January 18, 2012

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

Michael L Perlin, New York Law School
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

Prof. Michael L. Perlin
Director, International Mental Disability Law Reform Project
Director, Online Mental Disability Law Program
New York Law School
185 West Broadway
New York, NY 10013
212-431-2183
michael.perlin@nyls.edu
January 13, 2012

The author wishes to thank Jessica Cohn for her helpful research assistance, Yoshi Ikehara for his inspirational work on the creation of the Disability Rights Tribunal for Asia and the Pacific, and Heather Ellis Cucolo both for her work on the creation of the Disability Rights Information Center for Asia and the Pacific, and her extraordinarily helpful editorial suggestions and recommendations.

This article is an expansion of papers presented at Humboldt University in Berlin, Germany, at the biennial conference of the International Academy of Law and Mental Health (July 2011), at the launch of the Centre for the Advancement of Law and Mental Health at Monash University, Melbourne, Australia (June 2011), and at the Sellye Trust Lecture at the University of Auckland, Auckland, NZ (May 2011).
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, some significant and transformative decisions from the Inter-American Commission on Human Rights, and at least one major case from the African Commission on Human Rights.

In Asia and the Pacific region, however, there is no such body. Although the ASEAN (Association of Southeast Asian Nations) 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 serious 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 become further intensified since the ratification of the United Nations’ Convention on the Rights of Persons with Disabilities (sometimes “CRPD”; sometimes “the Convention”). 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 through a governing regional body. Only then, can we begin to be optimistic about the “real life” impact of this Convention on the rights of persons with disabilities in Asian and the Pacific region.
The research 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. The creation of a Disability Rights Tribunal for Asia and the Pacific (sometimes “DRTAP”; sometimes “the tribunal”) 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, not unimportantly, be – ultimately – a likely inspiration for a full regional human rights tribunal in this area of the world. If, however, it were to be created, it is also clear that it would be an empty victory absent available and knowledgeable lawyers to represent individuals who seek to litigate there.

In this paper, I will first consider the existence and role of regional human rights tribunals in other parts of the world, and will then briefly discuss some of the important disability rights cases litigated in those regions so as to demonstrate how regional tribunals can have a significant impact on the lives of persons with disabilities. Then, I will consider why there is a need for the DRTAP, looking at the absence of such bodies in Asia and the Pacific, the need for such a body, 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, concluding that this debate leads to a false consciousness (since 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 here. I then explain why the UN Convention on the Rights of Persons with Disabilities is a paradigm-shattering Convention that, truly, is the “first day of the rest of our lives” for anyone who does work in this area, and why the creation of the DRTAP is timely, inevitable and
essential, if the Convention is to be given true life. I will then briefly summarize the work that has already been done on the creation of a DRTAP, and how this work needs to continue in the future. I will conclude 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, insuring that this Tribunal has an authentic impact on social change.

I. Regional human rights bodies elsewhere

   a. An overview

A regional human rights court is an engine that provides real and practical meanings of each provision of international human rights law to citizens, and that universalizes these meanings.¹ 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. Europe established a European Court of Human Rights in 1956 that was renewed in 1998. The Inter-American Court of Human Rights was established in 1980. Africa established The African Court of Human Rights and People’s Rights in 2006.² It is well known that the European Court has been at the forefront of regional human rights protection; its precedents are relied on regularly as a basis for the interpretation of international human rights law.³

The Inter-American Court of Human Rights has played a similar role for its region and international society. Its greatest contribution to the inter-American system has been in de-legitimizing nondemocratic governments by means of the monitoring conducted during its on-site visits, and as a result of the presentation of its country reports to the OAS political organs and to hemispheric public opinion in general.⁴ These country reports are presented to the


political organs and 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 nongovernmental organizations, and every state will fight not to be censured by its peers.\(^5\) In summary, Prof. Robert Goldman has concluded that “The Inter-American system has contributed significantly to the development of human rights in the region as well as to broader democratic values.”\(^6\)

b. Disability rights cases in regional courts and commissions\(^7\)


Rosario Congo, involving a 48 year-old Ecuadorian who, as a result of the State’s gross negligence and willful acts, died of malnutrition, hydroelectrolitic imbalance, and heart and lung failure. Specifically, Mr. Congo was beaten with a club on the scalp by a guard, deprived of any medical treatment, and kept naked and forced to endure complete isolation.

The Inter-American Commission on Human Rights (Inter-American Commission) found that the State violated Mr. Congo’s right to humane treatment under Article 5 of the American Convention on Human Rights (American Convention). The Inter-American Commission determined that 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). This is of particular importance because it makes the MI Principles hard law, or in other words, binding on the United Nations members who have signed it. 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. Thus, the State violated Mr. Congo’s right to “be treated with respect for the inherent dignity of the human person.” Further, the Commission found that the State is responsible for the physical assault committed by one of its agents and that there is a duty upon the State to ensure the physical, mental and moral integrity of persons suffering from mental illness.

