press coverage of institutions in Central and Eastern Europe in which “many people with mental illnesses or disabilities are sequestered without rights or recourse under Communist-era rules.” PERLIN, *WHEN THE SILENCED ARE HEARD*, *supra* note 2, at 50.

52. See Tom Ginsburg, *Eastphalia and Asian Regionalism*, 44 *U.C. DAVIS L. REV.* 859, 860 (2011). On the irony of Asia’s imperviousness to international human rights law in this context, see Andrea Durbach et al., “A Tongue but No Teeth?” *The Emergence of a Regional Human Rights Mechanism in the Asia-Pacific*, 31 *SYDNEY L. REV.* 211, 212 (2009) (citing Geraldine van Bueren, *Why a Supermodel Is Still Such a Potent Symbol of Human Dignity and Liberation*, *TIMES* (Apr. 1, 2008), <http://www.thetimes.co.uk/tto/law/article2210839.ece>).

53. For a discussion of conferences and seminars held in the Asia and Pacific region seeking to support expanded human rights protections, see Michael L. Perlin & Yoshikazu

ments in this field of law during the 1980s and 1990s achieved significant success.<sup>54</sup> By way of example, in 1985, the Law Association for Asia and the Pacific proposed a Pacific Charter that would set forth wide-ranging civil, political, social, and cultural rights, including mechanisms for enforcing the Charter and dealing with complaints of human rights violations.<sup>55</sup> Unfortunately, this proposal failed due to political, social, cultural, and practical pressures.<sup>56</sup>

Although ASEAN has adopted a Charter of ASEAN providing for the establishment of a human rights body,<sup>57</sup> critics have dismissed

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Ikehara, *Creation of a Disability Rights Tribunal for Asia and the Pacific: Its Impact on China?* (N.Y. Law Sch., Legal Studies Research Paper No. 10/11 #19, 2011) [hereinafter Perlin & Ikehara, *Creation of a Disability Rights Tribunal*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1744196](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1744196) (concluding that there were no movements in this field of law during the 1980s and 1990s that achieved significant success in addressing the need for a human rights body in this region). In 1985, the Law Association for Asia and the Pacific proposed a Pacific Charter that would set forth wide-ranging civil, political, social, and cultural rights. Patricia Hyndman, *Report on a Proposed Pacific Charter of Human Rights Prepared Under the Auspices of LAWASIA, May 1989*, 22 VICTORIA U. WELLINGTON L. REV. 99, 99 (1992). The proposal included mechanisms for enforcing the Charter and dealing with complaints of human rights violations. See *id.* at 100–01. Ultimately the proposal failed due to political, social, cultural, and practical pressures. See P. Imrana Jalal, *Why Do We Need a Pacific Human Rights Commission?*, 40 VICTORIA U. WELLINGTON L. REV. 177, 180–82 (2009).

54. Colm Campbell & Avril McDonald, *Practice to Theory: States of Emergency and Human Rights Protection*, in HUMAN RIGHTS AND ASIAN VALUES: CONTESTING NATIONAL IDENTITIES AND CULTURAL REPRESENTATIONS IN ASIA 249, 270–71 (Michael Jacobsen & Ole Bruun eds., 2006); Jalal, *supra* note 53, at 180–81. On the relationship between the development of multilateral institutions in Asia and the Pacific and “identity building,” see Amitav Acharya, *Ideas, Identity and Institution-Building: From the “ASEAN Way” to the “Asia-Pacific Way”?*, 10 PAC. REV. 319 (1997).

55. Hyndman, *supra* note 53, at 99–101; see also Jalal, *supra* note 53, at 180–81.

56. Hyndman, *supra* note 53, at 171–72; see also Jalal, *supra* note 53, at 181–82.

57. Charter of the Association of Southeast Asian Nations art. 14, Nov. 20, 2007, available at [www.aseansec.org/21069.pdf](http://www.aseansec.org/21069.pdf); see also David Cohen, *ASEAN’s Intergovernmental Commission on Human Rights and Civil Society Initiatives in Southeast Asia*, ASIA PAC. BULL., Mar. 1, 2010, at 1. On the creation of ASEAN, see Lin Chun Hung, *ASEAN Charter: Deeper Regional Integration Under International Law?*, 9 CHINESE J. INT’L L. 821 (2010). On ASEAN in general, see Yasumasa Komori, *Asia’s International Creation and Evolution*, 33 ASIAN PERSP. 151, 179 (2009) (discussing how ASEAN countries continue to play a central role in institutional relationships among Southeast Asian state); Richard Stubbs, *ASEAN Plus Three: Emerging East Asian Regionalism?*, 42 ASIAN SURV. 440, 455 (2002) (examining the ASEAN plus three framework and arguing that it will remain a significant regional actor); Alan Collins, *A People-Oriented ASEAN: A Door Ajar or Closed for Civil Society Organizations?*, 30 CONTEMP. SE. ASIA 313 (2008); Edi Suharto, *Social Protection Systems in ASEAN: Social Policy in a Comparative Analysis*, 31 SOC. DEV. ISSUES 1 (2009); Simon S.C. Tay, *The ASEAN Charter: Between National Sovereignty and the Region’s Constitutional Moment*, 12 SING. Y.B. INT’L L. 151, 169 (2008). For a historical perspective on ASEAN, see Lee Leviter, *The ASEAN Charter: ASEAN Failure or Member Failure?*, 43 N.Y.U. J. INT’L L. & POL. 159 (2010).

the mandate as merely an “aspiration,”<sup>58</sup> and “toothless,”<sup>59</sup> and have characterized ASEAN as reflecting a “frustrated regionalism” or a “reactionary regionalism.”<sup>60</sup> These ASEAN shortcomings have made the failure to create a court or commission in Asia harmful to social justice in multiple ways,<sup>61</sup> including the failures of “authoritarian regime[s]” to be “adequately responsive to diverse developmental concerns.”<sup>62</sup> There are significant gaps between domestic law in the nations of Asia and the Pacific and international law, as reflected in the region’s ineffective—often non-existent—implementation of the CRPD. The creation of a DRTAP would be the most important and effective way to remediate this gap.<sup>63</sup>

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58. Tamio Nakamura, *Proposal of the Draft Charter of the East Asian Community: An Overview and the Basic Principles*, in EAST ASIAN REGIONALISM FROM A LEGAL PERSPECTIVE: CURRENT FEATURES AND A VISION FOR THE FUTURE 193, 204 (Tamio Nakamura ed., 2009).

59. Ginsburg, *supra* note 52, at 32; *see also* Shaun Narine, *ASEAN and the ARF: The Limits of the “ASEAN Way”*, 37 ASIAN SURV. 961, 977 (1997) (discussing how ASEAN bypasses conflict). For a more optimistic response, *see* Diane Desierto, *ASEAN’s Constitutionalization of International Law: Challenges to Evolution Under the New ASEAN Charter*, 49 COLUM. J. TRANSNAT’L L. 268, 319 (2011) (noting that the “constitutionalization” of international law “has a revolutionary potential for enriching the rule of law across all of Southeast Asia’s diverse politics”). On the distinctive features of constitutionalism in East Asia in general, *see* Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805, 839 (2011). On the frustrations of creating regionalist projects in Asia and the Pacific, *see* Deepak Nair, *Regionalism in the Asia Pacific/East Asia: A Frustrated Regionalism?*, 31 CONTEMP. SE. ASIA 110 (2008). On whether the current time is this region’s “constitutional moment,” *see* Tay, *supra* note 57.

60. Mark Beeson, *ASEAN Plus Three and the Rise of Reactionary Regionalism*, 25 CONTEMP. SE. ASIA 251, 256–57 (2003); *see also* Nair, *supra* note 59, at 208–09.

61. *See* Michael C. Davis, *The Political Economy and Culture of Human Rights in East Asia*, 1 JINDAL J. INT’L AFF. 48, 50 (2011) (explaining how East Asia would benefit from the development of regional and national human rights institutions); Andrew Byrnes et al., *Joining the Club: The Asia Pacific Forum of National Human Rights Institutions, the Paris Principles, and the Advancement of Human Rights Protection in the Region*, 14 AUSTL. J. HUM. RTS. 63 (2008) (examining the role of national human rights institution in this region in general); Shaun Narine, *ASEAN and the Management of Regional Security*, 71 PAC. AFF. 195, 213 (1998) (relating ASEAN’s failure to develop a sense of regional interest).

62. Davis, *supra* note 61, at 72; *see also id.* at 50 (“I believe it is precisely this strengthening of the domestic human rights debate fostered under East Asian conditions that offers something of interest to a world trying to deal with human rights concerns in many developmental contexts.”).

63. *See infra* Part III.

