

A SOCIETY DISABLED: STATE OF THE RIGHT TO EDUCATION FOR PEOPLE WITH DISABILITIES IN CHINA

NATE STEIN

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“If we hold up the mirror of disability to society, we can see whether the society itself is disabled or not.”1

—Chen Guangcheng

I. INTRODUCTION

Although there is no universal definition of “disability,” it is estimated that approximately fifteen percent of the world’s

1. Chen Guangcheng on Disability, Human Rights and China, THE TAKEAWAY (July 17, 2012), http://www.thetakeaway.org/story/223296-chen-guangcheng-disability-human-rights-and-china/ [hereinafter Chen Guangcheng].

population has disabilities—a staggering one billion people.<sup>2</sup> Unfortunately, these one billion people are overrepresented in the world's developing countries and within poor populations.<sup>3</sup> China, itself a developing nation, has the largest disabled population in the world—approximately 83 million of China's 1.4 billion citizens.<sup>4</sup> China's disabled population faces unique societal and legal challenges in many ways. Historic attitudes towards disabilities in China are negative, China's dedication to human rights has been weak, and there is a clear need for a better framework for human rights laws, as well as better implementation of those laws.<sup>5</sup>

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2. *The United Nations and Indigenous Persons with Disabilities*, UN ENABLE <http://www.un.org/disabilities/default.asp?id=1605> (last visited June 6, 2013). UN Enable states that people with disabilities are “those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various attitudinal and environmental barriers, hinders their full and effective participation in society on an equal basis with others. . . . [This definition shouldn't] undermine or stand in the way of wider definition of disabilities.” *Frequently Asked Questions*, UN ENABLE (2007), <http://www.un.org/esa/socdev/enable/faqs.htm>.

3. See U.S. AGENCY FOR INT'L DEV., *THE SECOND ANNUAL REPORT ON THE IMPLEMENTATION OF THE USAID DISABILITY POLICY 1 (2000)* (stating that an estimated 80% of the world's disabled population live in developing countries).

4. Maxim Duncan, *Theme Park Highlights Challenges Facing China's Dwarfs*, REUTERS (Mar. 25, 2010), <http://www.reuters.com/article/idUSTRE62P0J020100326>. The number is even higher if senior citizens are taken into account (11% of the population). 700,000 individuals are newly disabled each year in industrial accidents. *Number of Disabled Chinese Soars as Population Ages, Industrial Injuries Increase*, PEOPLE'S DAILY ONLINE (Dec. 1, 2006), [http://english.peopledaily.com.cn/200612/01/eng20061201\\_327388.html](http://english.peopledaily.com.cn/200612/01/eng20061201_327388.html). For an up-to-date approximation of China's population, see *China Population Clock*, NATIONAL DEP'T STATS, [data.stats.gov.cn/English](http://data.stats.gov.cn/English) (last visited Nov. 16, 2014).

5. Jane Zhi, *Living, Acting, and Experiencing Otherwise Than We Do: Rethinking China's Laws on the Protection of Persons with Disabilities*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 279 (2011) (discussing the “modern slavery” of persons with disabilities in China). News reports present a harrowing picture of slave trafficking of people with disabilities. See, e.g., *Arrests in Chinese Slavery Case*, BBC NEWS (May 22, 2009), <http://news.bbc.co.uk/2/hi/asia-pacific/8063038.stm>; *Dozens of Slave Workers Said Freed in China*, CHRISTIAN TODAY (Mar. 20, 2008), <http://www.christiantoday.com/article/dozens.of.slave.workers.said.freed.in.ch/17446.htm>; *Harbin Slave Labor Imprisonment Continues: 33 Slave Laborers are Rescued 6 Suspects are Arrested*, SOHU (Mar. 20, 2008, 9:49 AM), <http://news.sohu.com/20080320/n255809122.shtml>; Melanie McGanney, *The Brick Kiln Scandal: An In-Depth Look at China's Slave Trade*, SMALL SWORDS MAG. (May 26, 2010), available at <https://web.archive.org/>