The Inter-American Commission also found that the State violated Article 4(1) of the American Convention because the State 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.” Under Article 25(1) of the American Convention Mr. Congo had a right to judicial protection which the State violated since there were no judicial proceedings opened to investigate and establish the responsibility for his sustained injuries and death. As a result of this case, the Commission recommended that the persons responsible for the violations be punished, that the family of Mr. Congo be compensated, that medical and psychiatric care be provided for persons suffering from mental illness, and that individuals confined in the penitentiary system be assigned specialists to identify any psychiatric disorders.11


11 Id. On how Congo “[broke] new ground” in this area of the law, see PERLIN, supra note 7, at 12.
In *Purohit and Moore v. The Gambia*, the African Commission on Human and Peoples’ Rights (African Commission) found that Gambia violated various provisions of the African Charter on Human and Peoples’ Rights (African Charter). Although communications are not received by the African Commission until local remedies are exhausted, in this case the Commission found that the existent remedies were not realistic for persons with mental disabilities.

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 its domestic laws and practice in conformity with the African Charter. In detailing Article violation, the 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). Since the implementation of the LDA resulted in a higher rate of detention of people from poor backgrounds and only provided legal assistance to those charged with capital offenses, Gambia thus violated the guaranteed rights of Articles 2 and 3.

The LDA also violated Article 5 and failed to conform to the African Charter by classifying persons with mental disabilities as “lunatics” and “idiots.” Like the Inter-American Commission, the African Commission turned to the MI Principles, and concluded that the terms “lunatic” and “idiots” were dehumanizing and took away a person’s inherent right to human dignity in violation of Article 5. In addition, the African Commission found that the LDA violated Article 6

---

12 African Commission on Human and Peoples’ Rights, Comm. No. 241/2001 (2003). This decision found unlawful both the way that persons with mental disabilities were treated in Gambia as well as prevailing sections of the Lunatic Detention Act of the Gambia (LDA).

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.

Turning to the facts of the case before it, the 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 that would enable them to sustain the
optimum level of independence in accordance with both the African Charter and MI
Principles.14

Another success story of the effectiveness of litigation in other parts of the world arose
in Paraguay in 2003 in which 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.15 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. The investigation included two teenage
boys, Julio and Jorge who had been detained in six-by-six foot isolation cells, naked and without
access to bathrooms for over four years. The conditions were found to violate the right to

14 But see Frans Viljoen & Linette Louw, State Compliance with the Recommendations of the African
(alleging that state parties did not implement the Commission’s recommendations); see generally, Frans
Viljoen, State Compliance with the Recommendations of the African Commission on Human Rights, in Six
DECADES, supra note 1, at 411.

15 Alison A. Hillman, Protecting Mental Disability Rights: A Success Story in the Inter-American Human
Rights System, 12 HUM. RTS. BRIEF 25 (Spring 2005); Tara J. Melish, Rethinking the “Less As More” Thesis:
community integration, the right to life, the right to humane treatment, the right to personal liberty, and the rights of the child.\textsuperscript{16}

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. In late February 2005, MDRI and CEJIL signed a groundbreaking agreement with the Paraguayan government which “required 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.”\textsuperscript{17}

There have also been multiple cases in Europe that have had a significant impact on mental disability rights.\textsuperscript{18} In Winterwerp v. Netherlands, the European Court of Human Rights (ECHR) found that in order to detain “persons of unsound mind” in accordance with Article 5 of the European Convention, there must be a diagnosis made using objective medical expertise finding that the disorder required confinement.\textsuperscript{19} The ECHR also found that it is essential for the person concerned to have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. In Herczegfalvy v. Austria, the ECHR noted that the position of inferiority and powerlessness typical of patients confined

\textsuperscript{16} Hillman, supra note 15, at 25.

\textsuperscript{17} Id. at 28.

\textsuperscript{18} See PERLIN et al, supra note 2, at 451-789.

\textsuperscript{19} 2 EHRR 387 (1979).
to psychiatric hospitals calls for increased vigilance. Although ultimately the ECHR did not find a violation of Article 3, it noted that use of handcuffs and security bed were “worrying.”

Scholars are divided on the ultimate impact of the ECHR’s caselaw on the population in question. Looking specifically at Herczegfalvy, Prof. David Hewitt has concluded that that the Court has interpreted the European Convention “very restrictively in psychiatric cases.” On the other hand, Prof. Gerard Quinn has concluded that the due process protections of the “negative right to liberty ... are very robust under the Convention”. 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, regional tribunals, and resulting case law can we enter into an environment geared towards further defining and enforcing human rights.


21 Id.


24 On the salutary impact of such courts in another area of human rights (judgments involving lesbian, gay, bisexual and transgender [LGBT] issues), see Helfer & Voeten, supra note 3, at 3-4 (concluding that
II. 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.\(^{25}\) Although there have been some historical attempts to establish a regional human rights body in this region,\(^ {26}\)

---

European Court decisions “have a significant and positive effect on the probability that lagging countries will adopt [rights-expanding] reforms”).