### B. Lack of Comprehensive Domestic Legislation in Asian and Pacific Nations

There is no comprehensive disability law that mandates non-discrimination principle in many countries in this region,<sup>64</sup> and “relatively few” nations have “extensive and well-documented experience of the operation of disability discrimination legislation.”<sup>65</sup> Only seven governments in the region reported to the U.N. Economic and Social Commission for Asia and the Pacific (UNESCAP) that they have anti-discrimination laws.<sup>66</sup> Unfortunately, some of these laws, in particular the Japanese law, are neither comprehensive nor effective.<sup>67</sup>

Thirty-one out of thirty-six governments surveyed by UNESCAP offer some definition of “disability” in their laws.<sup>68</sup> Several nations, however, include definitions that are flatly rejected by the CRPD, including those implemented in Azerbaijan, Bangladesh, and China, all of which define disability as an “abnormality.”<sup>69</sup> At least nine governments use a medical model defining disability as attributed to one’s impairment, in direct violation of the CRPD, which firmly endorses a social model definition.<sup>70</sup> Only two nations in

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64. See Yoshikazu Ikehara, *What Is the DRTAP Project and Its Future?* 11–17 (Oct. 22, 2010) (paper presented to the International Conference on Disability Rights Tribunal in Asia & the Pacific, Bangkok, Thailand), available at [http://tokyo-advocacy.com/drtapeng/conference\\_bangkok.html](http://tokyo-advocacy.com/drtapeng/conference_bangkok.html) (discussing all statutes); U.N. ECON. & SOC. COMM’N FOR ASIA & THE PACIFIC (UNESCAP), *DISABILITY AT A GLANCE 2010*, U.N. Doc. ST/ESCAP/2583 (2010) (hereinafter ESCAP, *DISABILITY AT A GLANCE 2010*). On the “paucity” of constitutional protections currently in place in this region in this context, see Christine Ricci et al., *A Review of the Legislative Mechanisms Available to Protect the Social Participation Rights of People with Depression in the Asia Pacific Region*, 12 AUSTRALASIAN PSYCHIATRY S16, S26 (2004).

65. Andrew Byrnes, *Disability Discrimination Law and the Asian and Pacific Region* ¶ 24 (UNESCAP, Working Paper No. 3, 2011), available at <http://www.unescap.org/sdd/issues/disability/crpd/files/Paper-III-Andrew-20110121.pdf>.

66. UNESCAP, *DISABILITY AT A GLANCE 2010*, *supra* note 64, at 16. The seven governments are Australia, Azerbaijan, Hong Kong, India, Japan, the Philippines, and the Republic of Korea. *Id.*

67. In employment law, Japan focuses on the special considerations owed to persons with disabilities, rather than outlawing employment discrimination per se. See Cerise Fritsch, *Right to Work? A Comparative Look at China and Japan’s Labor Rights for Disabled Persons*, 6 LOYOLA U. CHI. INT’L L. REV. 403, 417 (2009). It also only focuses on persons with physical disabilities and does not address persons with mental disabilities. *Id.* at 416–18. The Japanese law does not stipulate any procedure for dealing with complaints of failure to observe these rights, and it is not clear whether individual complaints can be brought under the legislation. See Byrnes, *supra* note 65, ¶ 47.

68. UNESCAP, *DISABILITY AT A GLANCE 2010*, *supra* note 64, at 12.

69. *Id.*

70. See Michael L. Perlin, “Abandoned Love”: *The Impact of Wyatt v. Stickney on the Intersection Between International Human Rights and Domestic Mental Disability Law*, 35 LAW & PSYCHOL. REV. 121, 139 (2011) [hereinafter Perlin, “Abandoned Love”]; see also Jane Zhi, *Living, Acting, and Experiencing Otherwise Than We Do: Rethinking China’s Laws on the Protection*

Asia—Malaysia and Thailand—define disability from the social model perspective.<sup>71</sup>

Several governments fail to adequately define operative terms, and, in direct violation of the CRPD, exclude certain disabilities from protection of the law.<sup>72</sup> For example, Bangladesh's definition does not include persons with autism,<sup>73</sup> and often, definitions are unclear as to whether "mental disabilities" includes persons with developmental disabilities and psycho-social disabilities. Mongolia, for instance, uses the phrase "mental problems,"<sup>74</sup> while Azerbaijan refers to mental "abnormalities,"<sup>75</sup> neither of which coherently defines the cohort of individuals about whom the statutes are purportedly written.<sup>76</sup> The Indian definition is a closed list that excludes many disabilities, such as epilepsy and autism.<sup>77</sup> In this region, only Malaysia has a definition that echoes the expansive language of the CRPD.<sup>78</sup>

Definitions of discrimination are unclear and inconsistent in this region. For example, the Fijian Constitution prohibits discrimination on the basis of disability, but there are no laws that actually define what constitutes "discrimination."<sup>79</sup> Similarly, in the Philippines and Turkmenistan, comprehensive laws prohibit discrimina-

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*of Persons with Disabilities*, 20 *TRANSNAT'L L. & CONTEMP. PROBS.* 279, 292–94 (2011) (describing why and how China, a country that has ratified the CRPD, needs to shift from a medical model to a social model).

71. See Byrnes, *supra* note 65, ¶ 43.

72. CRPD, *supra* note 1, pmb1.

73. *Country Profile: Bangladesh*, ASIA-PAC. DEV. CENTER ON DISABILITY, <http://www.apcd.foundation.org/?q=content/bangladesh> (last visited June 5, 2012). The Bangladeshi law also provides no explicit guarantee that persons who acquire a disability while employed are protected against discrimination on the basis of that disability. Byrnes, *supra* note 65, ¶ 43.

74. *Country Profile: Mongolia*, ASIA-PAC. DEV. CENTER ON DISABILITY, <http://www.apcd.foundation.org/?q=content/mongolia> (last visited June 5, 2012).

75. Ikehara, *supra* note 64.

76. See UNESCAP, *STUDY ON NATIONAL LEGISLATIVE FRAMEWORK ON DISABILITY AND ITS HARMONIZATION WITH THE UNCRPD IN TURKMENISTAN* 27–28 (2009); *Country Profile: Philippines*, ASIA-PAC. DEV. CENTER ON DISABILITY, <http://www.apcdfoundation.org/?q=content/philippines> (last visited June 5, 2012).

77. See, e.g., Byrnes, *supra* note 65, ¶¶ 87–88.

78. See *id.* ¶ 82; *Persons with Disabilities Act, Laws of Malaysia*, Act 685, § 2 (2008) (“[P]ersons 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.”).

79. 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).

tion against persons with disabilities, but fail to define “discrimination.”<sup>80</sup>

Many nations’ laws are inconsistent with other CRPD requirements. In Korea, for example, the broadcasting law does not require sign language interpretation as required by the CRPD,<sup>81</sup> and Korea’s family health law gives priority to the institutionalization of persons with disabilities.<sup>82</sup> Cambodia’s Marriage and Family Law forbids certain persons with disabilities from marrying, such as impotent men and persons who have leprosy, tuberculosis, cancer, or venereal disease, as well as persons with mental defects.<sup>83</sup> Even in many nations in the region that have domestic disability laws, there is no cause of action that would allow a person with a disability to file a claim to resolve a grievance.<sup>84</sup>

The Hong Kong government demonstrated its unwillingness to comply with the CRPD in a case in which an applicant was lawfully rejected for a public job due to her relation to a person with mental illness, on the theory that “such applicants cannot be trusted to perform the job safely.”<sup>85</sup> These examples clearly show that most individual Asian nations do *not* willingly comply with the CRPD.<sup>86</sup>

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80. *Id.* at 4.

81. See CRPD, *supra* note 1, art. 9, § 2(e) (“States Parties shall also take appropriate measures to . . . [p]rovide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public . . .”).

82. Michael L. Perlin & Yoshikazu Ikehara, *Promoting Social Change in East Asia: The Movement to Create a Disability Rights Tribunal and the Promise of International Online, Distance Learning* 8–9 (N.Y. Law Sch., Legal Studies Research Paper No. 10/11 #17, Jan. 20, 2011) [hereinafter Perlin & Ikehara, *Promoting Social Change*], available at <http://ssrn.com/abstract=1743741>. Contrarily, Article 19 of the CRPD commands that “States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community.” CRPD, *supra* note 1, art. 19.

83. Ulrike Buschbacher Connelly, *Disability Rights in Cambodia: Using the Convention on the Rights of Persons with Disabilities to Expose Human Rights Violations*, 18 PAC. RIM L. & POL’Y J. 123, 136 (2009).

84. See Byrnes, *supra* note 65, ¶ 50 (discussing Laos).

85. K, Y, & W v. Secretary for Justice, H.K.C. 796 (2000); see also Carole J. Petersen, *From British Colony to Special Administrative Region of China: Embracing Human Rights in Hong Kong*, in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA 224, 249 (R. Peerenboom et al. eds., 2006).

86. Perlin & Ikehara, *Promoting Social Change*, *supra* note 82, at 9; see also Emilie Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1373 (2005) (explaining that the acceptance of human rights doctrine and conventions leads to an emergent global legitimacy of human rights that “exerts independent global civil society effects that improve states’ actual human rights practices”).



C. *The "Asian Values" Debate*

The Asian values debate<sup>87</sup> is a form of cultural relativism.<sup>88</sup> Cultural relativism, however, should not and cannot be used as a defense in ignoring human rights. Cultural relativism is not sufficient justification for the denial of the universal application of human rights standards.<sup>89</sup> There is a difference between "adhering less to some global standard of human rights in order to promote overall human rights in socioeconomic realms and not adhering to certain rights because of a lack of political will or hiding behind the mask of cultural relativism."<sup>90</sup> As Arati Rao has stated, "the notion of culture favored by international actors must be unmasked for what it is: a falsely rigid, ahistorical, selectively chosen set of self-justificatory texts and practices whose patent partiality raises the question of exactly whose interests are being served and who comes out on top."<sup>91</sup> While it is important to take cultural differences into consideration when involved in international rela-

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87. See Michael L. Perlin, *Why a Regional Tribunal Is Needed to Implement the CRPD* (N.Y. Law Sch., Legal Studies Research Paper No. 10/11 #18, Jan. 20, 2011) [hereinafter Perlin, *Why a Regional Tribunal Is Needed*], available at <http://ssrn.com/abstract=1744157>; PERLIN, *WHEN THE SILENCED ARE HEARD*, *supra* note 2, at 174–80. See generally Christian Tomuschat, *Asia and International Law – Common Ground and Regional Diversity*, 1 *ASIAN J. INT'L L.* 217 (2011) (discussing Asian and international law in general); Teemu Ruskola, *Where Is Asia? When Is Asia? Theorizing Comparative Law and International Law*, 44 *U.C. DAVIS L. REV.* 879, 885–89 (2011) (discussing attempts to define Asia for these purposes).