The medical model of disability rights presumes that the problem is with the disabled person, not society, and thus ameliorative change must come from the individual himself. It “views a disabled person’s limitations as inherent, naturally and properly excluding her from participating in mainstream culture” because disabled people have no place in society and “live in an outsider role waiting to be cured.”<sup>6</sup> Thus, it excuses society even if it ignores the difficulties of life with a disability.<sup>7</sup> However, the “medical model has never proven to ‘resolve’ disability, its solutions remain partial, feeding into the real, but potentially illusory, promise of enhancing quality of life.”<sup>8</sup>

The social model defines disability from a different perspective. Instead of focusing on the individual, it focuses on the society around the individual. There are two elements to the social model. First, there is an affirmative recognition of the basic human rights of people with disabilities; second, disability is redefined as a construct of society. Instead of asking people with disabilities to change and adapt to their communities, the social model “asks communities to change normative practices that contribute to the impairment of individuals with disabilities.”<sup>9</sup> Thus, the main goal of this model is inclusion.

Inclusive education can best be defined as the opposite of segregated education (placing students with disabilities in separate classrooms or separate schools) and is believed to benefit

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web/20100526171445/http://smallwordsmagazine.com/articles/life/brickkiln.html; John Ray, *China’s Disabled Children are Sold Into Slavery as Beggars*, THE GUARDIAN (July 22, 2007), <http://www.guardian.co.uk/world/2007/jul/22/china.theobserver> (“[I]t is common for the parents of disabled children to offload them in this way.”).

6. Michael Ashley Stein, *Disability Human Rights*, 95 CALIF. L. REV. 75, 86 (2007); Vanessa Torres Hernandez, Comment, *Making Good on the Promise of International Law: The Convention on the Rights of Persons with Disabilities and Inclusive Education in China and India*, 17 PAC. RIM L. & POL’Y J. 497, 499–500 (2008); *Medical Model vs. Social Model*, KIDS AS SELF ADVOCATES <http://www.fvkasa.org/resources/files/history-model.pdf> (last visited Nov. 16, 2014).

7. Chai R. Feldblum, *Definition of Disability under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 96 (2000).

8. Patrick J. Devlieger, Professor, University of Leuven and University of Illinois at Chicago, *Generating a Cultural Model of Disability*, 7 (Oct. 14–16, 2005), available at <http://feapda.org/FEAPDA%20Geneva%202005/culturalmodelofdisability.pdf>.

9. Hernandez, *supra* note 6, at 500 (citing Stein, *supra* note 6).

both disabled students and the societies they live in.<sup>10</sup> Through inclusive education, students with disabilities have the opportunity to learn in normal classroom settings, and students without disabilities have the opportunity to learn that people are all equal, no matter their differences.<sup>11</sup> The Convention on the Rights of Persons with Disabilities (“the Convention”) was created with the help of disabled rights organizations and other non-governmental organizations,<sup>12</sup> and it imagines that civil society will be involved in the effective implementation of human rights. However, civil society is not yet sufficiently involved in China. Moreover, the Convention itself is not being adequately enforced through statutes, and, thus, there is no judicial fallback.

This Note begins in Part II by describing the United Nations’ approach to the right to education, including the relevant international legal standards that apply to people with disabilities. In Part III, this Note describes the domestic framework for disability rights in the United States and in China to compare the Chinese system with that of a developed nation at the forefront of the disability rights movement. It concludes in Part IV by illustrating the possible avenues available to China for improving disability rights law and the successes and failures of the implementation of the international framework.

