Intensive Course on Justiciability of Economic, Social and Cultural Rights: Theory and Practice

Abo Akademi University, November 13

Equality Rights and Non-Discrimination:

9-10:30  Persons with Disabilities
10:30-12  Women’s Rights
Common Link

Stereotypical Assumptions about the Inherent Capabilities and Roles of Distinct Groups of Individuals

• Justifies and sustains differential treatment in laws, policies and practices.

• Reinforces attitudes of lower worth and relationships of dependency that sustain public and private violence and abuse.

(ESCR likewise subject to stereotypical assumptions that seek to marginalize and “parallel track” them)
Usefulness of Human rights-based approach

• Require policy-making focus on *individual* human dignity and individualized assessments (not stereotyped assumptions)

• Empower individuals to engage policy-making by claiming rights to:
  – **equal protection**, including reasonable accommodation of difference where relevant
  – **inclusion**
  – **participation** (*best situated to identify barriers*)
  – **disaggregated information**
  – **monitoring**,
  – **accountability frameworks**
Persons with Disabilities

- Present Conditions: Unequal Status of PWD
- UN Convention on Rights of PWD
- **Grismer Estate Case** (Reasonable Accommodation)
- **Olmstead v. L.C.** (“ADA Integration Mandate”)
- Paraguayan Neuropsychiatric Hospital

Substantive-equality approaches to addressing key issues of the rights to work, to health, and to living in the community (not be institutionalized)
Disability and Inequality

- 20% of world’s poorest people are disabled
- Mortality rate for children with disabilities as high as 80% in countries where under-5 mortality as a whole has decreased below 20%.
- PWD more likely to be victims of violence or rape.
- 90% children PWD in LDC do not attend school
- Global literacy rate for adult PWD is 3%, 1% for women PWD
- Unemployment as high as 80% in some countries.
Why is specialized UN Convention on Rights of Persons with Disabilities Needed?

All human rights treaties already protect against discrimination and unequal treatment on the basis of disability.

(2006 Quinn and Degener report on UN treaty bodies)
UN Convention on Rights of Persons with Disabilities

Two broad paradigm shifts:

Conceptual: Medical/Social Welfare Model of Disability (“parallel track” difference) to Human Rights Model (ability, inclusion, and lifting of barriers to participation).

Instrumental: From top-down, state-centric modeling, to participatory model of governance—taking voice of affected as principal point of departure

(part of broader shift in 21st century human rights law and development policy—decisionmaking, monitoring, implementation)
General Principles (art. 3)

- **Full and effective participation and inclusion in society**;
- **Respect for inherent dignity, individual autonomy** including freedom to make one’s own choices, and independence of persons;
- **Non-discrimination & Equality of opportunity** (reasonable accommodation);
- **Respect for difference** and acceptance of PWD as part of human diversity and humanity
- **Accessibility**
Definition of Disability in Convention?

Many countries have legislation that narrowly defines disability, excluding many from national protection.

Ethiopia, for example, defines “disability” to expressly exclude “mental disability,” which includes all those with both intellectual and psychiatric (or psycho-social) disabilities.
Preamble:
e) “Recognizing that disability 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.

Art. 1: Purpose
“…promote, protect and ensure the full and equal enjoyment of all HR and FF by all PWD, and to promote respect for their inherent dignity.”

“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.”
Protected Rights

Equality & Non-Discrimination
- Women with disabilities
- Children with disabilities
- Awareness raising
- Accessibility
- Right to life
- Situations of risk
- Equal recognition before the law
  --Legal Personality
- Legal Capacity (and support in exercising it where necessary)
  - Access to justice
  - Liberty and security of person
  - Freedom from torture & CIDT
  - Freedom from abuse

Right to physical & mental integrity
- Right to movement & nationality

Right to live in community, independently & inclusively
- Personal mobility
- Freedom of expression & opinion
- Respect for privacy
- Respect for home and family
- Right to education
- Right to health
- Habilitation and rehabilitation
- Work and employment
- Adequate standard of living
- Participation in political/public life
- Participation in culture/sport/leisure
Art. 12. Legal Capacity

State Parties shall...

