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OVERCOMING OUR GLOBAL DISABILITY IN THE WORKFORCE: MEDIATING THE DREAM

ELAYNE E. GREENBERG[†]

*Your imagination is your preview of life's coming attractions.*¹

Albert Einstein

INTRODUCTION

The unparalleled global support for the 2008 United Nations Convention on the Rights of Persons With Disabilities (“CRPD”)² highlights the global schism between the public extolling of human rights for individuals with disabilities and the private castigating of such individuals in their daily lives and in the workforce. The CRPD explicitly mandates that work is a right accorded to individuals with disabilities,³ and global employers are now being challenged to implement that right. Yet, in order

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¹ CHRIS MASER, VISION AND LEADERSHIP IN SUSTAINABLE DEVELOPMENT 82 (1999).

² There were eighty-two signatories to the Convention, forty-four signatories to the Optional Protocol, and one ratification of the Convention on the opening day of the Convention. See UNITED NATIONS ENABLE, *Convention on the Rights of Persons with Disabilities*, UN.ORG, <http://www.un.org/disabilities/default.asp?id=150> (last visited Nov. 17, 2012). As of November 17th, 2012, there were 154 signatories, including the United States, and 126 ratifications to the Convention and ninety signatories and seventy-six ratifications to the Optional Protocol. See UNITED NATIONS ENABLE, *Convention and Optional Protocol Signatures and Ratifications*, UN.ORG, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (last visited Nov. 17, 2012). In December 2012, however, the United States Senate failed to ratify the Convention. Rosalind S. Helderan, *Treaty on Disability Rights Fails in Senate*, WASH. POST, Dec. 5, 2012, at A03.

³ See United Nations Convention on the Rights of Persons with Disabilities, art. 27, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD], <http://treaties.un.org/doc/publication/UNTS/Volume%202515/v2515.pdf>.

to ensure meaningful, universal compliance with its directives, the CRPD imposes affirmative duties on Supporting States to develop a customized, workable plan that effectively addresses the biases about individuals with disabilities in the workplace.⁴ Among the recommendations to achieve meaningful compliance, the CRPD advises Supporting States to modify their existing mediation and conciliation programs within their human rights institutions to meet the CRPD imperative.⁵

To meaningfully implement the CRPD, Supporting States must address the attitudinal biases that abound against individuals with disabilities, especially among employment recruiters, employers, employees, and even lawyers representing aggrieved clients, all individuals who are instrumental in implementing the CRPD mandates. Unless these biases in all their cultural variants are addressed, enforcement efforts, such as the establishment of mediation and conciliation programs, will be neutered.

This Article focuses on the challenges of designing such effective, culturally sensitive mediation and conciliation programs to resolve global workplace discrimination against individuals with disabilities. Part One explains the CRPD and its mandates, focusing on its workplace imperatives. Part Two illustrates the scope and magnitude of the discrimination through harrowing statistics. Part Three highlights how Supporting States must address the gap, in all its cultural variants, between the global, public support for the CRPD and the more private societal and personal biases towards individuals with disabilities. Part Four offers the ideological, functional, and cultural considerations to be incorporated when adapting responsive mediation, conciliation, or any facilitated negotiation forums to mediate workplace disputes arising out of the CRPD. Part Five concludes with a summary of the salient points Supporting States need to address to help make the CRPD's aspiration a meaningful reality.

⁴ See *id.* at arts. 33, 35.

⁵ See U.N. DEPT OF ECON. & SOC. AFFAIRS ET AL., FROM EXCLUSION TO EQUALITY: REALIZING THE RIGHTS OF PERSONS WITH DISABILITIES 101–03 (2007) [hereinafter HANDBOOK], available at <http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf>.

I. AN OVERVIEW OF THE CRPD ASPIRATIONS AND MANDATES

The CRPD and its Optional Protocol are not only bold, global affirmations of the entitled rights of individuals with disabilities, but also commitments by Supporting States to provide the requisite laws, infrastructure, and accountability necessary to create a global network of support to ensure those rights.⁶ Adopted on December 13, 2006, opened for signature on March 30, 2007, and entered into force on May 3, 2008, the CRPD garnered the largest number of signatories of any U.N. Convention on its opening day.⁷ The CRPD offers an overdue but welcome paradigm shift that proclaims the rights of individuals with disabilities to access and engage in a full life without discrimination, rather than regarding such individuals as disempowered victims. The hallmarks of the CRPD are respect, access, integration, and equality⁸ in matters of the home,⁹ education,¹⁰ health,¹¹ political and public life,¹² culture,¹³ and employment.¹⁴ After all, full societal participation is a requisite for a thriving global economy.

A primary goal of the CRPD is to provide a supportive global network for the enforcement of rights for individuals with disabilities.¹⁵ In order to ensure accountability and compliance with the CRPD's mandate, Supporting States have to recalibrate their laws, create an infrastructure that promotes the CRPD's mandate, and demonstrate their accountability. The Committee on the Rights of Persons with Disabilities, the convention-monitoring body that was convened for the purpose of monitoring compliance with the CRPD,¹⁶ will review the ongoing reports that Supporting States are required to provide.¹⁷ As an additional commitment to accountability, those Supporting States who have also ratified the Optional Protocol have consented to the

⁶ See CRPD, *supra* note 3, at art. 33.

⁷ See *supra* note 2 and accompanying text.

⁸ See CRPD, *supra* note 3, at art. 3.

⁹ See *id.* art. 23.

¹⁰ See *id.* art. 24.

¹¹ See *id.* art. 25.

¹² See *id.* art. 29.

¹³ See *id.* art. 30.

¹⁴ See *id.* art. 27.

¹⁵ See *Convention on the Rights of Persons with Disabilities*, *supra* note 2.