88. Cultural relativism has been defined as an approach to rights which "posits that culture is the source of validity of rules and that, since cultures vary, rules that are valid within one culture will not necessarily be valid in others." Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 *MICH. J. INT'L L.* 307, 382 (1994).

89. See Patrick T.C. Hui, *Birth Control in China: Cultural, Gender, Socio-economic and Legislative Perspectives in Light of CEDAW Standards*, 32 *H.K. L.J.* 187, 199 (2002); see also Joel Paul, *Cultural Resistance to Global Governance*, 27 *MICH. J. INT'L L.* 1, 13 n.51 (2000) (citing Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 *HARV. HUM. RTS. J.* 109 (1998) (criticizing cultural relativism as deterministic and tautological)); Simon S.C. Tay, *Human Rights, Culture and the Singapore Example*, 41 *MCGILL L.J.* 743 (1996) (examining the problematic character of the cultural argument in the context of Asian human rights).

90. Mahmood Monshipouri, *Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries*, 4 *YALE HUM. RTS. & DEV. L.J.* 25, 25–26 (2001).

91. Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse*, in *WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 167, 174 (Julie Peters & Andrea Wolper eds., 1995); see also Ann-Belinda S. Preis, *Human Rights as Cultural Practice: An Anthropological Critique*, 18 *HUM. RTS. Q.* 286, 289 (1995) (examining and rejecting cultural relativism from an anthropological perspective); Man Yee Karen Lee, *Universal Human Dignity: Some Reflections in the Asian Context*, 3 *ASIAN J. COMP. L.* 1, 1–2, 31 (2008) (discussing cultural perspectives in this inquiry).

tions, in practice, cultural relativism rarely is a sincere call for tolerance.<sup>92</sup>

The Asian values debate began in the early 1990s with challenges from several of the states themselves—in particular Singapore, Malaysia, and Indonesia—arguing against the application of international human rights law because it is based in Western values, and thus, does not conform to Asian culture.<sup>93</sup> As used in this context, Asian values generally refers to Confucianism and concepts such as respecting elders, preserving social order, maintaining social harmony, enhancing group orientation, and fostering the collective interests of the society and state.<sup>94</sup> “The implication is that not to share these values is to be less than ‘Asian,’ to have lost one’s bearings and to become ‘Westernized.’”<sup>95</sup>

Proponents of the Asian values position overcoming international human rights obligations “argue that if ‘Western’ human rights treaties are respected in a given situation, the public will be worse off—thrown into civil war, vulnerable to insurgents, or, alternatively, unable to engage in the practices they value.”<sup>96</sup> In other words, adhering to human rights obligations interferes with the government’s welfare-promoting activities, and these welfare-promoting activities should take precedence.<sup>97</sup> “Many Asian countries, in justifying their claim that economic rights are more important than political rights, argue that at different stages of a country’s

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92. See Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT’L L. 527, 545 (2001).

93. Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT’L L. & POL. 291, 331 (2000). On self-imposed limitations on constitutional construction in Malaysia and Singapore, see Li-ann Thio, *Beyond the “Four Walls” in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore*, 19 COLUM. J. ASIAN L. 428 (2006). On the potential role of a national human rights commission in Malaysia, see Li-ann Thio, *Panacea, Placebo, or Pawn? The Teething Problems of the Human Rights Commission of Malaysia (Suhakam)*, 40 GEO. WASH. INT’L L. REV. 1271 (2009).

94. See Same Varayudej, *Right to Democracy in International Law: Its Implications for Asia*, 12 ANN. SURV. INT’L & COMP. L. 1, 13 (2006); see also Stephen L. McPherson, *Crossing the River by Feeling the Stones: The Path to Judicial Independence in China*, 26 PENN ST. INT’L L. REV. 787, 791–92 (2008) (discussing the significance of group orientation in this context).

95. Tay, *supra* note 89, at 764. *But see* Tomuschat, *supra* note 87, at 230 (“From the very outset, the assumption that human rights was a Western concept was erroneous.”); Christian Tomuschat, *Human Rights in a World-Wide Framework: Some Current Issues*, 45 HEIDELBERG J. INT’L L. 547, 550 (1985); CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 85 (2d ed. 2008).

96. Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1771 (2008).

97. *Id.*

development, it is necessary to focus on different rights.”<sup>98</sup> In addition, many Asian governments complain “vehemently that international human rights should not be an excuse for strong-arm politics and interference in the domestic affairs of a country.”<sup>99</sup>

Some scholars argue that the Asian values debate should not be interpreted as a philosophical debate about the universality of human rights.<sup>100</sup> Rather, the better interpretation is that “virtually all governments concede that they have a ‘universal’ obligation to advance the welfare of their populations, but, given local conditions and traditions, they cannot advance the welfare of their populations if they are constrained by human rights treaties.”<sup>101</sup> Regardless of how the Asian values debate is interpreted, the crux of the argument is whether Asian values really do exist and if so, whether they can be an excuse to observing universal human rights.

The Asian values debate leads to false consciousness because it presumes a unified and homogenous multi-generational attitude towards a bundle of social, cultural, and political issues.<sup>102</sup> The Asian values argument fails to account for “the richness of values discourse” in Asia.<sup>103</sup> For this reason, some argue that there is no such thing as an Asian value.<sup>104</sup> Further, assuming that there are uniform Asian values leads to generalizations and stereotypes of what is “Asian.”<sup>105</sup> One such generalization is that Asian countries favor the community over the individual. Opponents of the Asian values debate question whether Asian governments are really interested in promoting development of communities over that of indi-

98. Richard Klein, *Cultural Relativism, Economic Development and International Human Rights in the Asian Context*, 9 *TOURO INT’L L. REV.* 1, 31 (2001).

99. Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates About “Values in Asia”*, 14 *IND. INT’L & COMP. L. REV.* 1, 41 (2003).

100. *See id.* at 2–5; Ruskola, *supra* note 87, at 885–89.

101. Posner, *supra* note 96, at 1771.

102. On the other hand, some opponents of the “Asian values” argument are guilty of constructing an overly unified and idealized West. *See* Peerenboom, *supra* note 99, at 1 (arguing that the Asian values debate is no longer fruitful).

103. Davis, *supra* note 89, at 147.

104. Engle, *supra* note 93, at 313.

105. Tay, *supra* note 89, at 758. On ways that Buddhist thought is universalist and fully consonant with expanded human rights as “an integral part of the spiritual tradition of Asia,” see Menachem Mautner, *From “Honor” to “Dignity”: How Should a Liberal State Treat Non-Liberal Cultural Groups?*, 9 *THEORETICAL INQUIRIES L.* 609, 628 (2008). *See generally* Shiv Narayan Persaud, *Eternal Law: The Underpinnings of Dharma and Karma in the Justice System*, 13 *RICH. J.L. & PUB. INT.* 49 (2009) (discussing the compatibility of Hindu thought and practice with universal human rights); Fait A. Muedini, *Examining Islam and Human Rights from the Perspective of Sufism*, 7 *MUSLIM WORLD J. HUM. RTS.* 1 (2010) (discussing the compatibility of the mystical tradition of Sufism within Islam and human rights).

viduals.<sup>106</sup> The broad state sovereignty claims of Asian governments are undermined given the “increasing reach of international law and the participation of all countries in the international legal order.”<sup>107</sup> In addition, the Asian values debate assumes that culture is static, rather than varying from generation to generation.<sup>108</sup>

In contrast to cultural relativism is the universalist position, which consists of two main variants: extreme moral universalism and moderate moral universalism.<sup>109</sup> Extreme moral universalism is the concept that moral issues do not depend on culture or the views of any group or individual.<sup>110</sup> Moderate moral universalism holds that “culture is irrelevant to the correctness of some, but not necessarily all, issues.”<sup>111</sup> “Both variants underscore the importance of basic human rights that must be universally applied irrespective of cultural differences.”<sup>112</sup>

The universality of human rights must predominate. Rosalyn Higgins aptly summarized as follows:

Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practice their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial.<sup>113</sup>

To deny persons with mental disabilities these basic human rights on the basis of Asian values is an attempt to hide behind the mask of cultural relativism.<sup>114</sup>

106. Compare Peerenboom, *supra* note 99, at 39, with Ginsburg, *supra* note 52, at 868 (“[T]here is no region-wide notion of law as a superior regulatory device in East Asia.”).

107. See *id.* at 41.

108. See Tay, *supra* note 89, at 759.

109. See Peerenboom, *supra* note 99, at 12.

110. *Id.*

111. *Id.*

112. PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 2, at 179; see also Talal A. Al-Emadi & Maryam A. Asmakh, *Cultural Differences and Their Impact*, 5 CHINESE J. INT’L L. 807, 810 (2006) (“The analysis of the impact of culture should move beyond the relatively simplistic categorization of Eastern, Asian or Western countries.”).

113. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 97 (1994).

