

UN Convention on the Rights of Persons with Disabilities: What is this 'New Paradigm'?

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What is this 'New Paradigm'?

[F]or 650 million persons around the world living with disabilities, today promises to be the dawn of a new era -- an era in which disabled people will no longer have to endure the discriminatory practices and attitudes that have been permitted to prevail for all too long. [Kofi Annan, 2006]

The CRPD arrived with the promise of change. A 'paradigm shift' was meant to bring about a new world for people with disabilities, including people with mental disabilities.

For people with mental disabilities, the case for change is overwhelming. Detention and forced treatment happen for reasons that would be indefensible for other people (if reasons beyond a medical diagnosis are actually insisted on at all). Standards of accommodation and treatment are risible. Employment rates and standards of living are dismal. In many countries, community living exists neither as a practical reality nor even as an ideal. Social alienation is pervasive, and political marginalization routine. Law provides the forms in which these and so many other difficulties thrive and perpetuates the stigma that politically allows them to continue. It also frequently furthers the injustice by denying people with mental disabilities access to the justice system.

If things need to be fixed, it is fair to surmise that the politico-legal model we have been dealing with since at least the second world war (and arguably since the enlightenment) is not up to the job. Considerable efforts have been made for decades through this model to change the situation of people with mental disabilities; but we have not seen the required changes to problems such as those noted above that would provide people with mental disabilities with the life choices we all want to see. A cry for the continuation of the old approaches with enhanced vigor is thus unconvincing: it is not as though they have not been tried.

The CRPD therefore promises us a 'paradigm shift'. While this is routinely touted as the key to what the CRPD is about, there is a lot less structured debate as to what the new paradigm is: there seem to be a lot of abstract nouns in the discussion ('dignity' and 'autonomy', for example). It is not always obvious that they involve a 'new' paradigm. We read a lot that the new paradigm is about human rights and non-discrimination for example, but these are equally 'old' paradigm concepts: at least on the face of the international documents, human rights and non-discrimination have been at the core of social policy relating to mental disability for decades. What is it that makes them 'new' now, particularly when we are assured that the CRPD offers no 'new' rights, but merely gives substance to existing rights? The CRPD Committee is also being extremely diligent in providing general comments and interpretive

statements as to Convention implementation (six general comments and twelve statements in the last four years). Presumably these are meant to progress the new paradigm – but absent a clear statement of what the paradigm is, it is not clear how: what is this future we are building towards?

That raises the first set of questions: what does the ‘new paradigm’ actually mean? Does it have something that binds it together, or is it really a collection of piecemeal implementations of individual CRPD articles? If the latter, does that limit what we will attain, since it does not mean a clear break with the approaches of the past that have not been successful? If the former, does that limit what we can attain, given the difficulties of ‘big bang’ approaches in states with minimal political enthusiasm for change?

How do we Implement the ‘New Paradigm’?

If we are actually talking about a ‘paradigm shift’, how do we implement that?

This question can be explored conceptually or practically. Conceptually, a new paradigm means that we are trying to do something fundamentally new. It is difficult to see how that can successfully be bolted onto the forms of law and social organization that have existed for decades or in some cases centuries. Criminal law provides a clear example of this: it is all well and good to say (perhaps quite rightly) that there are profound conceptual and practical problems with rules regarding fitness to plead and defenses based on mental disability; but from a criminal law perspective, these are not just about disability, but flow from much more complex conceptual structures relating to ‘guilt’, ‘culpability’, ‘rights of the accused’ and the role of the state in the criminal trial process. Each of these has its own long, rich and contested legal and political history. Change does not just affect disability law; it affects the totality of the law in question. That may well be a good thing, but it is at best a huge undertaking, giving rise to huge political, social, theoretical and doctrinal issues. It is certainly not one which at this time we have the adequate understanding to take forward on all fronts.

A more concrete way to think about those conceptual questions is what we should be asking of our present international institutions, such as the CPT and the SPT. They have their own treaties that structure their work, and those treaties developed for specific reasons, to respond to specific (and ongoing) injustices. How should those bodies understand their roles in this new paradigm? Is the claim that the new paradigm of disability is a trump card that displaces what has come before? And if not, do these institutions end up still perpetuating the ‘old paradigm’? Gradual moves towards implementation are thus problematic.

That is not merely the case on the international level, but on the domestic level as well. Insofar as states care about CRPD implementation, they seem to want it done as a one-off exercise: a nice, omnibus piece of legislation that will tick CRPD off the things-to-do list. It is not clear that such a big bang approach is possible: we do not yet have a good sense of the full panoply of legislative amendment that needs to occur, let alone what form the amendments should take. On this, the CRPD Committee are in an impossible situation: they are criticized for not providing adequate direction on one hand, but when they do provide a steer towards concrete suggestions (as for example regarding supported decision-making in General Comment 1) they are equally criticized for impinging on the independence of the governments of States Parties. To be realistic, we therefore need to understand implementation as an ongoing process that will take a long time. But the longer it takes, the more social actors will be viewing the old and new paradigms as a coexisting blur, a potentially ‘comfortable’ state for the political actors which may mean that the new paradigm in the robust form we need it never arrives.

Those problems are highlighted in states where there is no political will to implement the CRPD at all. Sadly, this seems to be a significant majority of states, and it is fair to note that the UK responses to the CRPD reports about us leave us no space for smug complacency on this point. If we are looking at no significant will for political change, how will the new paradigm be kept alive? And in that event, does the CRPD become little more than a photo opportunity for politicians, allowing them to look progressive and caring, when they don't actually plan to do anything to make things better?