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10. See, e.g., World Conference on Special Needs Education, Salamanca Statement and Framework for Action on Special Needs Education, preface, U.N. Doc. ED-94/WS/18 (June 7–10, 1994) [hereinafter Salamanca Statement] (recognizing “the need to work towards ‘schools for all’”); Special Rapporteur on the Right to Education, *The Right to Education of Persons with Disabilities*, ¶ 29, U.N. Doc. A/HCR/4/29 (Feb. 19, 2007) (by Victor Muñoz) [hereinafter Muñoz Report] (arguing that states should “both view and ensure the family, community and civil society as active participants in inclusive education”); Hernandez, *supra* note 6, at 505 (“Inclusive education is superior for a variety of reasons: it combats the tendency to exclude students with disabilities from education or educational opportunities and mitigates the tendency of education to perpetuate lifelong segregation in work and recreation programs.”).

11. Salamanca Statement, *supra* note 10.

12. See Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 SYRACUSE J. INT’L L. & COM. 563, 589 (2007); Hernandez, *supra* note 6, at 502.

II. INTERNATIONAL HUMAN RIGHTS – THE RIGHT TO EDUCATION AND RIGHTS OF THE DISABLED

This Part discusses the UN standards regarding the right to education for people with disabilities, including the move to the “social” definition of disability and its emphasis on “inclusive education.”

In December 2006, the United Nations adopted the Convention and an Optional Protocol specifically to enforce the rights of people with disabilities. It entered into force in May 2008.<sup>13</sup> The goals of the Convention are to ensure that disabled people are afforded the same rights and protections as everyone else; the goal is equality—to “promote respect for their inherent dignity,” and to ensure that people with disabilities have the right to recognition before the law.<sup>14</sup> The Convention illustrates the standards of modern disability law that stem from the social model of disability. In particular, the Convention exemplifies the United Nations’ gradual recognition of the social model, rather than the old medical model paradigm, of disability.<sup>15</sup>

The Convention builds upon a long legacy of human rights treaties. The 1948 United Nations Universal Declaration of Human Rights (the Universal Declaration) states that “[e]veryone has the right to education. Education shall be free . . .” and “all human beings are born free and equal in dignity and rights.”<sup>16</sup> It advocates for the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.”<sup>17</sup> The Universal Declaration,

13. Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter Disabilities Convention].

14. *Id.*, art. 1; *see also* Stein, *supra* note 6 (discussing the lead up to the Convention).

15. *See* Ad Hoc Comm. on a Comprehensive and Integral Int’l Convention on the Prot. and Promotion of the Rights and Dignity of Persons with Disabilities, Report of the Working Group to the Ad Hoc Committee, Annex I, n. 12, UN Doc A/AC.265/2004/WG.1 (Jan. 27, 2004); Hernandez, *supra* note 6, at 499–501.

16. Universal Declaration of Human Rights, G.A. Res 217 (III) A, arts. 1, 26, U.N. Doc A/RES/217(III) (Dec. 10, 1948); *see also* Eric G Zhang, *Employment of People with Disabilities: International Standards and Domestic Legislation and Practices in China?*, 34 SYRACUSE J. INT’L L. & COM. 517, 520 (2007) (“Though persons with disabilities are not specifically mentioned in the Declaration, there is little doubt that they are covered under the Declaration.”).

17. Universal Declaration of Human Rights, *supra* note 16, pmbl.

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along with the instruments adopted in 1966 by the UN General Assembly, constitute the International Bill of Human Rights.<sup>18</sup> This Bill of Rights, coupled with The UN Standard Rules on Equalization of Opportunities for Persons with Disabilities adopted by the UN General Assembly on December 20, 1993, has significantly impacted the rights of people with disabilities worldwide.<sup>19</sup>

#### A. *International Framework of Disability Rights Law*

The United Nations did not originally explicitly safeguard the rights of people with disabilities. Documents drafted by the United Nations used the term “everyone” in the context of equal rights; this can logically include individuals with disabilities.<sup>20</sup> The 1975 Declaration on the Rights of Disabled Persons

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18. The informally named “International Bill of Human Rights” consists of the Universal Declaration of Human Rights; the International Covenant on Economic, Social, and Cultural Rights; and the International Covenant on Civil and Political Rights and its two Optional Protocols. U.N. Office of the High Comm’r for Human Rights, Fact Sheet No.2 (Rev.1), The International Bill of Human Rights (June 1996), <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> (“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”).