But see Perlín, supra note 7, at 50:

This litigation notwithstanding, it should not be presumed that the judicial process has served as a full palliative for conditions in European communities and psychiatric institutions. A New York Times article from 2009, by way of example, concluded, “Across Central and Eastern Europe, many people with mental illnesses or disabilities are sequestered without rights or recourse under Communist-era rules that put their fates in the hands of legal guardians, often regardless of the severity of their disabilities, according to human rights groups.”


\(^{26}\) For example, a “Seminar on Human Rights in Developing Countries” was held in 1964, and a “Southeast Asia & Pacific Conference of Jurists” was held in 1965. And some resolutions on a human rights regional body in Asia this region were consecutively adopted by the General Assembly of the UN beginning in the late 1970s. The “Colombo Seminar on Human Rights” was held in 1982. This addressed the need for a human rights body in this region, but there were not any movements in this field of law during the 1980s and 1990s that achieved significant success. See Michael L. Perlin & Yoshikazu Ikehara, *Creation of a Disability Rights Tribunal for Asia and the Pacific: Its Impact on China?i* NYLS Legal Studies Research Paper No. 10/11 #19. Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1744196&.

In 1985, the Law Association for Asia and the Pacific (LAWASIA) proposed a Pacific Charter that would set forth wide ranging civil, political, social, and cultural rights. It would also include mechanisms for enforcing the Charter and dealing with complaints of human rights violations. Ultimately it failed due to political, social, cultural, and practical issues. Patricia Hyndman, *Report On A Proposed Pacific Charter Of*
no movements in this field of law during the 1980s and 1990s achieved significant success.27

Although ASEAN (the Association of Southeast Asian Nations) has adopted a “Charter of ASEAN” providing for the establishment of a human rights body,28 critics have dismissed the mandate as merely “aspirational,” and “toothless,”29 and have characterized ASEAN as reflecting a


“frustrated regionalism” or a “reactionary regionalism.” These ASEAN shortcomings have made the failure to create a court or commission in Asia harmful to social justice in multiple ways. For the purposes of this paper, consider the gaps between domestic law and the state of international law as reflected in the CRPD (which I will discuss in detail subsequently).

B. Lack of comprehensive legislation

There is no comprehensive disability law that mandates non-discrimination principle in many countries in this region. Some examples follow:

and the ARF: The Limits of the “ASEAN Way,” 37 ASIAN SURVEY 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 (2011), and see id. at 319 (the “constitutionalization” of international law “has a revolutionary potential for enriching the rule of law across all of Southeast Asia’s diverse politics”). For a consideration of the need for ASEAN to develop a more proactive role with regard to Mynamar, see Ruukun Katanyuu, Non-Interference in ASEAN: The Association’s Role in Mynamar’s National Reconciliation and Democratization, 46 ASIAN Survey 825 (2006). 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 AsiaPacific/East Asia: A Frustrated Regionalism? 31 CONTEMP. SOUTHEAST ASIA 110 (2008). On whether the current time is this region’s “constitutional moment,” see Tay, supra note 28.

30 Nair, supra note 29; Beeson, supra note 28


32 See generally, Yoshikazu Ikehara, What is DRTAP and its Future? Paper presented to the International
• Only seven governments (Australia, Hong Kong China, India, Japan, Philippines and Republic of Korea) in the region reported to the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) that they have anti-discrimination laws. The Japanese law, however, is neither comprehensive nor effective.33

• 31 out of 36 governments surveyed by UNESCAP offer some definition of disability in their laws. However, several nations -- Azerbaijan, Bangladesh, China -- define disability as an "abnormality," a definition flatly rejected by the CRPD. 34

• At least nine governments use a medical model define disability as attributed to one’s impairment, in direct violation of the CRPD.


33 In employment law, Japan focuses on the special considerations owed to persons with disabilities, rather than outlawing employment discrimination per se. It also only focuses on persons with physical disabilities and does not address persons with mental disabilities. 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 (2009).

which firmly endorses a social model definition; only two nations in Asia – Malaysia and Thailand -- define disability from the social model perspective.

- Several governments fail to adequately define operative terms, and, in direct violation of the CRPD, exclude certain disabilities from protection of the law. By way of examples:
  - persons with autism are not included in Bangladesh.
  - often, the definition is unclear as to whether “mental disabilities” includes persons with developmental disabilities and/or persons with psycho-social disabilities.
  - Mongolia, for instance, uses the phrase “mental problems,” while Azerbaijan refers to “mental abnormalities”.

- Definitions of discrimination are unclear and inconsistent in this region.

---

o Again, by way of example, the Fiji Constitution prohibits discrimination on the basis of disability, but there are no laws that actually define what constitutes “discrimination.”

o In the Philippines and Turkmenistan, comprehensive disability laws prohibits discrimination against persons with disabilities, but fail to define “discrimination.”

o Many nations’ laws are inconsistent with other CRPD requirements.

- In Korea, for example, the broadcasting law does not require sign language interpretation, and the family health law gives priority to the institutionalization of persons with disabilities.

- Cambodia’s Marriage and Family Law forbids certain persons with disabilities from marrying, such as impotent men, persons who have leprosy, tuberculosis, cancer or venereal disease, and persons with mental defects.36

- The government’s position in Hong Kong, was made clear 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”).