114. See generally Albert H.Y. Chen, *Pathways of Western Liberal Constitutional Development in Asia: A Comparative Study of Five Major Nations*, 8 INT’L J. CONST. L. 849 (2010) (discussing the role of western constitutionalism in Asia); Li-Ann Thio, *Soft Constitutional Law in Non-liberal Asian Constitutional Democracies*, 8 INT’L J. CONST. L. 766 (2010) (discussing the role of “soft” constitutional law); Desierto, *supra* note 59, at 273–74 (discussing how a turn to constitutionalism might positively affect “the trajectory of ASEAN’s institutional and normative development as a regional organization.”). For a recent, thoughtful piece rejecting the notion that there are Asian values demanding a separate intellectual property corpus

## IV. THE U.N. CONVENTION

Disability rights have taken center stage at the United Nations with the drafting and adoption of a binding international disability rights convention, the most significant historical development to date in the recognition of the human rights of persons with mental disabilities.<sup>115</sup> In late 2001, the U.N. General Assembly established an ad hoc committee “to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities . . . .”<sup>116</sup> The ad hoc committee drafted a document over the course of five years and eight sessions, and the U.N. General Assembly adopted the new CRPD in December 2006 and opened it for signature in March 2007.<sup>117</sup> It entered into force, and thus became legally binding on states parties, on May 3, 2008, thirty days after the twentieth ratification.<sup>118</sup> One of the hallmarks of the process that led to the publication of the CRPD was the participation of persons with disabilities and the clarion cry, “nothing about us, without us.”<sup>119</sup>

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of law, see Peter K. Yu, *Intellectual Property and Asian Values*, 16 MARQ. INTELL. PROP. L. REV. 101, 112–22 (2012).

115. On the singular role of this Convention, see, e.g., PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 2, at 143–58; Frédéric Mégret, *The Disabilities Convention: Toward a Holistic Concept of Rights*, 12 INT'L J. HUM. RTS. 261, 274–75 (2008); Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 494, 514–15 (2008) [hereinafter Mégret, *Disability Rights*]; Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, in MENTAL HEALTH AND HUMAN RIGHTS 94, 99–100 (Michael Dudley ed., forthcoming 2012) [hereinafter Perlin & Szeli, *Evolution and Contemporary Challenges*]; Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution, Challenges and the Promise of the New Convention*, in UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: MULTIDISCIPLINARY PERSPECTIVES 241, 248 (Jukka Kumpuvuori & Martin Scheninen eds., 2010) [hereinafter Perlin & Szeli, *Promise*]. On the impact of U.N. human rights treaties on domestic law generally, see Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483, 487–88 (2001) (noting that United Nations human rights treaties are most effective when treaty norms are spontaneously made out of domestic law).

116. G.A. Res. 56/168, ¶ 1, U.N. Doc. A/RES/56/168 (Feb. 26, 2002).

117. See G.A. Res. 61/106, ¶ 2, U.N. Doc. A/RES/61/106 (Jan. 24, 2007).

118. Press Release, Officer of the High Commission for Human Rights, With 20 Ratifications, Landmark Disability Treaty Set to Enter into Force on 3 May, U.N. Press Release HR/4941 (Apr. 3, 2008); see also Tara Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUM. RTS. BRIEF 37, 44 (2007); Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203 (2007). As of the time of the completion of this Article, 153 states have signed and 113 have ratified the Convention, while 90 countries have signed and 65 have ratified the Optional Protocol. See Work of the United Nations for People with Disabilities, U.N. ENABLE, <http://www.un.org/disabilities> (last visited June 5, 2012).

119. Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 4 n.15 (2008).

This has led commentators to conclude that 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.”<sup>120</sup>

The CRPD is the most revolutionary international human rights document applying to persons with disabilities ever created.<sup>121</sup> The CRPD furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most every aspect of life.<sup>122</sup> It firmly endorses a social model of disability in a clear and direct repudiation of the medical model that traditionally was part-and-parcel of mental disability law.<sup>123</sup> It furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most aspects of life. “The [CRPD] responds to traditional models and situates disability within a social model framework and sketches the full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities.”<sup>124</sup> It provides a framework for insuring that mental health laws “fully recognize the rights of those with mental illnesses.”<sup>125</sup>

The CRPD categorically affirms the social model of disability<sup>126</sup> by describing it as a condition arising from “interaction with various barriers [that] may hinder their full and effective participation

120. *Id.* at 4.

121. See Perlin & Szeli, *Evolution and Contemporary Challenges*, *supra* note 115, at 99; PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 2, at 3–21. See generally Michael L. Perlin, “A Change Is Gonna Come”: The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law, 29 N. ILL. U. L. REV. 483 (2009).

122. See Aaron Dhir, *Human Rights Treaty Drafting Through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 41 STAN. J. INT’L L. 181, 182 (2005).

123. See Perlin, “Abandoned Love”, *supra* note 70, at 139.

124. Janet E. Lord & Michael A. Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. INT’L L.J. 249, 256 (2009); see also Ronald McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections* (Sydney Law Sch., Research Paper No. 10/30, 2010), available at <http://ssrn.com/abstract=1563883>. For more on the social model framework, see Janet E. Lord et al., *Lessons from the Experience of U.N. Convention on the Rights of Persons with Disabilities: Addressing the Democratic Deficit in Global Health Governance*, 38 J.L. MED. & ETHICS 564 (2010); H. Archibald Kaiser, *Canadian Mental Health Law: The Slow Process of Redirecting the Ship of State*, 17 HEALTH L.J. 139 (2009).

125. Bernadette McSherry, *International Trends in Mental Health Laws: Introduction*, in INTERNATIONAL TRENDS IN MENTAL HEALTH LAWS 1, 8 (Bernadette McSherry ed., 2008).

126. See Lord et al., *supra* note 125, at 568; Kaiser, *supra* note 124, at 164; Perlin, “There Must Be Some Way Out of Here”, *supra* note 17, at 6–7; Michael L. Perlin, “There’s Voices in the Night Trying to Be Heard”: The Potential Impact of the Convention on the Rights of Persons with

in society on an equal basis with others” instead of inherent limitations,<sup>127</sup> re-conceptualizing mental health rights as disability rights,<sup>128</sup> and extending existing human rights law to take into account the specific rights experiences of persons with disabilities.<sup>129</sup> To this end, the CRPD calls for “respect for inherent dignity”<sup>130</sup> and “non-discrimination.”<sup>131</sup> Subsequent articles declare “freedom from torture or cruel, inhuman or degrading treatment or punishment,”<sup>132</sup> “freedom from exploitation, violence and abuse,”<sup>133</sup> and a right to protection of the “integrity of the person.”<sup>134</sup>

The CRPD is unique because it is the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities. It not only clarifies that states may not discriminate against persons with disabilities, but also sets out explicitly the many steps that states must take to create an enabling environment so that persons with disabilities can enjoy authentic equality in society.<sup>135</sup> One of the most critical issues in seeking to bring life to international human rights law in a mental disability law context is the right to adequate and dedicated counsel. The CRPD mandates that “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”<sup>136</sup> Elsewhere, the CRPD commands as follows:

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*Disabilities on Domestic Mental Disability Law, in* EVOLVING ISSUES IN DISCRIMINATION: SOCIAL SCIENCE AND LEGAL PERSPECTIVES 8 (R. Wiener ed., forthcoming 2012).

127. CRPD, *supra* note 1, pmb. (e), art. 1.

128. Phil Fennel, *Human Rights, Bioethics, and Mental Disorder*, 27 *MED. & L.* 95, 95 (2008).

129. Mégret, *Disability Rights*, *supra* note 115, at 268; see PERLIN, *WHEN THE SILENCED ARE HEARD*, *supra* note 2, at 143–58.

130. CRPD, *supra* note 1, art. 3(a).

131. *Id.* art. 3(b).

132. *Id.* art. 15.

133. *Id.* art. 16.

134. *Id.* art. 17.

135. On the changes that ratifying states need to make in their domestic involuntary civil commitment laws, see Bryan Y. Lee, *The U.N. Convention on the Rights of Persons with Disabilities and Its Impact upon Involuntary Civil Commitment of Individuals with Developmental Disabilities*, 44 *COLUM. J.L. & SOC. PROBS.* 393, 414–16 (2011); see also István Hoffman & György Kóncei, *Legal Regulations Related to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code*, 33 *LOV. L.A. INT'L & COMP. L. REV.* 143, 151 (2010) (discussing the application of the CRPD to capacity issues).

136. See Michael L. Perlin, *I Might Need a Good Lawyer, Could Be Your Funeral, My Trial: A Global Perspective on the Right to Counsel in Civil Commitment Cases, and Its Implications for Clinical Legal Education*, 28 *WASH. U. J.L. & POL'Y* 241, 252–53 (2008) [hereinafter Perlin, *I Might Need a Good Lawyer*] (citing CRPD, *supra* note 1, art. 12).

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.<sup>137</sup>

While this instrument purports to create binding obligations, it is important to remember that “[t]he extent to which this Article is honored in signatory nations will have a major impact on the extent to which this entire Convention affects persons with mental disabilities.”<sup>138</sup> If, and only if, there is a mechanism for the appointment of dedicated counsel<sup>139</sup> can this dream become a reality.

The ratification of the CRPD marks the most important development ever seen in institutional human rights law for persons with mental disabilities. The CRPD is the detailed, comprehensive, and integrated result of a careful drafting process. It seeks to reverse the results of centuries of oppressive behavior and attitudes that have stigmatized persons with disabilities.<sup>140</sup> Its goal is clear: to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms of all persons with disabilities, and to promote respect for their inherent dignity.<sup>141</sup> Whether this goal will actually be achieved is still far from settled.

## V. THE STRUCTURE OF THE DRTAP

If there is no tribunal to adjudicate cases of persons with disabilities in the Asia-Pacific region, it is exceedingly unlikely that individuals in that region will have a forum to which they can bring their grievances.<sup>142</sup> In such case, the CRPD will be little more than an

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137. CRPD, *supra* note 1, art. 13.

138. Perlin, *I Might Need a Good Lawyer*, *supra* note 136, at 253.

139. See generally Michael A. Stein et al., *Book Review: Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1663 (2010) (discussing the significance of “cause lawyers” in the development of mental disability law in the United States).