¹⁶ See CRPD, *supra* note 3, at arts. 34, 35.

¹⁷ See *id.* art. 35.

jurisdiction of the Committee to adjudicate complaints and violations of the CRPD from the citizens within the Supporting States.¹⁸

Of significance, because the CRPD is designed to have broad inclusion of all appropriate individuals, the definition of disability in the CPRD is purposefully vague, thereby permitting greater inclusion of all who need its protection. Moreover, the term “disability” is conspicuously not included in the definition section of the Convention. Instead, reference to disability is found in the Preamble of the Convention: “[D]isability is an *evolving* concept and that disability results from the *interaction* between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”¹⁹

Then, in Article I of the Convention, further clarification is provided about who is covered under the CRPD: “Persons with disabilities *include* those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”²⁰

Such broad inclusion is one strategy to minimize potential challenges about whether an individual with disabilities is a qualified person under the CRPD and to avoid the ongoing litigation that U.S. employees with disabilities had to endure to prove whether they were to be considered “qualified” for the protection of the Americans with Disabilities Act of 1990.²¹ Undoing a series of Supreme Court decisions that narrowed the interpretation of those protected, the ADA Amendments Act of 2008, effective January 1, 2009, emphasized that the definition of “disability” should be construed broadly, without engaging in a further intensive analysis.²²

¹⁸ See Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art 1, U.N. Doc. A/RES/61/106 (Dec. 13, 2006) [hereinafter *Optional Protocol*], available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/61/106&Lang=E (last visited Nov. 17, 2012).

¹⁹ See CRPD, *supra* note 3, at pmb1. (emphasis added).

²⁰ See *id.* at art. 1 (emphasis added).

²¹ See Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 (2006 & Supp. II 2008)).

²² See Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12102 (2006 & Supp. II 2008)).

In the area of work and employment, the subject of this Article, Article 27 provides that individuals with disabilities have a recognized right to work.²³ The right to work includes equality, inclusivity, and accessibility.²⁴ Furthermore, if necessary, employers are expected to make reasonable accommodations so that the employee may work.²⁵ Specifically, Article 27 specifies:

1. States [sic] Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States [sic] Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

(c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

²³ See CRPD, *supra* note 3, at art. 27.

²⁴ See *id.*

²⁵ See *id.*

(g) Employ persons with disabilities in the public sector;

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

(j) Promote the acquisition by persons with disabilities of work experience in the open labour market;

(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States [sic] Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.²⁶

Thus, the CRPD is a comprehensive, statutory scheme that accords persons with disabilities the right to fully and effectively participate in society. Providing a global network of accountability, the CRPD makes the long overdue proclamation that disability rights are human rights.

II. WHAT IS THE SCOPE AND MAGNITUDE OF THE PROBLEM?

Compelling the promulgation of the CRPD, statistics about persons with disabilities force us to confront the idea that individuals with disabilities are significantly underrepresented in the global workforce.²⁷ Implicitly, these numbers represent the lost opportunities of persons with disabilities to contribute to the workforce. Moreover, the numbers also represent the resulting economic drain on our global communities, which then provide essential economic support for those individuals with disabilities who are discriminatively excluded from the workforce.

For some, it may be a logical, albeit incorrect, syllogism to infer that because individuals with disabilities are underrepresented in the workforce, there are not actually that many persons with disabilities. Statistics provide us with a more objective representation. Individuals with disabilities are the

²⁶ See *id.*.

²⁷ UNITED NATIONS ENABLE, *Factsheet on Persons with Disabilities*, UN.ORG, <http://www.un.org/disabilities/default.asp?id=18> (last visited Nov. 17, 2012) [hereinafter *Factsheet*].

world's largest minority group comprising approximately ten percent of the world's population or 650 million people.²⁸ Moreover, this number is growing.²⁹ According to the World Health Organization, the number of persons with disabilities is increasing because of the advances in medical, population growth and the aging process.³⁰

The unemployment of individuals with disabilities is a global problem. The International Labor Organization reports that in some countries there is an eighty percent unemployment rate among persons with disabilities.³¹ Closer to home, a 2004 study indicates that in the United States only thirty-five percent of working age persons with disabilities are working compared with seventy-eight percent of those without disabilities. Even sadder, two thirds of the unemployed with disabilities said they would like to work, but were unable to find employment.³² In Europe, it is reported that twice as many persons with disabilities are unemployed compared to persons without disabilities.³³ And persons with severe disabilities are three times less likely to be employed.³⁴ Further, employees with disabilities are customarily paid less than those employees without disabilities.³⁵

Employers' fears and misconceptions contribute to the underrepresentation. One fallacy held by employers is that individuals with disabilities are unable to work.³⁶ In a 2003 survey of employers conducted by Rutgers University, employers were questioned about their reluctance to hire individuals with disabilities.³⁷ One third of those surveyed believed that individuals with disabilities are unable to work effectively.³⁸ A

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.*

³¹ *See id.*

³² *See id.*

³³ CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS OPTIONAL PROTOCOL, www.un.org/disabilities/documents/ppt/crpdbasics.ppt (last visited Nov. 17, 2012).

³⁴ *Id.*

³⁵ *See id.*

³⁶ *See Factsheet, supra* note 27.