These examples clearly show that most individual Asian nations do not willingly comply with the CRPD.

C. The “Asian values” debate

The “Asian values” debate is a form of cultural relativism. However, cultural relativism should not and cannot be used as a defense in ignoring human rights. Cultural relativism is


On Asia and international law in general, see Christian Tomuschat, Asia and International Law – Common Ground and Regional Diversity, 1 ASIAN J. INT’L L. 217 (2011). On the attempts to define Asia for these purposes, see Teemu Ruskola, Where is Asia? When is Asia? Theorizing Comparative Law and International Law, 44 U.C. DAVIS L. REV. 879 (2011).

40 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
not [a] sufficient justification for the denial of the universal application of human rights standards. @41 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.” 42 As Arati Rao has stated:

the notion of culture favoured 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. 43


While it is important to take cultural differences into consideration when involved in international relations, in practice, cultural relativism rarely is a sincere call for tolerance.44

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 of its basis in Western values, thus not conforming to Asian culture.45 As used in this context, “Asian values” generally refer to Confucianism and concepts such as respect for elders, preserving social order and social harmony, group orientation, and fostering the collective interests of the society and State.46 “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”.47
Proponents of the “Asian values” debate “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.” In other words, having human rights obligations interferes with the government’s welfare promoting activities, and these welfare promoting activities should take precedence. Many Asian countries, in a justification of their claim that economic rights are more important than political rights, argue that at different stages of a country’s development, it is necessary to focus on different rights. 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.”

Some scholars argue that the better interpretation of the “Asian values” debate is not a philosophical debate about the universality of human rights. 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.”

---


49 Id. at 1771.


52 Posner, supra note 48, at 1771.
how the “Asian values” debate is interpreted, the crux of the argument is whether “Asian values” really do exist and if so, can they be an excuse to disregard universal human rights.

In fact, 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. The “Asian values” argument fails to account for “the richness of values discourse in Asia.” For this reason some argue that there is no such thing as an “Asian value.” Further, assuming that there are uniform “Asian values” leads to generalizations and stereotypes of what is “Asian.” 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 communities.

53 Of course, on the other hand, some opponents of the “Asian values” debate are guilty of constructing an overly unified and idealized “West.” See Peerenboom, supra note 51 (arguing that “Asian values” debate no longer fruitful).

54 Davis, supra note 41, at 148.

55 Engle, supra note 41, at 313.


57 Peerenboom, supra note 51, at 39. Compare Ginsburg, supra note 25, at 868 (“[T]here is no region-wide notion of law as a superior regulatory device in East Asia”).
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.”58 In addition, the “Asian values” debate assumes that culture is static, rather than something that varies generation to generation.59

The universalist position consists of two main variants: extreme moral universalism and moderate moral universalism.60 Extreme moral universalism is the concept that moral issues do not depend on culture or the views of any group or individual. Moderate moral universalism holds that “culture is irrelevant to the correctness of some, but not necessarily all, issues.”61 Both variants underscore the importance of basic human rights that must be universally applied irrespective of cultural differences.

The universality of human rights must predominate. “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.”62 To deny persons with mental disabilities these basic

58 Peerenboom, supra note 51, at 41.
59 Tay, supra note 41, at 759.
60 Peerenboom, supra note 51, at 12.
61 Id.
human rights on the basis of “Asian values” is an attempt to hide behind the mask of cultural relativism.63

C. III. The UN Convention

Disability rights have taken center stage at the United Nations in the most significant historical development in the recognition of the human rights of persons with mental disabilities: the drafting and adoption of a binding international disability rights convention.64

In late 2001, the United Nations 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. . . ."65 The Ad Hoc Committee drafted a document over the course of five years and eight sessions, and the new CRPD was adopted in December 2006 and opened for signature in March 2007.66 It entered into force - thus becoming legally binding on States parties - on May 3, 2008, thirty days after the 20th ratification.67 One of the hallmarks of the process that led to the publication of the UN Convention was the participation of persons with disabilities and the clarion cry, "Nothing about us, without us."68 This has led commentators to conclude that the Convention "is regarded as having finally empowered the 'world's largest minority' to claim their rights, and to


See, for example, Statement by Hon Ruth Dyson, Minister for Disability Issues, New Zealand Mission to the UN, for Formal Ceremony at the Signing of the Convention on the Rights of Persons with Disability, 30 March 2007: "Just as the Convention itself is the product of a remarkable partnership between governments and civil society, effective implementation will require a continuation of that partnership." The negotiating slogan 'Nothing about us without us' was adopted by the International Disability Caucus, available at: http://www.un.org/esa/socdev/enable/documents/Stat_Conv.nzam.doc [last accessed August 23, 2011]
participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection."^69

This Convention is the most revolutionary international human rights document ever created that applies to persons with disabilities.^70 The Disability Convention furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most every aspect of life.^71 It firmly endorses a social model of disability – a clear and direct repudiation of the medical model that traditionally was part-and-parcel of mental disability law.^72 It furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most aspects of life. “The Convention responds to traditional models and situates disability within a social model framework^73 and sketches the