19. See Office of the High Commissioner for Human Rights, Committee on Economic, Social, and Cultural Rights (CESCR), General Comment 5: Persons with Disabilities, ¶ 7, U.N. Doc. E/1995/22 (Dec. 9, 1994) [hereinafter General Comment 5] (“The Standard Rules are of major importance and constitute a particularly valuable reference guide in identifying more precisely the relevant obligations of States parties under the Covenant.”). See also World Health Organization, The U.N. Standard Rules on the Equalization of Opportunities for Persons with Disabilities: Government Responses to the Implementation of the Rules on Medical Care, Rehabilitation, Support Services and Personnel Training, available at [http://whqlibdoc.who.int/hq/2001/WHO\\_DAR\\_01.4.pdf](http://whqlibdoc.who.int/hq/2001/WHO_DAR_01.4.pdf) (presenting the results of a survey of nations on their implementation of a selection of the Standard Rules).

20. People with disabilities were not specifically included in the exemplary, though not exhaustive, list of possibly suspect classes in which extra protection is afforded. Instead, the text of the Universal Declaration was interpreted, and expanded upon, such that the broad rights afforded to all humans included persons with disabilities. See Charles D. Siegal, *Fifty Years of Disability Law: The Relevance of the Universal Declaration*, 5 *ILSA J. INT’L & COMP. L.*, 269 (1999); see also Universal Declaration of Human Rights, *supra* note 16, art. 2.

Beyond merely providing for protection of people with disabilities because of their inherent human dignity, it is additionally possible to read the Universal Declaration as placing people with disabilities into Article 25 for pro-

represented substantial progress in the field of international disability rights. The 1975 Declaration explicitly stated that people with disabilities “have the same fundamental rights as their fellow-citizens,”<sup>21</sup> and advocated for the change to the social, rather than the medical, model of disability.<sup>22</sup> Later, the 1989 Convention on the Rights of the Child (“CRC”) included a provision stating that it applies equally to children with or without disabilities regarding their right to an education.<sup>23</sup> By the time of the adoption of the 1993 Standard Rules on the Equalization of Opportunities for Persons with Disabilities, the modern nomenclature exemplifying the commitment to the social model was firmly entrenched in international law.<sup>24</sup>

The Convention built on the earlier movement to the social model to delineate the obligations of Contracting States under international law. The Convention helps to foster inclusive education by mandating that states meet five criteria: to

- 1) refrain from excluding persons with disabilities from the general education system on the basis of disability,
- 2) ensure that people with disabilities have equal access to a free and quality education,
- 3) provide reasonable accommodation of the individual’s requirements,
- 4) support persons with disabilities in the way required to facilitate their effective education, and
- 5) provide effective individualized support

protecting people who need specific services due to circumstances beyond their control. *See* Universal Declaration of Human Rights, *supra* note 16, art. 25; Hernandez, *supra* note 6, at 500; *See also* Siegal, *supra* note 20, at 269.

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21. Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), ¶ 3, 30 U.N. GAOR 30th Sess., Supp. No. 34, U.N. Doc. No. A/10034, at 88 (Dec. 9, 1975).

22. *See id.*

23. Gerard Quinn & Theresia Degener, *Building Bridges From “Soft Law” to “Hard Law”: The Relevance of the United Nations Human Rights Instruments to Disability*, in HUMAN RIGHTS AND DISABILITY 47, 49 (2002).

24. The “Standard Rules” were adopted in 1993 and call on countries to adopt policies and revise curricula to encourage the education of children with disabilities in general schools. G.A. Res. 48/96, U.N. Doc. A/RES/48/96 (Dec. 20, 1993). The Salamanca Statement, adopted in 1994, goes further, proclaiming the right of every child to an education, and specifically calling on governments to adopt policies that further the access and accommodation of students with special educational needs in “regular schools.” Salamanca Statement, *supra* note 10. *See also* Hernandez, *supra* note 6, at 501–02.