³⁷ *Id.*

³⁸ *Id.*

second fear expressed by the surveyed employers was the potential runaway costs of any accommodations that would have to be made.³⁹

However, statistics again show that these fears are misplaced. A 2010 study of employers conducted by the Job Accommodation Network of the U.S. Department of Disability Employment found that fifty-seven percent of reasonable accommodations cost nothing; the remainder cost less than \$500.⁴⁰ Statistics show individuals with disabilities to be reliable employees. Several American studies support that individuals with disabilities have high retention rates, one study reporting after a year of employment, the retention rate is eighty-five percent.⁴¹ Another indication of persons with disabilities' abilities, the U.S. Department of Labor reports that thousands of individuals with disabilities are successful small business owners.⁴²

The numbers are compelling and prompt a query into why such discrimination exists.⁴³

III. WHY IS IMPLEMENTATION SO DIFFICULT?: UNDERSTANDING THE DISSONANCE BETWEEN PUBLIC PROCLAMATIONS AND ATTITUDINAL BIASES

The CRPD's global support for the rights of individuals with disabilities belies the lack of societal and individual support within Supporting States.⁴⁴ There exists a dissonance between public proclamations advancing the rights of persons with disabilities and the societal and private attitudinal biases held about persons with disabilities. In three glaring examples, the United States', China's, and Latin America's less-than-successful

³⁹ *See id.*

⁴⁰ JOB ACCOMMODATION NETWORK, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 3 (2012), available at <http://askjan.org/media/downloads/lowcosthighimpact.pdf>.

⁴¹ *See Factsheet, supra* note 27.

⁴² *See id.*

⁴³ *See generally* Lisa Waddington, *When It Is Reasonable for Europeans To Be Confused: Understanding When a Disability Accommodation Is "Reasonable" from a Comparative Perspective*, 29 COMP. LAB. L. & POL'Y J. 317 (2008); Kerri Stone, *Substantial Limitations: Reflections on the ADAAA*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 509 (2011).

⁴⁴ *See* Barbara A. Lee, *Legal Requirements and Employer Responses to Accommodating Employees with Disabilities*, 6 HUM. RESOURCES MGMT. REV. 231, 232 (1996).

initiatives to integrate persons with disabilities into the workplace illustrate how existing biases towards persons with disabilities could potentially erode the intentions of the CRPD. Moreover, employers, employees, lawyers representing clients embroiled in workplace discrimination conflicts, and officials implementing CRPD mandates are not only human beings with their own attitudes towards persons with disabilities, but are also the agents who will be implementing the discrimination-free mandates. Like peeling the layers of an onion, there are different values, biases, and behaviors towards persons with disabilities at the policy, societal, and individual level.

We see that although conventions and declarations may be effective in publicizing the problem and changing the narrative in the short term, they appear to be less effective in changing the attitudes that are necessary to support meaningful implementation. Looking at the United States experience, the same bias, prejudice, and fear that motivated the passage of the American Disabilities Act of 1990—heralded as the landmark civil rights legislation for persons with disabilities—is the same bias, prejudice, and fear that limited the number of persons characterized as “disabled” and limited the interpretation of “reasonable accommodations.”⁴⁵ Repeated parsimonious judicial interpretations of the term “disabled” limited the scope of the ADA and neutered its mandate.⁴⁶ To counter these judicial erosions, in September 2008 President George Bush signed the ADA Amendments Act of 2008, which in effect expanded those persons with a “disability” that are entitled to ADA protections, and re-established the importance of the rights of persons with disabilities.⁴⁷

⁴⁵ See *id.* at 238; Stone, *supra* note 43, 514 n.25; *Labor and Employment Alert: Congress Expands Scope of Federal Disability Discrimination Law*, GOODWIN PROCTER (Oct. 7, 2008), http://www.goodwinprocter.com/Publications/Newsletters/Labor-and-Employment-Alert/2008/1007_Congress-Expands-Scope-of-Federal-Disability-Discrimination-Law.aspx.

⁴⁶ See Stone, *supra* note 43, at 525–531 (analyzing such examples as *Adams v. Rice*, 484 F. Supp. 2d 15 (D.D.C. 2007), *rev'd in part*, 531 F.3d 936 (D.C. Cir. 2008), and *Felix v. N.Y.C. Transit Auth.*, 324 F.3d 102 (2d Cir. 2003)); see also *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196–200 (2002); *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 481–82 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 564–68 (1999).

⁴⁷ *New Amendments to the Americans with Disabilities Act Expand Employee Protections and Employer Obligations*, PATTERSON BELKNAP WEBB & TYLER LLP (Oct. 2008), available at <http://www.pbwt.com/files/Publication/5c3afe10-fbb0-473a->

These judicial attitudes towards persons with disabilities mirror the often unspoken biases held by the general population. Phillip K. Howard, in his irreverent book, "The Death of Common Sense," reacted to the proliferation of rights for U.S. citizens, including the ADA, capturing the unspoken sentiment of many: "A paranoid silence has settled over the workplace. Only a fool says what he really believes. It is too easy to be misunderstood or to have your words taken out of context."⁴⁸ Mr. Howard vocalized the politically incorrect argument against rights for persons with disabilities, questioning the choice of time, focus, and expense of one group's interests over the majority's.⁴⁹ Questioning the logic behind the allocation of funds for individuals with disabilities, Mr. Howard points to the exorbitant cost of making public buildings wheelchair accessible when most of the disabled are not in wheelchairs.⁵⁰ Mr. Howard correctly predicted that there would be a backlash for all these rights, saying, "Americans are building up a reservoir of hatred."⁵¹

Studies confirm that employers have abundant misconceptions about employing persons with disabilities, including: doubts about whether they will make good employees;⁵² fears about the costs of reasonable accommodations, health care, and liability;⁵³ concerns that there will be resistance from other employees and co-workers;⁵⁴ and apprehensions that persons with disabilities will require more supervision than other employees.⁵⁵ Employers do not have equal discomfort with all persons with disabilities. Rather, employers have a greater comfort with individuals with disabilities that they can see or understand. For example, employers are more comfortable with employees with obvious sensory impairments, such as hearing loss, mobility impairments such as paralysis, and developmental

8b7f-033db72d1703/Presentation/PublicationAttachment/506100cb-a613-45d6-925e-0620c2c141fa/Alert_Employment_ADAAAandExpansions_Oct08.pdf; Stone, *supra* note 43, at 531–32.