2. recognize that PWD enjoy legal capacity on an equal basis with others in all aspects of life.

3. take appropriate measures to provide access by PWD to the support they may require in exercising their legal capacity.

4. Ensure … appropriate and effective safeguards to prevent abuse… **Must:**
   - Respect the rights, will and preferences of the person
   - Free of conflict of interests and undue influence
   - Proportional and tailed to the person’s circumstances
   - Apply for the shortest time possible;
   - Subject to regular review by competent, independent, impartial authority
Shtukaturov v. Russia  
(Eur.Ct.HR. 2008)

- Deprived of legal capacity without his participation and knowledge. Mother claimed incapable of leading an independent social life and thus needed a guardian ("simple schizophrenia").
- 10 minute hearing.
- 2 questions to doctor: (1) have mental illness; (2) able to understand his actions and control them.
- No ability to appeal or see lawyer (b/c no legal capacity).
- Institutionalized & medicated ag. will (despite own flat)
Held: Violation of Art. 5, 6 & 8.

Art 6. Fair hearing by a tribunal. “Fair” hearing requires participation of applicant (true adversarially) & ability to appeal.

Art. 8. Respect for Private Life. Arbitrary standards; not strike “fair balance” b/t rights of individual and others.
• No legal test (“understand and control actions”);
• Not pursue legitimate aim (nat’l security, threat)
• Not necessary in a democratic society; disproportionate as not allow for partial limitation.

Art. 5. Right to liberty and security. “Lawful detention of persons of unsound mind” requires “fair & non-arbitrary procedures.”
• No basis for decision to hospitalize (only legal status).
• Judicial review of detention required
Recent similar cases
(legal capacity)

• Salontaji-Drobnjak v. Serbia (Oct. 2009)
• Mitev v. Bulgaria (argued 11 Nov. 2009)
• Stanev v. Bulgaria (same)
Art. 5. Equality & Non-Discrimination: Reasonable Accommodation

In order to promote equality and eliminate discrimination, **States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.**
Definitions (art. 2)

“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment, on an equal basis with others, of all human rights and FF in the political, economic, social, cultural or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to PWD the enjoyment or exercise on an equal basis with others of all HR and FF.
Access to employment
  – Physical infrastructure
  – Job requirements

Health care options

Access to Adequate Education

Freedom of movement
Grismer Estate Case (S.Ct.Canada,1999)

**Facts:** 44 year old truck driver suffered stroke, causing condition (“HH”) that permanently impaired peripheral vision

Drivers license revoked on basis of medical standards that require a minimum of 120 degree field of vision (ave. person, 200-220). People with HH never permitted to drive in British Columbia, even if pass all other relevant driving tests on basis of compensating strategies.

**Issue:** Does application of a blanket rule to an individual, without the possibility of specialized assessment of individual capabilities, constitute discrimination in violation of human rights act?
Held: **Blanket refusal is unjustified.**

“This case is not about whether unsafe drivers must be allowed to drive. Rather, it is about:

- Ensuring opportunity to show in an **individualized assessment** that he could drive safely.
- **Combating false assumptions regarding the effects of disabilities on individual capacities.** All too often, PWD are assumed to be unable to accomplish certain tasks. The thrust of HR legislation is to eliminate such assumptions and break down the barriers that stand in the way of equality for all.”

**Meiorin Test:** What is it? Why is it necessary?
Meiorin Test

Establish single allocation of burdens for discrimination cases, whether “direct” or “indirect” discrimination.

Allocation of Burdens

1. Plaintiff: Establish standard is *prima facie* discriminatory (either in purpose or effect)

2. Defendant: Prove discriminatory standard has a bona fide and reasonable justification.
   a) Goal rationally connected to function being performed.
   b) Adopted in good faith (not pretext)
   c) Standard reasonably necessary to accomplish goal (i.e., safety)—i.e., *cannot accommodate persons with P’s characteristics without incurring undue hardship*.