140. See, e.g., CRPD, *supra* note 1, pmbl. (k) (expressing concerns “that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world”); *id.* pmbl. (n) (recognizing “the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices”).

141. CRPD, *supra* note 1, art. 1.

142. By way of example, India and other parts of South Asia lack domestic review bodies for involuntary mental health admissions and lack either the psychiatrists or the mental health hospitals presumed as the basis for mental health laws, effectively rendering them almost worthless. See Terry Carney, *A Regional Disability Tribunal for Asia and the Pacific: Changing the Conversation to a “Conversation”?*, 7 INT’L J.L. CONTEXT 319, 319 n.2 (2011)



empty shell. This Section sketches out a preliminary blueprint for the DRTAP. The creation of a DRTAP would be a definite quantum leap in the quest for an Asian human rights mechanism, and would give meaning to the obligations created in the CRPD.

The Toyota Foundation funded the initial project to create a DRTAP, and the Tokyo Advocacy Law Office has directed the effort since it began in 2008.<sup>143</sup> From 2008 to 2009, project leaders researched domestic disability rights cases in which plaintiffs with disabilities were unsuccessful, and used these as a prism through which to examine the necessity and potential of a regional disability rights tribunal.<sup>144</sup> An international planning conference was held in Tokyo in July 2009, and regional meetings were held in Thailand, South Korea, and Australia in 2010.<sup>145</sup> Papers were presented on the need for a DRTAP at international conferences in Hong Kong, China, Denmark, Australia, New Zealand, and Taiwan in 2010-2011.<sup>146</sup> At the Korean meeting, participants decided that the tribunal should “launch” as a voluntary one and that, initially, it would be a sub-regional one to include the countries of the Pacific Rim, Oceania and Thailand.<sup>147</sup>

A Disability Rights Information Center for Asia and the Pacific (DRICAP) is developing a website collecting statutes, regulations, scholarly articles, advocacy news, and case law from selected Asian and Pacific nations.<sup>148</sup> The DRICAP will be housed at New York

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(citing A.K. Kala & Kunal Kala, *Mental Health Legislation in Developing Countries with Special Reference to South Asia: Problems and Solutions*, 8 GLOBAL SOC. POL'Y 308 (2008)). Only a few provisions of India's Persons with Disabilities Act expressly confer a right upon a person that can be vindicated before a court or before the Chief Commissioner. Byrnes, *supra* note 71, at 127-44; see also Catherine Renshaw et al., *Human Rights Protection in the Pacific: The Emerging Role of National Human Rights Institutions in the Region*, 8 N.Z. J. PUB. & INT'L L. 117, 133 (2010) (discussing the lack of adequate forums in the Pacific region).

143. See Perlin & Ikehara, *Creation of a Disability Rights Tribunal*, *supra* note 53, at 99; see also Perlin, *CRPD*, *supra* note 3; Perlin & Ikehara, *Promoting Social Change*, *supra* note 86; Perlin, *Why a Regional Tribunal Is Needed*, *supra* note 87; Ikehara, *supra* note 64.

144. See, e.g., Michael L. Perlin et al., *Online Mental Disability Law Education, a Disability Rights Tribunal, and the Creation of an Asian Disability Law Database: Their Impact on Research, Training and Teaching of Criminology and Criminal Justice in Asia* (Dec. 2011) (paper presented to third annual Asian Criminological Society conference, Taipei, Taiwan) (on file with author); see also Perlin & Ikehara, *Creation of a Disability Rights Tribunal*, *supra* note 53, at 2; Perlin, *supra* note 3, at 4-7; Perlin, *Why a Regional Tribunal Is Needed*, *supra* note 87, at 3-8; Perlin & Ikehara, *Promoting Social Change*, *supra* note 86.

145. Perlin & Ikehara, *Creation of a Disability Rights Tribunal*, *supra* note 53, at 3.

146. See, e.g., Michael L. Perlin, *Creation of a Disability Rights Tribunal for Asia and the Pacific: Its Impact on China?*, 5-6 (June 2010) (paper presented at the fifth annual European China Law Studies Association conference, Copenhagen, Denmark) (on file with author).

147. *Id.* at 2.

148. The website is currently under development and will be available at [www.disabilityrtsinfoAP.com](http://www.disabilityrtsinfoAP.com).

Law School and will be directed by New York Law School Adjunct Professor Heather Ellis Cucolo. Through the DRICAP, it is hoped, “lawyers and advocates throughout this region would have a virtual homeplace dedicated to these issues.”<sup>149</sup>

Although the structure of the tribunal is still inchoate, the incorporating documents will, at the very least, include sections covering the DRTAP’s general structure, judges, funding, the role of NGOs, reporting, and remedies.<sup>150</sup> Those tasked with the ultimate drafting of the incorporation documents will, of necessity, focus on a range of operational, logistical and instrument issues, including, but not limited to, the tribunal’s actual composition, its location, the rules of procedure and pleading to be employed,<sup>151</sup> the use of multiple languages, and the need to select one or more “official languages.” States will need to negotiate such fundamental terms as the DRTAP’s jurisdictional competency, parties’ voluntary participation, the composition of the DRTAP, and the number of states that will participate. Finally, to establish the DRTAP’s legitimacy, the body will need to coordinate with other international and regional human rights bodies and other Asian and Pacific regional bodies, maintain independence from national oversight, ensure accountability and respect to those who appear before it, and implement fair procedures.<sup>152</sup>

As to judges, the states that agree to be part of DRTAP must consider whether there should be seats set aside for citizens of certain nations and for individuals with disabilities, both mental and physical. Also, states parties will have to determine whether all judges will have to be lawyers, or might be non-lawyer advocates. Judges will need to be well-respected, autonomous from political interference, and have a demonstrated expertise in disability law.<sup>153</sup>

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149. Michael L. Perlin, *Online, Distance Legal Education as an Agent of Social Change*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 95, 105–06 (2011). Professor Cucolo has worked with the author and Mr. Ikehara on earlier stages of the DRTAP project. See Perlin et al., *supra* note 144, at 3.

150. See generally Naomi Weinstein, *Establishing the Disability Rights Tribunal for Asia and the Pacific* 24–41 (unpublished paper) (on file with author) (describing the issues and concerns that must be considered when establishing a structure for the DRTAP).

151. On the significance of procedural rules in Asian legal reform, see Yuka Kaneko, *A Procedural Approach to Judicial Reform in Asia: Implications from Japanese Involvement in Vietnam*, 23 COLUM. J. ASIAN L. 313 (2010).

152. There must also be protocols focusing on the relationship between nations that have signed the CRPD and those that have not.

153. Along with the question of selection of judges, it is also necessary to consider the role of lawyers appearing before the DRTAP (who will be court-appointed if the client is indigent), and how these lawyers will be trained in disability law so as to be effective advo-

It is expected that some funds will come from the United Nations and others from voluntary contributions.<sup>154</sup> Charter negotiators will need to determine whether non-governmental organizations will be able to bring claims before the tribunal, request advisory opinions, and file amicus briefs in litigation.<sup>155</sup> They will also need to consider how DRTAP decisions will be reported, and how best to insure free access to decisions online.<sup>156</sup> Finally, the entire question of remedies needs to be considered, specifically addressing the sort of sanctions that will be available, how will compliance be enforced, and what role alternative dispute resolutions methods might play.<sup>157</sup>

This proposal raises many related, still unresolved issues. Some of the most contentious will most likely be:

- What will be the impact of voluntary participation on the ultimate success of such a tribunal?<sup>158</sup>
- Will the judges be independent or representative of their respective countries?<sup>159</sup>
- How will the tribunal be funded?<sup>160</sup>

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cates. See *infra* Part VII. See generally Perlin, *I Might Need a Good Lawyer*, *supra* note 136 (examining the development of effective representation for persons with mental disabilities facing civil confinement).

154. See, e.g., Peter G. Fischer, *The Victims' Trust Fund of the International Criminal Court – Formation of a Functional Reparations Scheme*, 17 EMORY INT'L L. REV. 187, 202 (2003) (noting that contributions to the International Criminal Court are supplied by governments, non-governmental organizations, corporations, and private individuals).

155. To avoid the appearance of conflict, it is recommended that NGOs will not have dedicated seats as judges on DRTAP.

156. See Hester Swift, *Product Review: ILR on Justis*, 11 LEGAL INFO. MGMT. 146, 146 (2011) (discussing how *International Law Reports* (ILR) is “often described as the only publication wholly devoted to the reporting in English of decisions of international courts and tribunals as well as decisions by national courts on matters of international law”); Fischer, *supra* note 154 (discussing Oxford Reports on International Law, an online service).

157. Professor Carole Petersen has urged the inclusion of a mediation mechanism in DRTAP in an article about the CRPD's mandate for a right to inclusive education. See Carole Petersen, *Inclusive Education and Conflict Resolution: Building a Model to Implement Article 24 of the Convention on the Rights of Persons with Disabilities in the Asia Pacific*, 40 H.K. L.J. 481, 511 (2010) (“[G]iven the historic reluctance of governments in the Asia Pacific to create a regional mechanism with enforcement powers, it might be wise to include a voluntary mediation program under the auspices of the proposed tribunal.”); see also Vicki Waye & Ping Xiong, *The Relationship Between Mediation and Judicial Proceedings in China*, 6 ASIAN J. COMP. L. 1 (2011) (examining mediation in a Chinese context).

158. See, e.g., Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 24–31 (2006).

159. See, e.g., Gilbert Guillaume, *Some Thoughts on the Independence of International Judges Vis-à-Vis States*, 2 L. & PRAC. INT'L CTS. & TRIBUNALS 163, 163–66 (2003).