⁴⁸ PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 137 (2011).

⁴⁹ *Id.* at 146–47.

⁵⁰ *Id.* at 155–56.

⁵¹ *Id.* at 156.

⁵² Lee, *supra* note 44, at 232, 237.

⁵³ *Id.* at 237.

⁵⁴ *Id.*

⁵⁵ *Id.*

disabilities such as retardation.⁵⁶ Employers have less comfort with and tolerance for persons with invisible disabilities such as mental illness, learning disabilities, or alcoholism.⁵⁷ Interestingly, the size of the company influences attitudes towards employees with disabilities, with larger companies being more receptive.⁵⁸ In part, this may be because larger companies feel better able to absorb the cost of any reasonable accommodation. Beyond the biases, the average reasonable accommodation costs approximately \$500.⁵⁹ Moreover, the research indicates that even employees who have had little experience with persons with disabilities did not elicit strong negative reactions towards co-workers with disabilities.⁶⁰

Although the ADA has yet to yield the consistent litigation successes that had been hoped for, the ADA is emerging as a linguistic agent of change that has prompted the media to use more “people-first” terminology, such as “people with disabilities,” to replace the previously used term “handicapped.”⁶¹ Stigmatizing language is a reflection of the fears and biases towards persons with disabilities.⁶² Replacing the terms “disabled” or “handicapped” with more “people-first” terminology is a critical cultural shift that emphasizes the humanity of the person, recognizes his differences, and shifts the frame from regarding the “handicapped” as the problem to acknowledging society’s responsibility to accommodate the person with a disability.⁶³ Yet, linguistic challenges remain. Newspapers still use the term “disabled” instead of “person with disabilities” when space is an issue. “If we are ‘disabled,’ that is, ‘without abilities,’ then what is this demand for equal employment, journalists likely think. On the other hand, if we can work with only minimal special arrangements, then why do we need all kinds of

⁵⁶ *Id.* at 241.

⁵⁷ *See id.*

⁵⁸ *Id.* at 243.

⁵⁹ *Id.* at 247; *Factsheet*, *supra* note 27.

⁶⁰ Lee, *supra* note 44, at 247.

⁶¹ Beth Haller et al., *Media Labeling Versus the U.S. Disability Community Identity: A Study of Shifting Cultural Language*, 21 *DISABILITY & SOC'Y* 61, 62–63 (2006).

⁶² *Id.* at 71.

⁶³ *Id.* at 67.

government funds to live on?"⁶⁴ Similarly, the term "wheelchair-bound" is an oxymoron because a wheelchair actually provides a person with a disability with more mobility.⁶⁵

China is another example of a country where there is dissonance between the public endorsement of human rights for individuals with disabilities and the private, attitudinal biases towards individuals with disabilities. In 2000, Beijing hosted the first World Summit on Disability.⁶⁶ The Summit produced the Declaration on the Rights of People with Disabilities in the New Century, calling for the adoption of an international treaty to promote the rights of persons with disabilities.⁶⁷ Approximately five years later, the CPRD was drafted.⁶⁸ Notably, in 2008, China was the first East Asian country to ratify the CPRD.⁶⁹

However, upon closer scrutiny, some of China's laws and domestic policies are in direct contravention of the CRPD.⁷⁰ China has a strong policy of disability prevention.⁷¹ As one illustration, Beijing's policy limiting one child per family is intended to not only limit the population, but to promote the quality of the population,⁷² a buzzword for zero tolerance for individuals with disabilities. Interestingly, the Chinese term "yousheng" has been interpreted to mean healthy birth or eugenics.⁷³ Prior to 2003, there was a requirement for a pre-marital examination to screen a couple for such "undesirable traits" as low intelligence, mental illness, blindness, extreme short-sightedness, and even some undesirable physical traits.⁷⁴ Certificates of "pre-marital medical examination[]" were issued to successful couples, allowing them to register for marriage.⁷⁵ In

⁶⁴ *Id.* at 64 (quoting Bill Bolt, an activist for persons with disabilities, in Bill Bolt, *The Media "Don't Get It" Because We Don't Know What "It" Is*, RAGGED EDGE ONLINE (Jul./Aug. 1999), <http://www.ragged-edge-mag.com/0799/b799blt.htm>).

⁶⁵ *Id.* at 71.

⁶⁶ Carole J. Petersen, *Population Policy and Eugenic Theory: Implications of China's Ratification of the United Nations Convention on the Rights of Persons with Disabilities*, CHINA: AN INT'L J., March 2010, at 85, 88.

⁶⁷ *Id.*

⁶⁸ *Id.* at 89.

⁶⁹ *Id.* at 90.

⁷⁰ *Id.* at 93.

⁷¹ *Id.* at 108.

⁷² *Id.* at 101.

⁷³ *Id.* at 102.

⁷⁴ *Id.* at 104.

⁷⁵ *Id.* at 105.

another powerful example, China has a policy of supporting “*yousi*” or “superior death,” an abortion of a fetus with a genetic disease.⁷⁶

As in the United States, China has enacted legislation such as the Disability Law of 1990 and the Employment Protection Law of 2008 prohibiting the discrimination of individuals with disabilities in the workplace.⁷⁷ Again, as experienced in the United States, employers still manage to evade these laws.⁷⁸ Potential employees are still not hired because they do not satisfy the physical requirement that they have “five facial organs . . . in the right place.”⁷⁹ Moreover, Chinese employers still exercise broad discretion in selecting employees who do not have health problems.⁸⁰

Latin America is another region that has a long history of ostracizing persons with disabilities from all spheres of life.⁸¹ In the area of mental health, the 1990 Caracas Declaration spurred significant mental health care reforms.⁸² However, mental health care remains woefully insufficient because of inadequate funding, legislation, and mental health care systems.⁸³ These inadequacies reflect the devaluation of persons with mental illness.