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measures in environments that maximize academic and social development.<sup>25</sup>

Though “[e]ducation is a fundamental human right and essential for the exercise of all other human rights,” the enforcement of this right is not fully consistent around the world as most international law is almost entirely voluntary.<sup>26</sup> Additionally, because both the right to education and the rights of people with disabilities are not generally recognized as *jus cogens*,<sup>27</sup> they need help from international bodies to be fully implemented.

B. *Positive Obligations Under the Convention*

The UN Human Rights Committee recognizes that “the principle of equality may require affirmative action in order to . . . eliminate conditions which cause . . . discrimination.”<sup>28</sup> The Convention requires equal, inclusive, access to the general education system for all students, regardless of disabilities.<sup>29</sup> The states that have signed the Convention are commit-

25. Hernandez, *supra* note 6, at 504 (“Broadly categorized, the Convention requires states to guarantee non-discriminatory access to general education; reasonable accommodation of disability; and adequate, individualized supports for students with disabilities.”) (summarizing Disabilities Convention, *supra* note 13, art. 24).

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26. *The Right to Education*, UNESCO, <http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/right-to-education/> (last visited Nov. 10, 2014); see also Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 489 (2005).

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27. This generally includes aggression, genocide, crimes against humanity, war crimes, piracy, slavery, and torture. See Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, in MAN’S INHUMANITY TO MAN 595, 619–22 (Lal Chand Vohrah et al. eds., 2003).

28. Hazel Jones, *Disabled Children’s Rights and the UN Convention on the Rights of the Child*, DISABILITY STUD. Q. (Fall 2000), available at <http://dsq-sds.org/article/view/266/281>.

29. Disabilities Convention, *supra* note 13, art. 24(2)(a)–(b); see also Hernandez, *supra* note 6, at 505 (“The Convention does not imply that students can never benefit from special education, but instead appears to recognize that students in ‘special’ schools are often segregated and marginalized, failing to enjoy the range of academic and recreational opportunities available to students in mainstream schools.”) (citing Ursula Kilkelly, *Disability and Children: the Convention on the Rights of the Child in Human Rights*, in HUMAN RIGHTS AND DISABILITY 191, 198 (2002)).

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ting to “respect the rights of persons with disabilities, [p]rotect the rights of persons with disabilities, [and f]ulfill the rights of persons with disabilities.”<sup>30</sup> The Convention addresses issues of accessibility, health, rehabilitation, non-discrimination, and, most importantly for this Note, education.<sup>31</sup>

The Convention details the right to inclusive education<sup>32</sup> and requires individualized support for all students with disabilities to facilitate their education.<sup>33</sup> Article 24 of the Convention requires states to “recognize the right of persons with disabilities to education,” but merely recognizing the right does not ensure that students receive it.<sup>34</sup> Inclusive education requires an increase in access to general education systems and access to meaningful learning in those schools, which may include reasonable accommodations such as changes to the building, the curriculum, and culture.<sup>35</sup> There are still many obstacles to inclusive education, including local school officials who deny access to students with disabilities, teachers with inadequate training, and buildings with inadequate accommodations.<sup>36</sup>

30. *Frequently Asked Questions Regarding the Convention on the Rights of Persons with Disabilities*, UN ENABLE, <http://www.un.org/esa/socdev/enable/convinfaq.htm> (last visited Nov. 10, 2014).

31. *A Convention on the Rights of Persons with Disabilities, Why Do We Need a Convention for Persons with Disabilities?*, UN ENABLE, <http://www.un.org/disabilities/convention/pdfs/qna.pdf> (last visited Mar. 6, 2011) [hereinafter *Why Do We Need a Convention?*].

32. Disabilities Convention, *supra* note 13, art. 2.

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33. Disabilities Convention, *supra* note 13, art. 24; Muñoz Report, *supra* note 10, ¶ 28; *see also* Dorothy Kerzner Lipsky & Alan Gartner, *Factors for Successful Inclusion*, in INCLUSIVE SCHOOLING 98, 103 (Stanley J. Vitello & Dennis E. Mithaug eds., 1998) (noting that all children have unique characteristics that they need individualized support for).