---


^72See generally, Perlin, supra note 35.

full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities.” 74 It provides a framework for insuring that mental health laws “fully recognize the rights of those with mental illness.” 75

The CRPD categorically affirms the social model of disability 76 by describing it as a condition arising from “interaction with various barriers [that] may hinder their full and effective participation in society on an equal basis with others” instead of inherent limitations, 77 reconceptualizes mental health rights as disability rights, 78 and extends existing human rights to take into account the specific rights experiences of persons with disabilities. 79 To this end, it calls for "respect for inherent dignity" 80 and "non-discrimination." 81 Subsequent articles declare


77 CRPD, art. 1 and pmbl., para. e.,


79 Megret, Disability Rights, supra note 64; see PERLIN, supra note 7, at 143-58.

80 CRPD, Article 3(a).

81 Id., Article 3(b).
"freedom from torture or cruel, inhuman or degrading treatment or punishment,"82 "freedom from exploitation, violence and abuse,"83 and a right to protection of the "integrity of the person."84

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 should 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.85 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”86 Elsewhere, the convention commands:

States Parties shall ensure effective access to justice for persons with disabilities on an

82Id., Article 15.

83Id., Article 16.

84Id., Article 17.


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.  

“\cite{CRPD, Article 13}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.”\cite{Perlin, supra note 86, at 253} If and only if, there is a mechanism for the appointment of dedicated counsel,\cite{On the significance of “cause lawyers” in the development of mental disability law in the United States, see Michael A. Stein, Michael E. Waterstone & David B. Wilkins, Book Review: Cause Lawyering For People With Disabilities, 123 HARV. L. REV. 1658 (2010)} 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 detailed, comprehensive, integrated and the 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. 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.\cite{CRPD, Article 1} Whether this will actually happen is still far from a settled matter.

\footnote{\cite{CRPD, Article 13}}

\footnote{\cite{Perlin, supra note 86, at 253}}

\footnote{On the significance of “cause lawyers” in the development of mental disability law in the United States, see Michael A. Stein, Michael E. Waterstone & David B. Wilkins, Book Review: Cause Lawyering For People With Disabilities, 123 HARV. L. REV. 1658 (2010).}

\footnote{\cite{CRPD, Article 1}}
III. The structure of the DRTAP

If there is no tribunal to adjudicate cases of persons with disabilities in the Asia-Pacific region, it is unlikely – exceedingly unlikely – that individuals in that region will have a forum to which they can bring their grievances. In such case, the CRPD will be little more than an empty shell. In this section, I sketch out a preliminary blueprint for the DRTAP.91 I believe that the

---

91 See generally, PERLIN, supra note 7, at 169-202.

The project to create a DRTAP, initially funded by the Toyota Foundation, has been directed by the Tokyo Advocacy Law Office since it began in 2008. From 2008 to 2009, project leaders researched domestic disability rights cases in which plaintiff with disabilities were unsuccessful, and used these as a prism through which to examine the necessity and potential of a regional disability rights tribunal. An international planning conference was held in Tokyo in July 2009, regional meetings were held in Thailand, South Korea, and Australia in 2010, and papers were presented on the need for such a Tribunal at international conferences in Hong Kong, China, Denmark, Australia, New Zealand, and Taiwan in 2010-2011 (all papers on file with the author; see generally, Perlin, supra note 1; Perlin, supra note 39; Perlin & Ikehara, supra note 26; Perlin & Ikehara, supra note 38). See Perlin & Ikehara, supra note 26, manuscript at 9. At the Korean meeting, in which the author participated, it was decided that the tribunal should “launch” as a voluntary one and that, initially, it would be a sub-regional one (the Pacific Rim, Oceania and Thailand).

A Disability Rights Information Center for Asia and the Pacific (DRICAP) that will host a website collecting statutes, regulations, scholarly articles, advocacy news and case law from selected Asian/Pacific nations will be housed at New York Law School (where the author directs the International Mental Disability Law Reform Project), and will be directed by NYLS Adjunct Professor Heather Ellis Cucolo. See www.disabilityrtsinfoAP.com. Through this Center, it is hoped, “lawyers and advocates throughout this region would have a virtual homeplace dedicated to these issues.” Michael L. Perlin, Online, Distance Legal Education as an Agent of Social Change, 24 PAC. McGeorge Global Bus. & Dev. L.J. 95 (2011). Professor Cucolo has worked with the author and Mr. Ikehara on earlier stages of the DRTAP project. See Michael L. Perlin, Heather Ellis Cucolo & Yoshikazu Ikehara, 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 (paper presented at 3d annual conference of the Asian Criminological Society, Taipei, Taiwan, December 2011) (see http://www.ntpu.edu.tw/college/e4/acs/news_more.php?id=211).
creation of a DRTAP would be a definite quantum leap in the quest for an Asian human rights mechanism.