An individual’s culture of origin contributes to shaping his or her beliefs about disabilities.⁸⁴ Moreover, collectivist societies such as China have less tolerance for individuals with disabilities than individualistic societies.⁸⁵ It is hypothesized that in collectivist societies, where the focus is on the group at the

⁷⁶ *Id.* at 106.

⁷⁷ RONALD C. BROWN, UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA 92–93 (2010).

⁷⁸ *Id.* at 96–97.

⁷⁹ Ronald C. Brown, *China’s Employment Discrimination Laws During Economic Transition*, 19 COLUM. J. ASIAN L. 361, 362 (2006).

⁸⁰ BROWN, *supra* note 77, at 97.

⁸¹ Christian Curtis, *Disability Rights in Latin America and International Cooperation*, 9 SW. J. L. & TRADE AMERICAS 109, 110 (2002).

⁸² José Miguel Caldas de Almeida & Marcela Horvitz-Lennon, *An Overview of Mental Health Care Reforms in Latin America and the Caribbean*, 61 PSYCHIATRIC SERVS. 218, 220 (2010).

⁸³ *Id.*

⁸⁴ Ted Brown et al., *Occupational Therapy Students’ Attitudes Towards Individuals with Disabilities: A Comparison Between Australia, Taiwan, the United Kingdom, and the United States*, 30 RES. IN DEVELOPMENTAL DISABILITIES 1541, 1552 (2009).

⁸⁵ *Id.*

expense of the individual, individuals with disabilities may be viewed as unable to fulfill their full societal obligations.⁸⁶ In direct contrast, individualistic societies such as the United States and the United Kingdom have promoted the rights of persons with disabilities and adopted the individualistic values of “equity, normalization, mainstreaming, and empowerment.”⁸⁷

Yet, there are limitations to this line of reasoning and culture's influence. We see that the United States, very much considered an individualist society, has promulgated the Americans with Disabilities Act of 1990⁸⁸ and the ADA Amendments Act of 2008, both heralding the civil rights of individuals with disabilities.⁸⁹ Following suit, in 2000, the European Community, another individualist group, adopted the Employment Equality Directive, another declaration of individual rights.⁹⁰ However, the analysis cannot stop here. Even though the categorization of a culture as collectivist or individualistic may alter the frame in which its members react to persons with disabilities, their underlying personal biases provide another source of reactions. For example, the United States still has law in six states that limit marriage based on disability.⁹¹ Though no longer enforced, they are vestiges of our past treatment of persons with disabilities.⁹²

The lawyers and legal systems that are charged with protecting and enforcing the rights of individuals with disabilities may, in fact, have biases against the very individuals they are to protect. Michael L. Perlin, an internationally recognized expert on the rights of individuals with mental disabilities, has labeled these biases as “sanism” and “pretextuality.”⁹³ “Sanism” refers to the irrational prejudices, similar to the feelings of racism, sexism, and ethnic bigotry,

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 (2006 & Supp. II 2008)).

⁸⁹ Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12102 (2006 & Supp. II 2008)).

⁹⁰ Council Directive 2000/78/EC, 2000 O.J. (L 303) 16 (EU). *See* Waddington, *supra* note 43, at 317.

⁹¹ Petersen, *supra* note 66, at 95.

⁹² *Id.* at 95–96.

⁹³ MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD 34–35 (2012).

toward individuals with mental disabilities.⁹⁴ “Pretextuality” defines the systemic, biased decision-making of participants in the legal system.⁹⁵ Expectedly, the dynamics of sanism and pretextuality are a toxic combination that potentially weakens any enforcement opportunities of the CRPD.⁹⁶

Positive experiences with and education about person with disabilities are necessary to narrow the public/private schism between the public declarations that support rights for individuals with disabilities and the private, personal, rejecting feelings towards individuals with disabilities in the workplace.⁹⁷ Attitudes are learned and the “stereotypes” for disability may assume that a person with one disability also has the impairments associated with other disabilities.⁹⁸ These negative attitudes or biases are caused by inadequate information, knowledge, and a generalized fear held by the broader society. In one illustration, it is assumed a person in a wheelchair also lacks the ability to speak. Therefore, people will commonly speak to the companion, as if the person in the wheelchair is invisible.⁹⁹ In another example, persons with mental illness are demonized and labeled “nonhuman.” What makes it even more challenging to address these attitudinal biases is that there exists a “pseudo-inconsistency” or dichotomy between what is considered proper, societal behavior and true, underlying feelings.¹⁰⁰ For example, if someone was asked in a face-to-face interview his or her thoughts about an individual with a disability having children, that person might overtly opt for the “socially appropriate” answer. On the other hand, if asked the identical question in a written questionnaire where anonymity was assured, one may give a different answer because he or she would feel more comfortable being forthcoming.¹⁰¹

Additional determinants of positive attitudes towards persons with disabilities include inner strength and gender. The inner strength of individuals without disabilities determines how

⁹⁴ *Id.* at 34.

⁹⁵ *Id.* at 34–35.

⁹⁶ *See id.* at 165–66.

⁹⁷ *See* Pheroza Daruwalla & Simon Darcy, *Personal and Societal Attitudes to Disability*, 32 ANNALS TOURISM RES. 549, 554 (2005).

⁹⁸ *Id.* at 552.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 554.