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34. Disabilities Convention, *supra* note 13, art. 24; *see also* Muñoz Report, *supra* note 10, ¶ 26; Martha E. Snell, *Characteristics of Elementary School Classrooms Where Children with Moderate and Severe Disabilities are Included: A Compilation of Findings*, in INCLUSIVE SCHOOLING 76, 78 (Stanley J. Vitello & Dennis E. Mithaug eds., 1998); Hernandez, *supra* note 6, at 502–03.

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35. SEAMUS HEGARTY, UNESCO, EDUCATING CHILDREN AND YOUNG PEOPLE WITH DISABILITIES: PRINCIPLES AND THE REVIEW OF PRACTICE, 20–22 (1992).

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36. *See* Inter-American Dev. Bank, Disability and Inclusive Education, 13–15 (Mar. 16, 2001) (by Gordon L. Porter); World Bank, Disability Group, Inclusive Education: Achieving Education for All by Including Those with Disabilities and Special Education Needs, 7 (Apr. 30, 2003) (by Susan J. Peters) [hereinafter Peters]; Jones, *supra* note 28.

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III. DOMESTIC IMPLEMENTATION OF DISABILITY RIGHTS IN THE UNITED STATES AND CHINA

In addition to the lack of enforcement through international channels, there is also a lack of implementation of the Convention by China on a domestic level. In general, compliance with international law is difficult to police and must be self-enforced.<sup>37</sup> According to Article 33, a Contracting State must designate government officials to implement the Convention and coordinate with other governmental agencies, interest groups, and individuals with disabilities.<sup>38</sup> However, there is no evidence of domestic actors bringing claims under the Law of the People’s Republic of China on the Protection of Disabled Persons (LPDP) against China, and domestic actors will not likely be able to greatly influence China’s legal policies.<sup>39</sup>

In contrast, inclusive education concepts are fully realized in the United States but are not yet implemented in China. This Part first outlines the framework and growth of disability rights in the United States to provide a comparison to Chinese policy and development in the next section.

A. Domestic Disability Law in the United States

The United States has not ratified the Convention. Nonetheless, it is viewed as a world leader in progressive disability-rights law as evidenced by its history.<sup>40</sup> The disability rights movement grew from the 1960s era Civil Rights Movement due to the tireless effort of advocates.<sup>41</sup> The U.S. Supreme Court’s decision in *Brown v. Board of Education* provided a legal foundation by finding that separate accommodations are inherently unequal.<sup>42</sup> The idea of constitutionally mandated, ra-

37. See Hathaway, *supra* note 26.

38. Disabilities Convention, *supra* note 13, art. 33.

39. Hernandez, *supra* note 6, at 521–22.

40. Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform*, DREDF, [http://www.dredf.org/international/degener\\_quinn.html](http://www.dredf.org/international/degener_quinn.html) (last visited Nov. 19, 2014) (“U.S. law has subsequently been instrumental for the evolution of disability discrimination law in many countries.”).

41. For a brief overview of the Civil Rights Movement, see generally, *Civil Rights Movement*, HISTORY CHANNEL, <http://www.history.com/topics/black-history/civil-rights-movement> (last visited Nov. 19, 2014).

42. *Brown v. Board of Education*, 347 U.S. 483 (1954).

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cially integrated schools was extended to students with disabilities attending integrated schools and was subsequently used to advocate for disabled children's rights.<sup>43</sup> Concerned parents called for national-level change, wanting to take their children out of asylums and institutions and place them into schools.<sup>44</sup>

Congress acted with the 1970 Individuals with Disabilities Education Act (IDEA), which ensures that all disabled children are provided a "free appropriate public education."<sup>45</sup> IDEA is based on cooperative federalism—it provides federal funds to assist state and local agencies to educate disabled children, but the eligibility for funding is conditioned on state-level compliance with goals and procedures; thus, the primary responsibility for developing educational programs for handicapped children is left with the states.<sup>46</sup> The Americans with Disabilities Act (ADA), enacted in 1990, supplemented the core legislation embodied in IDEA.