Although the structure of the tribunal is still inchoate, the incorporating documents will include sections covering at least these issues:

- General Structure:
  - Hybrid tribunal benefits
    - Collaboration among nation states
  - Composition – number of nations to be involved
  - Rules of procedure and pleading
  - Voluntariness of tribunal
  - Language – all languages of each Asia-Pacific country
    - Official language(s)
  - Location
  - Competency – jurisdiction to hear any matter relating to a State
  - Coordination with other international and regional bodies
  - Coordination with other Asian bodies
  - Relationship between nations that have signed the CRPD and those that have not
  - Legitimacy – independence from national oversight
    - General sense of accountability, respect

---

• Fair procedures

• Judges
  • Designated seats for specific nations
  • Designated seats for persons with disabilities
    • Backgrounds – lawyers, advocates, judges
    • Known and respected by national judges
    • Awareness of audience
    • Autonomy from political interests, impartial
    • Expertise in disability law
      • Lawyers trained in disability rights
        • Court appointed if client is indigent

• Funding – government
  • UN funding
  • Voluntary contributions
  • NGOs
    • Standing
    • Members should not serve on tribunals
    • Ability to bring claims before tribunal
      • Ability to request advisory opinions
      • Ability to file amicus briefs

• Reporting – precedent from other transnational tribunals
  • Use of advisory opinions
• Free access to cases online

• Remedies – sanctions, reparations, injunctions

  - Enforcing compliance – binding authority not necessary
  - The role of mediation\(^{93}\)
  - Inclusion of persons with physical disabilities.\(^{94}\)

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

✓ What will the impact of voluntariness be on the ultimate success of such a tribunal?\(^{95}\)

✓ Will the judges be independent?\(^{96}\)

\(^{93}\) Prof. Carole Petersen has urged the inclusion of a mediation mechanism in DRTAP in an article otherwise 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 HONG KONG. L. J.481, 511 (2010):

It has been proposed that the Asia-Pacific region establish a Disability Rights Tribunal, which would have the capacity to hear complaints, issue decisions and provide remedies for violations of the rights of persons with disabilities. This idea is certainly worth pursuing. However, given 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.


\(^{94}\) See generally, Naomi Weinstein, *Establishing the Disability Rights Tribunal for Asia and the Pacific* (unpublished paper; on file with author).

\(^{95}\) See e.g., Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 31 (2006).

✓ How will the tribunal be funded?97
✓ How many nations will be involved (initially and eventually)?98
✓ Will the tribunal’s jurisdiction extend to private and public cases?99
✓ Will there be co-ordination with other international bodies?100
✓ Will there be coordination with other Asian/Pacific tribunals?101
✓ What will the relationship be between those nations that have signed the CRPD and those that have not?102
✓ What will the standing be of NGOs before the tribunal?103
✓ What is the expected scope of the remedies available to the tribunal?104

97 See e.g., Lindsey Raub, Positioning Hybrid Tribunals in International Criminal Justice, 41 INT’L L. & POLITICS 1014 (2009).

98 See supra note 91.


101 See e.g., Beatriz Garcia, Exercising a Community of Interests: A Comparison between the Mekong and the Amazon Legal Regimes, 39 HONG KONG L. J. 421 (2009).

102 As of January 12, 2012, there were 109 ratifications and 153 signatories of the Convention, and 53 ratifications and 90 signatories of the Optional Protocol. See supra note 67.

Will there be a difference in the way such a tribunal would operate in monist and dualist nations?105

Will there be a difference in nations that have common law and civil law traditions?106

What sanctions are there if a defendant refuses to comply?107

How will the issue of appointment of counsel be handled?108

VI. A question of timing.

The time is right, and the time is now. 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, concludes, “It is

---


107 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).

108 See generally, PERLIN, supra note 7, at 186-96.

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 supra text accompanying notes 94-107.
about time that the region moved ahead and acted towards that goal.”

All of the credible evidence supports this position. But in the absence of a consensus and political support for the creation of such a court to adjudicate all human rights matter, activists and advocates have begun work on efforts to create a court focused on the sole subtopic of disability rights, a DRTAP. For multiple reasons, the creation of a DRTAP would be the single best way to insure that the Convention on the Rights of Persons with Disabilities (CRPD) be given authentic and sustainable life.

First, experiences in other regions show that similarly-situated courts and commissions have been powerful forces in mandating the practical implementation of other UN Conventions and treaties and “soft law.” It defies credulity to suggest that there is any knowledgeable person who believes, by way of example, that the high courts of Ecuador or Gambia would have decided the Congo or the Purohit cases the way that the interregional bodies did.

________________________


110 See Perlin & Ikehara, supra note 38; Perlin, supra note 39.

111 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 85.

112 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. See 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, 23 (Dinah Shelton, ed. 2000). On the differences between “hard law” and “soft law” in another political context, see Gregory C. Shaffer & Mark A. Pollack, Hard Versus Soft Law in International Security, 52 B.C. L. REV. 1147 (2011).