160. See, e.g., Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INT'L L. & POL. 1014, 1024–26 (2009).

- How many nations will be involved, both initially and in the long term?<sup>161</sup>
- Will the tribunal's jurisdiction extend to private and public cases?<sup>162</sup>
- Will there be co-ordination with other international bodies?<sup>163</sup>
- Will there be coordination with other Asian/Pacific tribunals?<sup>164</sup>
- What will the relationship be between those nations that have signed the CRPD and those that have not?<sup>165</sup>
- What will the standing be of NGOs before the tribunal?<sup>166</sup>
- What is the expected scope of the remedies available to the tribunal?<sup>167</sup>
- Will there be a difference in the way such a tribunal would operate in monist and dualist nations?<sup>168</sup>
- Will there be a difference in cases involving nations that have common law and civil law traditions?<sup>169</sup>
- What sanctions will be available if a defendant refuses to comply?<sup>170</sup>
- How will counsel be appointed?<sup>171</sup>

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161. See Perlin et al., *supra* note 144, at 3–5.

162. See, e.g., Martin A. Geer, *Foreigners in Their Own Land: Cultural Land and Transnational Corporations – Emergent International Rights and Wrongs*, 38 VA. J. INT'L L. 331, 336 (1998).

163. See, e.g., Antonio Augusto Cançado Trindade, *The Merits of Coordination of International Courts on Human Rights*, 2 J. INT'L CRIM. JUST. 309, 309–11 (2004).

164. See, e.g., Beatriz Garcia, *Exercising a Community of Interests: A Comparison Between the Mekong and the Amazon Legal Regimes*, 39 H.K. L.J. 421 (2009).

165. See *supra* note 118.

166. See, e.g., Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 340 (1996); Lloyd Hitoshi Mayer, *NGO Standing and Influence in Regional Human Rights Courts and Commissions*, 36 BROOK. J. INT'L L. 911 (2011); Steve Charnovitz, *The Illegitimacy of Preventing NGO Participation*, 36 BROOK. J. INT'L L. 891, 892–96 (2011); Dana Brakman Reiser & Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 BROOK. J. INT'L L. 1011, 1033–40 (2011).

167. See, e.g., Sonja Starr, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693 (2008); Ellen Fasoli, *Declaratory Judgments and Official Apologies as Forms of Reparation for the Non-Material Damage Suffered by the State: The Djibouti-France Case*, 7 L. & PRAC. INT'L CTS. & TRIBUNALS 177 (2008).

168. See, e.g., Ernst-Ulrich Petersmann, *Judging Judges: From “Principal-Agent Theory” to “Constitutional Justice” in Multilevel “Judicial Governance” of Economic Cooperation Among Citizens*, 11 J. INT'L ECON. L. 827, 871 (2008).

169. See, e.g., Anna Gardella & Luca Radicati di Brozolo, *Civil Law, Common Law and Market Integration: EC Approach to Conflicts of Jurisdiction*, 51 AM. J. COMP. L. 611 (2003)

170. See, e.g., Anna Spain, *Using International Dispute Resolution to Address the Compliance Question in International Law*, 40 GEO. J. INT'L L. 807 (2009).

171. See generally PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 2, at 196–98. As part of their classwork, students in the author's Project-Based Learning course at New York Law School (“The Creation of a Disability Rights Tribunal for Asia and the Pacific”) prepared a set of “white papers” on many of the topics listed in *supra* notes 158–171.

The existence of these issues should in no way be read to suggest that the creation of the DRTAP is an impossible or quixotic undertaking. These outstanding questions merely reflect the amount of careful work that needs to be done as this plan moves ahead.

## VI. A QUESTION OF TIMING

No longer can we delay actions geared toward the investigation of human rights abuses and the protection of human rights. A recent law review article urging the creation of a Southeast Asian Court of Human Rights concluded that “[i]t is about time that the region moved ahead and acted towards that goal.”<sup>172</sup> All of the credible evidence supports this position.<sup>173</sup> In the absence of a consensus and political support for the creation of such a court to adjudicate *all* human rights matters in Asia, activists, and advocates have begun work on efforts to create a court focused on the sole subtopic of disability rights, a DRTAP.<sup>174</sup> For multiple reasons, the creation of a DRTAP would be the single best way to insure that the CRPD is given authentic and sustainable life in Asia.<sup>175</sup>

First, experiences in other regions show that similarly situated courts and commissions have been powerful forces in mandating the practical implementation of other U.N. conventions and “soft law.”<sup>176</sup> It defies credulity to suggest that the high courts of Ecuador or Gambia would have decided the *Congo* or *Purohit* cases the way that the interregional bodies decided them.<sup>177</sup>

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172. Hao Duy Phan, *A Blueprint for a Southeast Asian Court of Human Rights*, 10 *ASIAN-PAC. L. & POL'Y J.* 384, 431 (2009).

173. For a range of ongoing human rights abuses in this region, see, e.g., *NGO Statement on Country Specific Human Rights Defenders to Fourteenth Asia Pacific Forum*, 10 *ASIA-PAC. J. HUM. RTS. & L.* 97 (2009).

174. See Perlin & Ikehara, *Promoting Social Change*, *supra* note 86; see also Perlin, *Why a Regional Tribunal Is Needed*, *supra* note 87; Ikehara, *supra* note 64.

175. For an example of how domestic laws in just one area of disability law (involuntary civil commitment) globally fall short of the mandates of the CRPD, see Lee, *supra* note 135.

176. Soft law includes those norms that: (1) have been articulated in non-binding form; (2) contain vague and imprecise terms; (3) emanate from bodies lacking international lawmaking authority; (4) are directed at non-state actors whose practice cannot constitute customary international law; (5) lack any corresponding theory of responsibility; or (6) are based solely upon voluntary adherence. Christine Chinkin, *Normative Development in the International Legal System*, in *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM* 21, 30 (Dinah Shelton ed., 2000); see also Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 *B.C. L. REV.* 1147, 1147 (2011) (discussing differences between hard law and soft law in another political context).

177. See *supra* Part II.B.

Second, scholars who believe in the universality of human rights—and who recognize the false consciousness of the specious Asian values arguments that seek to reject that universality—understand that a DRTAP will be the most effective means of enforcing human rights in Asia. This is because a tribunal that spans multiple nations in diverse geographic regions, with diverse populations comprised of diverse ethnicities, races, religions, and cultures will be better able to decide cases without regard for cultural biases that may exist in domestic fora.<sup>178</sup>

Third, the *language* of the CRPD—specifically invocation of a social model and the repudiation of a medical model, the empowering of people with disabilities to be the masters of their own fates, and the focus on dignity and non-discrimination<sup>179</sup>—tells us that the time is especially right for such a tribunal. The African Charter calls for a pledge to achieve a better life for Africans by recognizing that human rights stem from attitudes of human beings and implying duties on the part of everyone.<sup>180</sup> In the same way, a DRTAP would similarly highlight and underscore necessary principles in the achievement of human rights in Asia and the Pacific. Similar to the European Convention aim of “securing the universal and effective recognition and observance of the Rights therein declared,”<sup>181</sup> the DRTAP would seek universal human rights. A DRTAP would recognize, just as has the Inter-American Convention, the following:

the essential rights of man are not derived from nationality in a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states.<sup>182</sup>

Fourth, without establishing a DRTAP, severe violations of human rights for persons with mental disabilities will continue to occur in the states, due to local inability and lack of opportunity to enforce human rights and address ongoing rights violations.<sup>183</sup>

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178. See *supra* Part III.

179. See *supra* Part IV.

180. African Charter, *supra* note 6, pmbl.; see also Ben Kiromba Twinomugisha, *The Role of the Judiciary in the Promotion of Democracy in Uganda*, 9 AFR. HUM. RTS. J. 1 (2009) (discussing the role of a national judiciary in Africa in the promotion of human rights through judicial review).

181. European Convention, *supra* note 44, pmbl.

182. American Convention, *supra* note 5, pmbl.

183. See PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 2, at 81–102 (discussing the pervasiveness of the violations in question); see also Perlin, *The Universal Factors*, *supra* note

Fifth and finally, from a perspective of economics, the timing is right for creation of a DRATAP. If CRPD-signatory nations such as China and Thailand emerge as economic and progressive leaders, they must mirror other major nations in other regions of the world and demonstrate their commitment to human rights as other major nations around the world have.<sup>184</sup> One significant and compelling way would be to support the establishment of the DRTAP as a means of fostering and promoting better international relations.<sup>185</sup>

## VII. ROLE OF COUNSEL

If this DRTAP is to have authentic value and lead to meaningful and ameliorative change, there must be a mechanism for the appointment of dedicated, knowledgeable counsel to litigants.<sup>186</sup> There is no question that one of the most critical aspects of law reform is the presence of dedicated and knowledgeable counsel.<sup>187</sup> But for adequate counsel, no judicial system can work effectively to protect human rights for a person when his or her human rights are infringed.<sup>188</sup> Because of their historically determined and uni-

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2, at 333; Michael L. Perlin, *Chimes of Freedom: International Human Rights and Institutional Mental Disability Law*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 423, 427 (2002).

184. See, e.g., Katie Lee, *China and the International Covenant on Civil and Political Rights: Prospects and Challenges*, 6 CHINESE J. INT'L L. 445, 452 (2007); Jacques de Lisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 481-82 (2002); see also Tomuschat, *supra* note 87, at 228 ("Some of the discrepancies that have arisen in the field of human rights [in China] are hardly concealed by the actors involved."). On the state of human rights in Thailand, see, e.g., Heather Montgomery, *Defining Child Trafficking & Child Prostitution: The Case of Thailand*, 9 SEATTLE J. SOC. JUST. 775, 804 (2011).