The important concepts of the U.S. laws under the ADA and IDEA include the Least Restrictive Environment, Individualized Education Plan (IEP), the Zero-Reject Policy, and Free and Appropriate Education. An IEP is created at the beginning of the year with collaboration between the parents, the teachers, public health representatives, and the child if possible.<sup>47</sup> Within the IEP, a written statement must be given whenever the student cannot participate in the regular classroom activities explaining why,<sup>48</sup> because the ideal is full classroom inclusion to allow the disabled students to spend the majority of the day in the general education setting.

Under IDEA, students who qualify for special education services are entitled to education in the Least Restrictive Environment according to their needs; for school-age children,

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43. See LEOPOLD LIPPMAN & I. IGNACY GOLDBERG, *RIGHT TO EDUCATION* 12–13 (1973).

44. See *id.* at 10.

45. The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (et seq.) (2012); see also Ann K. Wooster, Annotation, *What Constitutes Services that Must Be Provided by Federally Assisted Schools Under the Individuals with Disabilities Education Act (IDEA)*, 161 A.L.R. Fed. 1 (1999) ("According to the two-step test, a court must first determine whether the service at issue is a 'supporting service' required to assist a child with a disability . . .").

46. *Supra* note 45, 20 U.S.C. § 1400; *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816 (8th Cir. 1998).

47. 34 C.F.R. §§ 300.320, 300.322 (1992).

48. *Id.* § 300.320.

this is presumptively where nondisabled peers learn.<sup>49</sup> School districts must teach disabled and nondisabled children together to “the maximum extent possible;” IDEA presumes that children will be educated in regular educational environments unless a special class is required.<sup>50</sup>

The Zero Reject provision of IDEA prohibits schools from excluding any student with a disability from education. A Free Appropriate Public Education is provided at public expense, meets the standards of special education services, includes pre-school, elementary school, or secondary school, and conforms to the IEP.<sup>51</sup> However, enforcement of a free and appropriate education has been inconsistent; the Supreme Court seems to require “access” but “waffles” on substantive requirements.<sup>52</sup> Nonetheless, the United States has become the gold standard for the right to an education for students with disabilities.

### B. *Domestic Disability Rights Law in China*

This Part describes the current social and political treatment of individuals with disabilities in China. In stark contrast to the United States, China’s understanding of human rights priorities de-emphasizes the individual and focuses on the development of the nation—a perspective the author believes logically follows from its status as a developing country. In China, national growth is the top priority, and human, civil, and environmental rights are secondary. Only after the nation can lift itself fully from its status as a developing nation will it begin to consider the peripheral needs of its citizens outside of a strong economy.<sup>53</sup>

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49. Theresa M. DeMonte, *Comment on Least Restrictive Environment*, 85 WASH. L. REV. 157 (2010) (arguing that the presumptive Least Restrictive Environment under IDEA is the classroom where non-disabled peers learn).

50. 20 U.S.C. §1412(a)(5) (2012) (defining the least restrictive environment requirement for children with disabilities); DeMonte, *supra* note 49, at 158.

51. 34 C.F.R. § 300.17 (1992).

52. Gary L. Monserud, *The Quest for a Meaningful Mandate for the Education of Children with Disabilities*, 18 ST. JOHN’S J. L. COMMENT. 675, 700–06 (2004).