¹⁰¹ *Id.*

they will react to persons with disabilities.¹⁰² Individuals with “ego-strength, self-esteem, self-awareness, and sense of security” are likely to be more accepting of individuals with disabilities.¹⁰³ In direct contrast, individuals with “anxiety, hostility, authoritarianism, ethnocentrism, narcissism, interpersonal alienation, and rigidity” are more likely to reject those with disabilities.¹⁰⁴ For those who view persons with disabilities as a threat, they may see individuals with disabilities as asexual or a “third gender.”¹⁰⁵ Perhaps, for some, desexualization is one way to make individuals with disabilities less threatening, less real, less human. Turning to gender, women who have had experience with persons with disabilities were found to be more accepting than men who had no experience with disabilities.¹⁰⁶ Women generally favored making more reasonable accommodations.¹⁰⁷

Yet, in order to ensure full compliance with the spirit and the intent of the CRPD, Supporting States must align their societal and individual attitudes, policies, and practices towards persons with disabilities with the aspirational goals of the CRPD.

Moreover, unless there is proactive intervention to change attitudes, employers and employees with existing biases about individuals with disabilities will have a greater likelihood to continue interacting with individuals in this close-minded, biased way.¹⁰⁸

IV. DESIGN CONSIDERATIONS FOR DEVELOPING DISABILITY-SENSITIVE MEDIATION AND CONCILIATION FORUMS

Supporting States have an unparalleled opportunity to design disability-sensitive mediation and conciliation forums to help global employees with disabilities and their employers resolve the multi-dimensional issues in CRPD disputes. As has been discussed in the previous Section, acts of discrimination against persons with disabilities are not just isolated incidents

¹⁰² See Noa Vilchinsky et al., *Attitudes Toward People with Disabilities: The Perspective of Attachment Theory*, 55 REHABILITATION PSYCHOL. 298, 298 (2010).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 304.

¹⁰⁶ Paula M. Popovich et al., *The Assessment of Attitudes Toward Individuals with Disabilities in the Workplace*, 137 J. PSYCHOL. 163, 164 (2003).

¹⁰⁷ *Id.* at 174.

¹⁰⁸ See *id.* at 173–74; Brown et al., *supra* note 84, at 1542.

that can be remedied with a simple resolution.¹⁰⁹ Rather, acts of discrimination are often more nuanced expressions of embedded attitudinal biases towards persons with disabilities. Optimally, mediation and conciliation programs for CRPD potentially could offer employees with disabilities and employers an opportunity to address these attitudinal biases, learn from each other, and recalibrate their thinking. Thus, the design of such mediation and conciliation programs should be customized in a way that allows full participation by persons with all types of disabilities and shows respect for the individual cultural preferences of Supporting States. In order to ensure that there is accountability and enforceability for participation, the mediation and conciliation programs should be part of a comprehensive dispute resolution system of enforceability that provides for accountability, follow-up, and alternative courses of enforcement.¹¹⁰ Hallmarks of such disability-sensitive programs include: disability-accessible information, access to disability-sensitive lawyers, disability-responsive neutrals, and culturally sensitive forums that are adaptable to the needs of persons with disabilities.

A. *Accessible Information and Communication*

Although we have been referring to individuals with disabilities as a group, persons who are members of that group may have a spectrum of physical, cognitive, and/or emotional disabilities that require auxiliary aids or services to help them access information about available mediation and conciliation programs, and, if they opt to participate in these forums, to help them communicate in these forums.¹¹¹ Thus, any new websites that are developed to inform about the CRPD should be designed to be disability-accessible.¹¹² Moreover, existing websites about

¹⁰⁹ See *supra* Part II.

¹¹⁰ HANDBOOK, *supra* note 5, at 102–03.

¹¹¹ See, e.g., *ADA Best Practices Took Kit for State and Local Governments: Chapter 3: General Effective Communication Requirements Under Title II of the ADA*, ADA.GOV (Feb. 27, 2007), <http://www.ada.gov/pcatoolkit/chap3toolkit.htm> [hereinafter *ADA Best Practices*]; see generally JUDY COHEN, *DISABILITY ETIQUETTE: TIPS ON INTERACTING WITH PEOPLE WITH DISABILITIES*, available at <http://www.oregon.gov/DHS/vr/publications/etiquette.pdf?ga=t> (explaining various strategies for businesses to communicate with people with disabilities).

¹¹² See *Getting Started: Making a Web Site Accessible*, WEB ACCESSIBILITY INITIATIVE, <http://www.w3.org/WAI/gettingstarted/Overview.html.en> (last visited

the CRPD and available mediation and conciliation programs should be modified so that they are also accessible to individuals with disabilities.¹¹³ Beyond making the web accessible, other types of auxiliary aids and services should also be available as needed to facilitate information and communication. Examples of helpful aids that should be made available are qualified interpreters, computer-aided real-time transcription (CART), written materials, telephone handset amplifiers, assistive listening systems, hearing aid-compatible telephone, speech synthesizers, communication boards, text telephones (TTYs), qualified readers, and Braille materials.¹¹⁴

B. Disability-Sensitive Lawyers To Represent Individuals with Disabilities

Lawyers who are knowledgeable in the CRPD, competent in mediation advocacy, and psychologically aware of how to monitor their personal biases towards clients with disabilities play a vital role in promoting the interest of persons with disabilities in CRPD workplace mediations.¹¹⁵ As we have explained in the previous sections, CRPD workplace complaints are often an amalgam of legal issues, misinformation, misunderstandings, and attitudinal biases.¹¹⁶ Even though the conflict discourse in mediation may have a degree of informality that may cause some to question the necessity of legal representation, think again. Lawyers can still assist the client to be informed of his rights, prioritize the client's legal and other interests, draft any resulting agreements, ensure enforceability of any agreements, and strategize about alternative options if mediation does not

Nov. 17, 2012) (providing information on making a website accessible). Tim Berners-Lee, W3C Director and Inventor of the World Wide Web, believes, "The power of the Web is in its universality. Access by everyone regardless of disability is an essential aspect." Press Release, World Wide Web Consortium, World Wide Web Consortium Launches Int'l Program Office for Web Accessibility Initiative (Oct. 22, 1997), <http://www.w3.org/Press/IPO-announce>; see also *ADA Best Practices*, *supra* note 111.