185. See, e.g., ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES (Tom Ginsburg & Albert H.Y. Chen eds., 2009) (examining the role of courts in social development throughout Southeast Asia and the Pacific Rim).

186. See generally MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL §§ 2B-1 to -15 (2d ed. 1998) (discussing the appointment of counsel to persons with mental disabilities in the United States).

187. See Perlin, "A Change Is Gonna Come", *supra* note 121, at 496.

188. See SUE FARRAN, HUMAN RIGHTS IN THE SOUTH PACIFIC: CHALLENGES AND CHANGES 243-46 (2009). Professor Terry Carney has taken issue with this position, concluding that he would "put [more] lawyers last on the 'wish list' of needed reforms." Carney, *supra* note 142, at 325. This author disagrees with him profoundly, based on forty years of evidence from the United States. See PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 2, at 45-46; PERLIN ET AL., *supra* note 7, at 13-227. Without such counsel, any long-lasting efforts at ameliorative reform are doomed to failure. See generally Perlin, *I Might Need a Good Lawyer*, *supra* note 136. Carney recommends that the creation of a tribunal such as DRTAP be "delayed until after an adequate body of more diffuse conversations has taken place between governments, non-governmental organisations and civil society" as a "governance-based approach." Carney, *supra* note 142, at 329. This position is counter-productive, and no matter how well intentioned, is likely to lead to decades more of disempowerment for

versally perceived powerlessness and vulnerability, persons with disabilities necessarily require adequate counsel to protect and realize their rights.<sup>189</sup> This makes the issue in question all the more critical in a disability rights tribunal context.<sup>190</sup>

One of the reasons this is especially important in this area of the law and policy is the omnipresence of “sanism.”<sup>191</sup> Sanism is an irrational prejudice of the same quality and character of other irrational prejudices that cause, and are reflected in, prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry.<sup>192</sup> It permeates mental disability law, affecting all participants in the mental disability law system: litigants, fact-finders, counsel, and expert and lay witnesses. Its corrosive effects have warped mental disability law jurisprudence both domestically and internationally.<sup>193</sup>

Sanism—closely entwined with pretextuality<sup>194</sup>—has controlled, and continues to control, modern mental disability law. Just as importantly, these concepts continue to exert this control invisibly. This invisibility means that the most important aspects of mental disability law—not just the law “on the books,” but, more importantly, the law in action and practice—remains hidden from the public discussions about mental disability law.<sup>195</sup> Dedicated,

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persons with disabilities in this region, and the continuation of the sort of social “stigma, denial of human dignity, and neglect” that he so aptly decries. *See id.*

189. *See* Michael L. Perlin, *For the Misdemeanor Outlaw: The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 219 (2000) (discussing how persons with mental disabilities have always been relegated to a position of political powerlessness).

190. *See* PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 2, at 45–46.

191. Michael L. Perlin, “Everybody Is Making Love/Or Else Expecting Rain”: *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 U. WASH. L. REV. 481, 506 (2008).

192. *Id.* at 486.

193. *Id.* at 487.

194. *See* Michael L. Perlin, “Half-Wracked Prejudice Leaped Forth”: *Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 18 (1999). This article states as follows:

The pretexts of the forensic mental health system are reflected both in the testimony of forensic experts and in the decisions of legislators and fact-finders. Experts frequently testify in accordance with their own self-referential concepts of “morality” and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment or that articulate functional standards as prerequisites for an incompetency to stand trial finding. Often this testimony is further warped by a heuristic bias. Expert witnesses—like the rest of us—succumb to the seductive allure of simplifying cognitive devices in their thinking, and employ such heuristic gambits as the vividness effect or attribution theory in their testimony. *Id.*

195. *See* MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL 148–58 (2000).



trained, and knowledgeable lawyers are needed to combat the contamination thus caused by sanism.<sup>196</sup>

Public interest litigation in other aspects of substantive law has had a transformative impact as an “effective tool for the enforcement of fundamental rights, as well as for creating a legal and social environment in which justice could be made available to [the marginalized].”<sup>197</sup> In the context of a regional human rights tribunal, such litigation is also more likely to “translate into substantive improvements in the lives not only of petitioners to their systems, but of the far larger universe of individuals who will never see the inside of a supranational court.”<sup>198</sup> Litigation such as the sort that would be brought before the DRTAP requires dedicated counsel, a circumstance that is rare at an international level in cases involving disability rights; without such counsel, it is likely that the CRPD will be no more than a “paper victory” for persons with disabilities in Asian nations.<sup>199</sup>

Globally, there is little good news. In many nations, there is no mental health law at all.<sup>200</sup> In others, there is simply no provision for counsel. In others, counsel appears to be present in name only, what is referred to disparagingly in the literature as the “warm body” problem.<sup>201</sup> In only a few instances does counsel appear to

196. See Perlin & Szeli, *Evolution and Contemporary Challenges*, *supra* note 115; Perlin & Szeli, *Promise*, *supra* note 115, at 246.

197. M. Amir-Ul Islam, *Public Interest Litigation: Experiences in South Asia: (Rights in Search of Remedies)*, 7 INT'L REV. CONSTITUTIONALISM 129, 142 (2007); see also Christine M. Forster & Vedna Jivan, *Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience*, 3 ASIAN J. COMP. L. 1 (2008).

198. James L. Cavallaro & Stephanie E. Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 770 (2008). For an example of such litigation, see *supra* text accompanying notes 37–42, discussing the impact of the litigation brought in Paraguay against the state-run Neuro-Psychiatric Hospital.

199. See, e.g., Perlin, “*A Change Is Gonna Come*”, *supra* note 121, at 490–91; Michael L. Perlin, “*What's Good is Bad, What's Bad is Good, You'll Find Out When You Reach the Top You're on the Bottom*”: *Are the Americans with Disabilities Act (and Olmstead v. L.C.) Anything More Than “Idiot Wind?”*, 35 U. MICH. J.L. REFORM 235, 246 (2002) (“Mental disability law is strewn with examples of ‘paper victories.’”) (quoting Michael Lottman, *Paper Victories and Hard Realities*, in *PAPER VICTORIES AND HARD REALITIES: THE IMPLEMENTATION OF THE LEGAL AND CONSTITUTIONAL RIGHTS OF THE MENTALLY DISABLED* 93 (Valeric J. Bradley & Gary J. Clarke eds., 1976)).

200. See Perlin, *CRPD*, *supra* note 3, at 18–19.

201. See Katey Thom, “*Balancing Individual Rights with Public Safety*”: *The Decision-Making of the Mental Health Review Tribunal in New Zealand* (June 2011) (paper presented to the International Academy of Law and Mental Health annual Congress, Berlin, Germany, June, 2011) (on file with author) [hereinafter Thom, *Balancing*] (noting that 6.3% of patients were released at “contested hearings” between 2003 and 2010); see also Katey Thom, *Individual Rights vs. State Obligations: Striking a Balance in Appeals Before the Mental*

be doing a remotely adequate job.<sup>202</sup> Katey Thom summarizes the literature as follows:

- *Tribunals conduct 'back to front' decision-making.* Members firstly determine the outcome they prefer and then select the evidence to accord with this view.<sup>203</sup>
- *Extra-legal factors play a big part in decision-making.* For example, Hepworth found that judgments were frequently based on subjective feelings and intuition about the patient.<sup>204</sup>
- *Tribunals have also been seen to be merely 'rubber-stamping' medical opinions.* Decisions are based on the treating clinician's perception of what the patient needs, rather than strict application of legal tests.<sup>205</sup>
- *It follows that in the 'rubber stamping' context, the source rather than content of evidence becomes the best predictor of outcome for the applicant.*<sup>206</sup>

Although there is a right to counsel in India, no such right exists in many other Asian nations, including Afghanistan, China, Indonesia, Pakistan, South Korea, Sri Lanka, Thailand, and Vietnam.<sup>207</sup> The lack of provision of counsel in litigation to enforce disability rights is troubling for many reasons, not the least of which is that, without the availability of such counsel, it has been “virtually impossible” to imagine the existence of the bodies of involuntary civil commitment law, right to treatment law, right to refuse treatment law, or any aspect of forensic mental disability law that are now taken for granted in the United States. Without the presence of

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*Health Review Tribunal* (May 2011) (paper presented to the Mental Health and Social Justice Symposium, Auckland, New Zealand) (on file with author); Abbe Smith, *Carrying on in Criminal Court: When Criminal Defense Is Not So Sexy and Other Grievances*, 1 CLINICAL L. REV. 723, 735 (1995) (“The right to counsel is not just about having a warm body, any warm body stand beside a criminal defendant.”).

202. Israel is one non-Western nation that provides counsel in such cases, and in which counsel appears to have some significant success. See Arie Bauer et al., *Regional Psychiatric Boards in Israel: Expectations and Realities*, 28 INT'L J.L. & PSYCHIATRY 661, 668 (2005) (“[I]t seems advisable that all persons hospitalized compulsorily . . . be legally represented at [Regional Psychiatric Board] hearings, in order to ensure the greatest possible protection for their rights, first and foremost their liberty.”). Bauer works for the Forensic Psychiatry Unit of the Mental Health Services Division of the Israel Ministry of Mental Health. See Arie Bauer, *Trends in Involuntary Psychiatric Hospitalization in Israel 1991-2000*, 30 INT'L J.L. & PSYCHIATRY 60, 67 (2007) (speculating that amendment to national mental health law providing for counsel in all RPB proceedings “will bring about a diminution in the number of involuntary hospitalizations”).