**accommodation short of undue hardship has been incorporated into the standard.**
Why important?

• Avoid different standards (defenses and remedies) for cases based on “direct” and “indirect” discrimination.
  – Direct discrimination — standard struck down; could not escape by reasonable accommodation of individual
  – Indirect discrimination — remedy = accommodation

• Legitimized employment procedures that had effect of unjustifiably excluding people

• Burden on PWD to challenge each time

• **Meiorin solution:** Accommodation must be incorporated into standards themselves, rather than allowing a discriminatory standard to stand supplemented by accommodation for those who cannot meet it.
Recent case
(Eur.Ct.HR, 2009)

**Glor v. Switzerland**: Tax levied for exemption from military service (diabetes)

1. **Violation of Non-Discrim.** (art. 14)
2. **Failure to provide reasonable accommodation**
   (1st reference)
3. **Referred to CRPD as reflective of “European” and “universal” consensus**
Institutionalization of Persons with Disabilities

Warehousing

Right to community integration
CRPD, Art. 19
Living independently and being included in the community

Recognize the equal right of all PWD to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate … full inclusion and participation in the community, including by ensuring …

a) opportunity to choose their place of residence and where and with whom they live … not obliged to live in a particular living arrangement;

b) Have access to a range of residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community
Olmstead Case

**Facts:** L.C. and E.W., two women with psychiatric disabilities (schizophrenia / personality disorder), voluntarily committed to psychiatric unit of Georgia Hospital. Treatment professionals eventually concluded each woman could be cared for appropriately in community-based programs. Nonetheless, women remained institutionalized.

Filed suit against state officials seeking placement in community care, alleging discrimination on the basis of disability.

**District court** ordered immediate placement in appropriate community-based treatment program

- unnecessary institutional segregation constitutes discrimination per se, which cannot be justified by a lack of funding.
- rejected State’s defense that requiring immediate transfers in such cases would “fundamentally alter” the State’s programs.

**Court of Appeals** affirmed, but remanded for reassessment of State’s cost-based defense: **Reasonableness test:** Additional cost vs. State’s overall mental health budget.
Olmstead Case

Held: Under American with Disabilities Act, **States are required to provide community-based treatment for persons with mental disabilities when:**

1. treatment professionals determine such placement is appropriate,
2. the affected persons do not oppose such treatment, and
3. the **placement can be reasonably accommodated**, taking into account the resources available to the State and the needs of others with mental disabilities.

To **not** provide community integration in these circumstances constitutes discrimination on the basis of disability.
Olmstead Case

Given need to (1) maintain range of facilities and (2) administer services with an even hand, States must be given more leeway than lower courts allowed.

Reasonable accommodation standard met if State were to demonstrate that it had:

1. A comprehensive, **effectively working plan** for placing qualified persons with mental disabilities in less restrictive settings, and

2. A **waiting list that moved at a reasonable pace** not controlled by the State’s endeavors to keep its institutions fully populated.

In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions.
Paraguayan Neuropsychiatric Hospital

- Precautionary Measures
- Case strategy?
Women’s Rights
Common Link

Stereotypical Assumptions about the Inherent Capabilities and Roles of Distinct Groups of Individuals

• Justifies and sustains differential treatment in laws, policies and practices.

• Reinforces attitudes of lower worth and relationships of dependency that sustain public and private violence and abuse.
Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion:

– Family violence and abuse
– Forced marriage
– Dowry deaths and acid attacks
– Sexual harassment (jobs/education/health)
– Limits on reproductive choice/health
– Dependency on abusive partners
– Low levels of political participation
– Poor health and nutrition (women and children)
– Illiteracy, etc.
International Litigation: Women’s Rights

Civil Rights (Marriage, Property, Contract, Judicial Protection)

Rights to Physical Integrity & Security
   A. Domestic Violence
   B. Rape (official, private, family)

Reproductive and Sexual Health, Privacy, Autonomy
   A. Abortion
   B. Coercive Sterilizations by Health Officials
   C. Vaginal Inspections in Prisons