¹¹³ See WEB ACCESSIBILITY INITIATIVE, *supra* note 112; see also CRPD, *supra* note 3, at art. 4.

¹¹⁴ See *ADA Best Practices*, *supra* note 111.

¹¹⁵ See PERLIN, *supra* note 93, at 160.

¹¹⁶ See *supra* Part III.

succeed. Furthermore, lawyers can help equalize the inherent power imbalance in mediation between the employee and the employer by providing legal information and support.

However, if attorneys are going to be effective advocates in mediation for clients with disabilities, attorneys need to be both aware of their clients' special needs and mindful of their own personal attitudes and biases towards individuals with disabilities. If lawyers are not properly trained about how to monitor their personal reactions, such biases as sanism and pretextuality may potentially harm, rather than advance, the rights of the person with a disability.¹¹⁷ Thus, effective training for lawyers should also include a module on disability etiquette and awareness.¹¹⁸ Supporting States could potentially offer such education through a variety of modalities, including online courses, webinars, in-person courses, and the dissemination of written materials.

Although for many mediation programs, including those in the United States, it is an economic challenge to provide clients with affordable legal assistance, it can be done. Bar associations, law firms seeking to do pro bono work, and law school clinics are some potential sources of pro bono or affordable legal services. For those parts of the world that do not have adequate numbers of lawyers, online representation through such platforms as Skype is an option that deserves further exploration. The point that should not be lost in this climate of economic scarcity is that persons with disabilities who are opting to mediate or conciliate a CRPD conflict should also have the option of affordable legal representation. Attorneys provide requisite support for employees with disabilities who are attempting to enforce their CRPD rights in mediation and conciliation. Moreover, not only does the presence of attorneys help to safeguard clients' CRPD workplace rights, but attorneys also help to ensure that mediation and conciliation forums are not misused to condone continued workplace discrimination.

¹¹⁷ See PERLIN, *supra* note 93, at 159–60.

¹¹⁸ See COHEN, *supra* note 111, at 1.

C. *Disability-Responsive Neutrals*

The disability-sensitive neutral, regardless of whether the neutral is a mediator or a conciliator, will influence the quality of the process and the way the CRPD workplace addresses the dispute. Optimally, all neutrals involved in CRPD mediations and conciliation disputes should be disability-responsive. First, disability responsive neutrals should allow participants in the mediation adequate opportunity to have the difficult conversation about what happened to cause the CRPD complaint, including any real or perceived bias towards the individual with a disability.¹¹⁹ However, whether a neutral practices a more evaluative style of mediation where the neutral directs the mediation process or a more facilitative style of mediation where the neutral elicits the information from participating parties, the neutral's style influences the way the conflict is defined, the role of the neutral, and how the parties participate.¹²⁰ The more the neutral relies on a facilitative, elicitive style of mediation, the greater likelihood the participants in mediation will be able to engage in a multi-dimensional conflict discourse, beyond the presenting legal issue.¹²¹ Moreover, the more the neutral relies on a facilitative, elicitive style of mediation, the less danger of the neutral contaminating the mediation conciliation process by imposing his biases about individuals with disabilities on the participants.¹²²

Although the terms “facilitated settlement,” “mediation,” and “conciliation” may be used interchangeably with different cultures, they actually refer to somewhat different processes.¹²³ The different terms actually reflect the cultural preferences for a more facilitated or directed dispute resolution process—mediation being more facilitative and conciliation more

¹¹⁹ DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (2010).

¹²⁰ Elayne E. Greenberg, *The Defining Ingredient: Transformative Mediation Ideology in Parenting Coordination Practice*, in *TRANSFORMATIVE MEDIATION: A SOURCEBOOK* 271, 271 (Joseph P. Folger et al. eds., 2010).

¹²¹ Elayne E. Greenberg, *Dispute Resolution Lessons Gleaned from the Arrest of Professor Gates and “The Beer Summit,”* 25 *ST. JOHN'S J. C.R. & ECON. DEV.* 99, 110–11 (2010) [hereinafter Greenberg, *Dispute Resolution Lessons*].

¹²² *Id.*

¹²³ NADJA ALEXANDER, *INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES* 15 (2009).

directive.¹²⁴ For purposes of this Article, whether a Supporting State prefers a mediation or conciliation model is actually a continuation of the discussion about allowing participating parties to discuss the multi-dimensions of their CRPD workplace dispute. The conciliator should ensure that there is ample opportunity for conflict discourse in a way that permits the parties to hear each other's perceptions and, if they are willing, advance to a greater understanding of the employee with a disability. Furthermore, even though the conciliator will provide a recommendation at the conclusion of the mediation, that recommendation could be offered based on the principles of the CRPD, rather than based on the conciliator's personal biases.