203. Thom, *Balancing*, *supra* note 201, at 3 (citations omitted).

204. D. Hepworth, *The Decision-Process of the Mental-Health Review Tribunal: Analysis of Research Findings*, 23 MED. SCI. & L. 171, 172 (1983).

205. Thom, *Balancing*, *supra* note 201, at 3.

206. *Id.*

207. Perlin, *I Might Need a Good Lawyer*, *supra* note 136, at 251.

counsel, legal reforms, particularly in nations with developing economies, “will all too often be a hollow shell.”<sup>208</sup>

The CRPD mandates that “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”<sup>209</sup> The CRPD further commands that “States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others . . . in all legal proceedings . . . including at investigative and other preliminary stages.”<sup>210</sup> These provisions underscore the crucial importance of dedicated counsel and make mandatory the appointment of such counsel. The presence of counsel is the lynchpin to authentic change in this area of the law.<sup>211</sup> A regional human rights tribunal must therefore provide adequate counsel to help persons with disabilities to file, present, and argue cases.<sup>212</sup> “The extent to which this Article is honored in signatory nations will have a major impact on the extent to which this entire Convention affects persons with mental disabilities.”<sup>213</sup> If, and only if, there is a mechanism for the appointment of dedicated counsel, can the dreams generated by the CRPD become a reality.<sup>214</sup>

208. *Id.* at 250–52 (quoting Stephen Golub, *The Importance of Legal Aid in Legal Reform, in ACCESS TO JUSTICE IN AFRICA AND BEYOND: MAKING THE RULE OF LAW A REALITY* xv, xviii (Penal Reform Int'l & Bluhm Legal Clinic eds., 2007) [hereinafter *JUSTICE IN AFRICA*]).

209. CRPD, *supra* note 1, art. 12, § 3.

210. *Id.* art. 13, § 1.

211. On how online education can serve as an engine for social change in the context of international human rights law, see Michael L. Perlin, *Ain't No Goin' Back: Teaching Mental Disability Law Courses on Line*, 51 N.Y.L. SCH. L. REV. 991 (2006); Michael L. Perlin, *An Internet-based Mental Disability Law Program: Implications for Social Change in Nations with Developing Economies*, 40 FORDHAM INT'L L.J. 435 (2007). It is essential that cadres of trained lawyers be created if there is to be meaningful representation before the DRTAP; online education offers the promise of an economic and efficient way of providing this level of high-quality legal training. See Perlin, *CRDP*, *supra* note 3, at 23. On legal education in Asia in general, see LEGAL EDUCATION IN ASIA: GLOBALIZATION, CHANGE AND CONTEXTS (Stacey Steele & Kathryn Taylor, eds., 2010). On the globalization of public interest law in general, see Richard L. Abel, *The Globalization of Public Interest Law*, 13 UCLA J. INT'L L. & FOREIGN AFF. 295 (2008).

212. See generally Perlin, *I Might Need a Good Lawyer*, *supra* note 136 (discussing the right to counsel in the context of the need for adequate counsel).

213. *Id.* at 253.

214. Although the common assumption is that Asian citizens, especially those with a Confucianist background, prefer “a conciliatory approach to the settlement of disputes,” Bobby K. Y. Wong, *Traditional Chinese Philosophy and Dispute Resolution*, 30 H.K.L.J. 304, 304 (2000), this conclusion has been sharply questioned in an empirical study that concludes “there is nothing immoral in turning to a more coercive forum,” Carole J. Petersen, *A Progressive Law with Weak Enforcement? An Empirical Study of Hong Kong's Disability Law*, 25 DISABILITY STUD. Q. 1, 12 (2005); see also Junwu Pan, *Chinese Philosophy and International Law*, 1 ASIAN J. INT'L L. 233 (2011) (discussing Chinese philosophy and international law).

Law schools must commit themselves to the creation of clinical programs assigned to train lawyers to provide legal representation to indigent persons facing involuntary civil commitment.<sup>215</sup> Regarding the risks of improperly trained attorneys, the author has previously written the following:

In the civil commitment context, any sanism-inspired blunders by lawyers can easily be fatal to the client's chance of success. If a lawyer rejects the notion that his client may be competent (indeed, if s/he engages in the not-atypical "presumption of incompetency" that is all too often de rigeur in these cases), the chances are far slimmer that s/he will advocate for such a client in the way that lawyers have been taught—or at the least, should be taught—to advocate for their clients. In nations with no traditions of an "expanded due process model" in cases involving persons subject to commitment to psychiatric institutions or those already institutionalized, a lawyer's sanism can be fatal to his client's chance for release or for a judicial order mandating amelioration of conditions of confinement, or access to or freedom from treatment.<sup>216</sup>

The creation and international dissemination and proliferation of clinical programs to train law students in these issues<sup>217</sup> would be the best way to prevent such "sanist-inspired blunders." In their thorough and thoughtful analysis of the treatment of mental disability issues under the European Convention, Peter Bartlett and his colleagues lay down the gauntlet: the challenge of the next twenty-five years will be "to breathe life into Convention provisions as they apply to [persons with mental disabilities] and to press for full implementation of the standards that are won through litigation and political advances."<sup>218</sup> The provision of competent and knowledgeable counsel is the best means of "breath[ing] this "life" into the CRPD, especially in Asia.

The creation of a DRTAP is also consonant with the aims of therapeutic jurisprudence (TJ). One of the most important legal theo-

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215. See PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 2, at 104–11.

216. Perlin, *I Might Need a Good Lawyer*, *supra* note 136, at 262.

217. See PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 2, at 104–11. On the need for the creation of clinical programs as a part of a comprehensive human rights legal education that would best prepare students to focus on global justice issues when they enter law practice, see Perlin, *I Might Need a Good Lawyer*, *supra* note 136, at 258; Roy T. Stuckey, *Preparing Students to Practice Law: A Global Problem in Need of Global Solutions*, 43 S. TEX. L. REV. 649, 652–53 (2002); Philip Iya, *Enhancing the Teaching of Human Rights in African Universities: What Role for Law School Clinics?*, 7 INT'L J. CLINICAL LEGAL EDUC. 20 (2005); David McQuoid-Mason, *The Supply Side: The Role of Lawyers in the Provision of Legal Aid – Some Lessons from South Africa*, in JUSTICE IN AFRICA, *supra* note 208, at 97.

218. PETER BARTLETT ET AL., MENTAL DISABILITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 28 (2007).

retical developments of the past two decades has been the creation and dynamic growth of TJ.<sup>219</sup> Initially employed in cases involving individuals with mental disabilities, but subsequently expanded far beyond that narrow area,<sup>220</sup> TJ presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti-therapeutic consequences. The ultimate aim of TJ is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.<sup>221</sup>

The CRPD is a document that resonates with TJ values. It reflects the three core TJ principles of “voice, validation and voluntary participation” articulated by Professor Amy Ronner,<sup>222</sup> and it “look[s] at law as it actually impacts people’s lives.”<sup>223</sup> Each section of the CRPD empowers persons with mental disabilities, and one of the major aims of TJ is explicitly the empowerment of those whose lives are regulated by the legal system.<sup>224</sup> Dedicated counsel would

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219. See PERLIN, WHEN THE SILENCED ARE HEARD, *supra* note 2, at 203–18.

220. See, e.g., Michael L. Perlin, *Things Have Changed: Looking at Non-Institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 544–45 (2002–03) (discussing application of therapeutic jurisprudence (TJ) to such areas as contracts law, tort law, gay rights law, mediation, and preventive law).

221. See, e.g., DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008); Michael L. Perlin, “You Have Discussed Lepers and Crooks”: *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683 (2003); Michael L. Perlin, “My Best Friend, My Doctor, Won’t Even Say What It Is I’ve Got”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735 (2005). For a transnational perspective, see Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, in DISPUTES AND DILEMMAS IN HEALTH LAW 91 (Ian R. Freckelton & Kerry Anne Peterson eds., 2006). On the potential use of TJ in the resolution of matters arising from the CRPD, see PERLIN, *supra* note 2, at 203–28. On the relationship between TJ and the practice of mental disability law in central and eastern Europe, see Winick, *supra* note 50. On the need for human rights scholarship to embrace social science insights, see Ryan Goodman et al., *Social Science and Human Rights*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS (Ryan Goodman et al. eds., forthcoming 2012).

222. See Amy Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 93–96 (2002).

223. Bruce Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

224. See Michael L. Perlin, *Understanding the Intersection Between International Human Rights and Mental Disability Law: The Role of Dignity* 8 (Dec. 2011) (paper presented to the annual meeting of the Human Dignity and Humiliation Studies Network, New York City) (on file with author).

best be able to infuse DRTAP proceedings with a therapeutic jurisprudence perspective.<sup>225</sup>

### VIII. CONCLUSION

The CRPD is, potentially, the single most transformative legal initiative ever created to protect the rights of persons with disabilities, especially mental disabilities. Under current conditions, however, it is unlikely that it will have any significant impact on this population in Asia and the Pacific because of the lack of a regional court or commission in that area. The creation of a disability rights tribunal for that region offers the most likely redemptive solution to this dilemma. Yet, the desired impact will not flow from the creation of the DRTAP alone; it must include a coherent means of providing trained lawyers, specifically educated in mental disability law, to represent persons with disabilities who appear as parties before the DRTAP. It is only through the provision of vigorous and dedicated advocacy that the CRPD's promise can be fulfilled. DRTAP—in conjunction with the expansion of law-student training—is the best way of achieving that promise.

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225. See Perlin, "There Must Be Some Way Out of Here", *supra* note 17, at 21–25.