113 See supra text accompanying notes 8-14.
Second, those of us 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 that spans multiple nations (in diverse geographic regions, with diverse populations comprised of diverse ethnicities, races, religions and cultures) will make the enforcement of these human rights far more likely than reliance on state-by-state enforcement.\(^{114}\)

Third, the language of the Convention -- the 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; the focus on dignity and non-discrimination\(^{115}\) – tells us that the time is especially right for such a Tribunal. Just as the African Charter on Human and Peoples’ Rights calls for a pledge to achieve a better life for Africans, by recognizing that human rights stem from attitudes of human beings, implying duties on the part of everyone, so would a DRTAP similarly highlight and underscore necessary principles in the achievement of human rights.\(^{116}\) Just as the European Convention on Human Rights aims at “securing the universal and effective recognition and observance of the Rights therein declared” so too would the DRTAP seek universal human rights.\(^{117}\) Just as the Inter-American Convention on Human Rights recognizes

---

\(^{114}\) See supra text accompanying notes 39-61.

\(^{115}\) See supra text accompanying notes 62-88.


\(^{117}\) European Convention, preamble
that “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,” so too would DRTAP.

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. 119

Fifth, from a perspective of economics, the timing is right. If 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. 120 one significant and compelling way would be to

---

118 Inter-American Convention, preamble


support the establishment of the DRTAP as a means of fostering and promoting better international relations.\textsuperscript{121}

IV. Role of counsel

If this Tribunal is to have real meaning, there must be a mechanism for the appointment of counsel to litigants.\textsuperscript{122} Without such a mechanism, any Tribunal would lose much of its potential value. Without the assignment of dedicated, knowledgeable counsel, meaningful and ameliorative change is almost impossible to achieve. There is no question that one of the most critical aspects of law reform is the presence of dedicated and knowledgeable counsel.\textsuperscript{123} But for adequate counsel, no judicial system can work effectively to protect human rights for a person when his/her human rights are infringed.\textsuperscript{124} Because of their historically determined and

\textsuperscript{121} For an important overview of the role of courts in social development throughout Southeast Asia and the Pacific Rim, see ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES (Tom Ginsburg & Albert H.Y. Chen eds. 2009),

\textsuperscript{122} On the appointment of counsel to persons with mental disabilities in the United States, see generally, 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, §§ 2B-1 et seq. (2d ed. 1998).

\textsuperscript{123} See Perlin, supra note 70, at 496.

\textsuperscript{124} For consideration of this issue in the specific context of the South Pacific, see SUE FARRAN, HUMAN RIGHTS IN THE SOUTH PACIFIC: CHANGES AND CHALLENGES (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.” Terry Carney, A Regional Disability Tribunal for Asia and the Pacific: Helping to Change the Conversation?, accessible at http://ssrn.com/abstract=1688146, manuscript at 14. I disagree with him profoundly, based on forty years of evidence from the United States), see PERLIN, supra note 7, at 45-46; PERLIN et al, supra note 2, at 13-227, and more recent evidence from other regions. I believe that, without such counsel, any long-lasting efforts at ameliorative reform are doomed to failure. See generally, Perlin, supra note 86. 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-government organizations and civil society” as a “governance-based approach,”
universally perceived powerlessness and vulnerability, persons with disabilities necessarily require adequate counsel to protect and realize their rights.\textsuperscript{125} This makes the issue in question all the more critical.\textsuperscript{126}

One of the reasons this is especially important in this area of the law and policy is the omnipresence of “sanism.”\textsuperscript{127} 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. \textsuperscript{128} 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\textsuperscript{129}

\textsuperscript{125} On how persons with mental disabilities have always been relegated to a position of political powerlessness, see Michael L. Perlin, \textit{A For the Misdemeanor Outlaw= The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities}, 52 ALABAMA L. REV. 193, 219 (2000).

\textsuperscript{126} See also, on this question, Perlin, \textit{supra} note 91.


\textsuperscript{128} \textit{id.} at 486.

\textsuperscript{129} Perlin, \textit{supra} note 65, at 487.
I believe that sanism -- closely entwined with pretextuality\textsuperscript{130} -- has controlled--and continues to control--modern mental disability law. Just as importantly (perhaps, more importantly), they 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.\textsuperscript{131} Dedicated, trained and knowledgeable lawyers are needed to combat the contamination thus caused by sanism.\textsuperscript{132}

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].”\textsuperscript{133}

\textsuperscript{130} 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 caselaw 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. See Michael L. Perlin, \textit{A Half-Wracked Prejudice Leaped Forth @: Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did}, 10 J. CONTEMP. LEG. ISS. 3, 18( 1999).

\textsuperscript{131} See generally, \textsc{Michael L. Perlin}, \textit{The Hidden Prejudice: Mental Disability on Trial} (2000).

\textsuperscript{132} See Perlin & Szeli, \textit{Evolution and Contemporary Challenges}, supra note 64; Perlin & Szeli, \textit{Promise}, supra note 64.

\textsuperscript{133} M. Amir-Ul Islam, \textit{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, \textit{Public
In the context of a regional human rights tribunal, such litigation also, in the words of Cavallaro and Brewer, is 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”.  

Litigation such as the sort that would be brought before this Tribunal requires dedicated counsel, a circumstance that is rare at an international level:

Globally, there is little good news. In many nations, there is no mental health law at all. 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. In only a few instances does counsel appear to be doing a remotely adequate job.... Although there is a right to counsel in India, research has revealed no such right in a range of other Asian nations including, inter alia, Afghanistan, China, Indonesia, Pakistan, South Korea, Sri Lanka, Thailand, and Vietnam

This 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

---


counsel, legal reform--in nations with developing economies, at least--“will all too often be a hollow shell.”