Education

Access to Health Care
   A. Access to Health Care Services
   B. Feminization of HIV/AIDS

Labor / Working Conditions
   A. Pregnancy Discrimination
   B. Coercive Use of Contraception by Employers

Political Rights (Vote, Election to Public Office)
Access to Justice & Administration of Justice
Relevant Instruments

• **CEDAW**
  – General Comment No. 19 (VAW)

• **Inter-American Convention on the Prevention, Punishment and Eradication of Violence Ag. Women (“Belem do Para”)**

• Non-discrimination provisions of all international and regional HR treaties
CEDAW

PART II: Political Rights (arts. 7-9)
- Right to **Vote, be Elected to Public Office, and Political Participation** (art. 7);
- Right to **Nationality** of female spouse and her children (art. 9)

PART III: Economic, Social and Cultural Rights (arts. 10-14)
- Right to **Education** (art. 10)
- Right to **Work** (art. 11): employment opportunities, equal remuneration, maternity leave
- Right to **Just and Favorable Working Conditions** (art. 11)
- Right to **Social Security** (art. 11)—retirement, unemployment, sickness, invalidity/incapacity
- Right to **Health Care** (art. 12)
- Right to **Special Protection during Pregnancy** (art. 11)
- Other **Economic & Social Rights** (art. 13)—e.g., family benefits, access to credit, cultural life
- Rights of **Women in Rural Areas** (art. 14)
- Right to **Adequate Living Conditions**, particularly in relation to Housing, Sanitation, Electricity, Water Supply, Transport & Communications

PART VI: Civil Rights (arts. 15-16)
- Right to, in civil matters, a **legal capacity** identical to that of men (conclude contracts, administer property, judicial proceedings)
- Right to equality in **marriage and family relations** (divorce, child custody, family responsibilities, reproductive choice)
PART I: State Obligations (arts. 2-6)

Art. 2. Pursue by all appropriate means and without delay a policy of eliminating discrimination ag. women, undertaking to:

a) Give domestic legal effect (Constitutions & Legislation);
b) Prohibit/sanction (thru appropriate legislative and other measures);
c) Ensure effective legal protection (thru competent national tribunals and other public institutions);
d) Refrain [public authorities] from engaging in any act or practice;
e) Eliminate discrimination ag. women by any person, organization or enterprise [private actors];
f) Modify or abolish existing laws, regulations, customs & practices;
g) Repeal all national penal provisions which constitute discrimination ag. women.

...

Art. 5. Take all appropriate measures to modify social and cultural patterns of conduct based on the idea of the inferiority/superiority of either sex or on stereotyped roles; also to ensure recognition of common responsibility of men and women in upbringing of children.
Convention of Belem do Para (VAW)

• Ratified by highest number of American States than any other regional convention (31 of 35)
  – US, Canada, Cuba (kicked out of OAS), Jamaica

• Entered into force within 1 year (1995).

Ch. II. Rights Protected
• **Right to be free from violence** in both public and private spheres

• **Includes**, among others
  – **Right to be free from all forms of discrimination**; and
  – Right to be valued and educated **free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination**.
Ch. III. Duties of the States

Art. 7. States Parties agree to pursue, by all appropriate means & without delay, policies to prevent, punish, erradicate VAW:

a) **Refrain** from any act or practice of VAW (state authorities, personnel, agents, institutions)

b) **Apply due diligence to prevent, investigate and sanction** VAW;

c) **Adopt domestic legislation** (penal, civil, administrative) to prevent, punish, eradicate

d) **Adopt legal measures to require perpetrator to refrain** from harassing, intimidating or threatening women or using any method that harms or endangers her life or integrity, or damages her property.

e) **Amend or repeal** existing laws/regulations or **modify legal/customary practices** sustaining persistence and tolerance of VAW.

f) **Establish fair and effective legal procedures** for women who have been subjected to violence, including (among others): (1) **protective measures**; (2) **timely hearing**; (3) **effective access to judicial procedures**.

g) **Ensure effective and just remedies** (access to restitution, reparations, etc.)

h) **Adopt other measures** as may be necessary to give effect to this Convention.
Maria Eugenia Morales de Sierra  
(IACHR, 2001)

Guatemalan Civil Code divides marital duties/rights

**Husband:**
- Power to represent marital union
- Administer marital property
- Serve as guardian over children

**Wife:**
- Care for minor children and home
- Right to work outside home only where not prejudice role as mother/homemaker
Maria Eugenia Morales de Sierra  
(IACHR, 2001)

Allocation of Burdens?