Finally, whether the neutral is a mediator or conciliator, effective neutrals should actively monitor their own reactions and modify their interventions when working with persons with disabilities. Neutrals who are experienced working with individuals with disabilities have learned to monitor their own reactions and adjust their interventions based on the disability of the person. For example, neutrals will use simple, concrete language if the participant has a learning disability. A sensitive neutral, working with an individual with cerebral palsy and a speech difficulty, will allow the person ample time to complete his thoughts, encourage that of other participants, and make sure the individual is accorded appropriate respect, rather than being discounted because of his disability.¹²⁵

D. Disability-Respectful Structural Modifications and Physical Accommodations

Another requisite skill of effective neutrals working on CRPD workplace disputes is the ability to adapt to the physical environment and structure of the sessions to accommodate the diversity of needs for individuals with disabilities. By way of illustration, mediations should occur in buildings and offices that are accessible to the individual with disabilities. If a person is in a wheelchair, tables should be of an appropriate height to accommodate the wheel chair, and corridors should be wide

¹²⁴ *Id.* at 16.

¹²⁵ *Id.*

enough to permit navigation.¹²⁶ If a participant has a visual impairment, written correspondence might also be written in large font or Braille or reduced to an audio format, and the room should be of adequate size to permit the guide dog to accompany the person.¹²⁷ Skype mediations are another viable option if in-person meetings present too much of a challenge.

Astute mediators and sensitive conciliators should also demonstrate their flexibility to adjust the mediation sessions to accommodate an individual's medication schedule, focus, or tolerance.¹²⁸ For example, caucuses and breaks may be a welcome accommodation that may provide a person with a disability a needed opportunity to speak with the mediator or just regroup.

Pre-mediation provides an opportunity for the neutral to confer with the participant who has a disability about the participant's particular needs and learn how the neutral might make the mediation or conciliation more accessible.¹²⁹ The pre-mediation is also a welcome opportunity for the neutral to educate and prepare parties for mediation.¹³⁰ During the pre-mediation phase, the neutral has the opportunity to provide participants with educational materials about persons with disabilities and mediation. The neutral can also encourage participants, including the lawyers, to prepare for a perspective-sharing and problem-solving process, rather than a blaming process.¹³¹ Any pre-mediation submissions, such as briefing papers, should also invite exploration to a greater understanding of what transpired, what caused the impasse, and options for possible resolution.

¹²⁶ JUDY COHEN, MAKING MEDIATION SESSIONS ACCESSIBLE TO PEOPLE WITH DISABILITIES (2000) [hereinafter COHEN, MAKING MEDIATION SESSIONS ACCESSIBLE], available at <http://www.directionservice.org/cadre/pdf/Making%20Mediation%20Sessions%20Accessible%20To%20People%20With%20Disabilities.pdf>.

¹²⁷ See *id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See Elayne E. Greenberg, *Starting Here, Starting Now: Using the Lawyer as Impasse Breaker During the Pre-Mediation Phase*, in DEFINITIVE CREATIVE IMPASSE-BREAKING TECHNIQUES IN MEDIATION 15, 17 (Molly Klapper ed., 2011) [hereinafter Greenberg, *Starting Here, Starting Now*]; COHEN, MAKING MEDIATION SESSIONS ACCESSIBLE, *supra* note 126.

¹³¹ Greenberg, *Starting Here, Starting Now*, *supra* note 130, at 19.

E. Part of a System of Accountability and Enforceability

If mediation and conciliation forums are to be used effectively, then they also need to be part of a comprehensive conflict management system that manages the case and provides alternative methods for accountability and resolution in the event that mediation and conciliation are not effective.¹³² What is the impetus for parties to even try mediation or conciliation? Whether Supporting States decide to make mediation and conciliation participation voluntary or mandatory, participants should understand the next steps and the recourse available if they do not want to participate, or if the process does not succeed. Supporting States should encourage their ADR providers and related government agency to collect data that evaluates the efficacy of conciliation and conciliation cases to help maximize best practices for best results.

An ongoing concern about mediation and conciliation forums for discrimination issues is the fear that these forums will be misused as a shield that protects acts of discrimination, rather than a sword that protects these rights.¹³³ Playing out this fear, employers could misuse mediation and conciliation to consent to agreements that are still in contravention of the CRPD. Therefore, it is critical that Supporting States require review and approval of all mediated agreements to ensure that they comply with the CRPD mandate.¹³⁴

The true promise of mediation and conciliation may be realized if Supporting States design mediation and conciliation forums to respond to CRPD workplace complaints in a way that addresses the attitudinal biases and offers opportunities for true learning and change. It is unrealistic to be optimistic about the promise of the CRPD unless we are concomitantly prepared to address the pervasive, underlying biases and prejudices in the

¹³² CATHY A. CONSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (1996); CRPD, *supra* note 3, at art. 33; HANDBOOK, *supra* note 5, at 93–96 (2007).

¹³³ See Greenberg, *Dispute Resolution Lessons*, *supra* note 121, at 109–10.

¹³⁴ See, e.g., *ADA Mediation Program*, ADA.GOV, <http://www.ada.gov/mediate.htm> (last visited Nov. 17, 2012). The Key Bridge Foundation ADA model submits mediated agreements to the Department of Justice for sign off and approval. See *id.*

workplace towards persons with disabilities that infect our global community.¹³⁵ Mediation and conciliation forums offer that opportunity.

CONCLUSION

Albert Einstein motivates, "Your imagination is your preview of life's coming attractions."¹³⁶ This Article has allowed us to imagine the dispute resolution design guidelines that should be considered when developing responsive mediation and conciliation programs for CRPD workplace disputes. The CRPD is our global aspiration that fuels our imagination of what could be. However, in order to make the spirit and intent of the CRPD a reality, Supporting States now have the opportunity to address a history of systemic discrimination towards individuals with disabilities and begin implementing responsive mediation and conciliation forums to constructively address such discrimination. We have watched the preview of life's coming attractions. Now we are ready for the main attraction, a global workforce that encourages full participation of persons with disabilities.

¹³⁵ See, e.g., Peterson, *supra* note 66, at 106.

¹³⁶ MASER, *supra* note 1.