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,” and 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. These provisions underscore the crucial importance of dedicated counsel and make mandatory the appointment of such counsel. “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.” If and only if, there is a mechanism for the appointment of dedicated counsel, can the dreams generated by the CRPD become a reality.


136 CRPD, Article 12.

137 Id., Article 13.

138 Perlin, supra note 86, at 253.

139 Although the common assumption is that Asian citizens – especially those with a Confucianism 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 DIS. STUD. Q. 1, 13 (2005). On Chinese philosophy and
On the question of the need for law schools--internationally--to commit themselves to the creation of clinical programs assigned to train lawyers to provide legal representation to indigent persons facing involuntary civil commitment, I have also previously written:

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, sanism in lawyers can be fatal to an individual's chance for release or for a judicial order mandating amelioration of conditions of confinement and/or access to treatment and/or to be free from unwanted treatment interventions. 141

The creation and international dissemination and proliferation of clinical programs to train law students in these issues would be the best way to prevent such “sanist-inspired international law in general, see Junwu Pan, Chinese Philosophy and International Law, 1 ASIAN J. INT’L L. 233 (2011).

140 See PERLIN, supra note 7, at 104-11.

141 Perlin, supra note 86, at 262.

142 See PERLIN, supra note 7, 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
blunders.” In short, the presence of counsel is the lynchpin to authentic change in this area of the law. A regional human rights court/tribunal must therefore provide adequate counsel to help persons with disabilities to file, present and argue cases.

In their thorough and thoughtful analysis of the treatment of mental disability issues under the European Convention on Human Rights, Peter Bartlett and his colleagues lay down the gauntlet: the challenge of the next 25 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.”


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, supra note 1, manuscript at 23. On legal education in Asia in general, see Stacey Steele & Kathryn Taylor, eds., Legal Education in Asia: Globalization, Change and Contexts (2010). For a thoughtful review of this work, see Luke Nottage, Legal Education in Asia: Globalization, Change and Contexts – in Review, accessible at http://ssrn.com/abstract=1752646. On the globalization of public interest law in general, see Richard L. Abel, The Globalization of Public Interest Law, 13 UCLA Int’l L. & Foreign Aff. 295 (2008).

See generally, Perlin, supra note 86.

Peter Bartlett, Oliver Lewis & Oliver Thorold, Mental Disability and the European Convention on Human Rights 28 (2007).
competent and knowledgeable counsel is the best means of “breath[ing] this “life” into the Convention, especially in Asia.\textsuperscript{146}

\textsuperscript{146} One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence (TJ) Initially employed in cases involving individuals with mental disabilities, but subsequently expanded far beyond that narrow area, therapeutic jurisprudence 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 therapeutic jurisprudence 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. 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); see also, for a transnational perspective, Kate Diesfeld & Ian Freckleton, Mental Health Law and Therapeutic Jurisprudence, in 91 (Ian R. Freckleton & Kerry Anne Peterson eds., 2006). On the potential use of therapeutic jurisprudence in the resolution of matters arising from the CRPD, see Perlin, supra note 7, at 203-28. On the relationship between therapeutic jurisprudence and the practice of mental disability law in Central and Eastern Europe, see Winick, supra note 23. On the need for human rights scholarship to embrace social science insights, see Ryan Goodman, Derek Jinks & Andrew K. Woods, Social Science and Human Rights, in Understanding Social Action, Promoting Human Rights (Ryan Goodman, Derek Jinks, & Andrew K. Woods, eds., 2012) (in press), accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1910684.

The CRPD is a document that resonates with therapeutic jurisprudence values. It reflects the three core TJ principles of “voice, validation and voluntariness” articulated by Prof. Amy Ronner, see Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles, 71 U. Cin. L. Rev. 89 (2002), and it “look[s] at law as it actually impacts people’s lives,” Bruce Winick, Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime, 33 Nova L. Rev., 535, 535 (2009). 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. See Michael L. Perlin, Understanding the Intersection Between International Human Rights and Mental Disability Law: The Role of Dignity (paper presented to the annual meeting of the Human Dignity and Humiliation Studies Network, Dec. 2011, New York City) (on file with author). Dedicated counsel would best be able to infuse DRTAP proceedings with a therapeutic jurisprudence perspective. See Perlin, supra, note 9; Perlin, supra note 76.
Conclusion

The Convention on the Rights of Persons with Disabilities is, potentially, the single most transformative legal initiative – ever -- affecting persons with disabilities, especially mental disabilities. However, under current conditions, 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 Tribunal alone; it must include a coherent means of providing trained lawyers, specifically educated in mental disability law, to represent persons with disabilities who would appear before that body. It is only through the provision of vigorous and dedicated advocacy that the CRPD’s promise can be fulfilled. I believe that DR-TAP – in conjunction with the expansion of law-student training – is the best way of achieving that promise.