**Petitioner:** Establish *prima facie* violation—similarly situated persons treated differently

**State:**
- Distinction is objectively justified in pursuit of legitimate end: “based on reasonable and objective criteria.”
  - Pursues *legitimate aim*;
  - Means are *proportional* to ends.

**heightened scrutiny**
Held?

Art. 24. Far from ensuring “equality of rights and adequate balancing of responsibilities”

• Institutionalizes imbalances
• Establishes situation of *de jure* dependency
• Applies stereotyped notions of roles, which perpetuates *de facto* discrimination ag. women in family and impede ability of men to fully develop their roles w/in marriage and family
• **Art. 11 (privacy):** arbitrary infringement on right to have private life respected.
  – No link to protection of family (improper “fit”)
  – Denies right to seek employment and benefit from increased self-determination this affords
  – Reinforces cultural habits

**Gender violence** = “manifestation of the historically unequal power relations b/t men and women”
Rights to Physical Integrity, Security, Housing, Health: Domestic Violence


Facts:

Held:

Remedy:
Maria da Penha Maia Fernández (Brazil), Case 12.051 (2000)

Facts: victim subjected to domestic violence by husband over many years. In May 1983 he shot and attempted to kill her, leaving her gravely injured, with irreversible paraplegia. Two weeks later he attempted to electrocute her. Criminal case languished for 8 years.

Inter-American Commission on HR applies both American Convention and Convention of Belém do Pará in establishing nature of Brazil’s obligation to apply due diligence to investigate, prosecute and punish domestic violence.
Rape in public hospital

M.M. v. Peru

- Duty to investigate with due diligence
- Sanction
- Repair
- Educate
- Guarantees of non-repetition
VI. Reproductive and Sexual Health, Privacy, Autonomy: Coercive Sterilization

Widespread, systematic practice—often due to focus of family planning programs in region on statistical targets, rather than protection of fundamental human rights of women. Intersects with discrimination against ethnic and cultural groups.

(CEDAW Committee)
VI. Reproductive and Sexual Health, Privacy, Autonomy: Coercive Sterilization

Mamerita Mestanza v. Peru (Friendly Settlement)
State officials coerced woman into having a surgical sterilization by telling her and her husband that it was a crime to have more than 5 children and that she would be criminally punished. Through negligent medical treatment and follow-up, she died 10 days later from the forced sterilization.

Sara Santiz Gomez v. Mexico
Doctor in public hospital performed a salpingoclasia (tying of fallopian tubes) on 24 year-old woman—without her knowledge or consent!!—when she went to the hospital to give birth to her fourth child, leaving her without the possibility of having more children.
Right to Education

• **MCG v. Chile** (friendly settlement)
  – Right to education for pregnant teens

• **Yean and Bosico Girls v. Dominican Republic**
  – Right to education infringed by arbitrary enrollment law (birth certificate—nationality of child based on nationality of father)
Right to Reproductive Choice

• **Karen Llantoy v. Peru** (HRC)
  - 17 year old denied abortion despite fatal fetal abnormalities, based on stereotyped notions of hospital administrators who ignored law.
A Mother’s Final Look at Life (Sierra Leone):

Woman’s chance of dying in childbirth:
-- Ireland: 1 in 48,000
-- United States: 1 in 4,800
-- Sierra Leone: 1 in 8

“Women die in childbirth every day...because of cultures and traditions that place more worth on the lives of men. ‘It really reflects the way women are not valued in many societies...But there is not that sense of demand that this is unacceptable, so it continues to happen.’”