53. According to some, the greatest threat from China in the human rights arena is that other developing countries will follow China’s conception of human rights and ignore them until they reach their desired economic status. If more countries follow China’s growing influence, it could undermine support for international human rights norms. SONYA SCEATS & SHAUN BRESLIN, *CHINA AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM* 41

China went through three major revolutions in the twentieth century,<sup>54</sup> and though the political system has become more open in each phase of transition, it is still not a liberal democracy. Constitutional and individual rights do not garner the same deal of reverence as they do in the United States, and human rights are still largely a political item. Interestingly, China has never voted the same way as the United States or Canada on the United Nations Human Rights Council (sixty-nine resolutions voted on, and fifty-one resolutions voted on in total, respectively).<sup>55</sup>

Whether motivated by political or humanitarian concerns, China has self-consciously moved towards reform in the realm of human rights. China has joined the Asian Pacific Decade of Disabled Persons<sup>56</sup> and adopted domestic laws and regulations in an effort to conform to international standards and curb discrimination.<sup>57</sup> This is evidence of China's self-conscious

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(Oct. 2012), available at [http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/r1012\\_sceatsbreslin.pdf](http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/r1012_sceatsbreslin.pdf).

54. The last Chinese Emperor of the Qing Dynasty, Puyi, fell to the Xinhai Revolution in 1911. *Puyi*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/482238/Puyi> (last visited Jan. 25, 2015). The Chinese Communist Revolution of Mao Zedong's People's Liberation Army occurred in 1949. *Chinese Communist Party (CCP)*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/112450/Chinese-Communist-Party-CCP> (last visited Jan. 25, 2015). Finally, Mao Zedong's Proletariat Cultural Revolution occurred in 1966. *Id.*

55. SCEATS & BRESLIN, *supra* note 53, at 23.

56. *Country Profile: China*, ASIA-PACIFIC DEVELOPMENT CENTER ON DISABILITY, <http://www.apcdfoundation.org/?q=content/china> (last visited Nov. 19, 2014). This decade includes the Biwako Millennium Framework. U.N. Secretariat, U.N. Econ. & Soc. Council: Econ. & Soc. Comm'n for Asia & the Pac., Biwako Millennium Framework for Action Towards an Inclusive, Barrier-Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific, U.N. Doc. E/ESCAP/APDDP/4/Rev.1 (Jan. 24, 2003), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=E/ESCAP/APDDP/4/REV.1](http://www.un.org/ga/search/view_doc.asp?symbol=E/ESCAP/APDDP/4/REV.1).

57. *See, e.g.*, Zhonghuá rénmin gònghéguó cánjí rén bǎozhàng fǎ (中华人民共和国残疾人保障法) [Law of the People's Republic of China on the Protection of Disabled Persons] (promulgated by the President of the People's Republic of China, Dec. 28, 1990, effective May 15, 1991, revised Apr. 28, 2008, effective June 1, 2008), art. 22, translation available at [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383889.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383889.htm) (China) [hereinafter LPDP]; Nancy Ellsworth & Chun Zhang, *Progress and Challenges in China's Special Education Development*, 28 REMEDIAL & SPECIAL EDUC. 58, 60 (2007) (noting that every province in China has adopted a regulatory scheme in compliance with the LPDP).

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progression in the human rights arena.<sup>58</sup> China's laws, however, do not meet the standards guaranteed by the Convention.<sup>59</sup> And even if the laws change to meet the Convention's standards, China is not currently able effectively to implement its laws. Though China may have adequate resources for implementation, the resources must be allocated differently in order for China to succeed.<sup>60</sup>

### 1. *Historical Attitudes and Treatment of People with Disabilities*

The history of people with disabilities in China has been characterized by shunning, institutionalization, and treatment bordering on slavery. There is great fear and stigma surrounding disabilities, with people with disabilities refusing to go outside because of the poor treatment they receive at the hands of their peers.<sup>61</sup> It becomes a self-fulfilling prophesy

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58. Chinese legislator Wu Bangguo acknowledged, "Caring for the disabled is a sign of social progress and an important part of building a harmonious society." *China's New Law on Protection of the Disabled Effective July 1*, CHINAGATE (July 10, 2008), [http://www.chinadaily.com.cn/chinagate/2008-07/10/content\\_6835389.htm](http://www.chinadaily.com.cn/chinagate/2008-07/10/content_6835389.htm). Additionally, Chinese President Hu Jintao delivered a speech at the start of the 2008 Paralympic Games in which he stated, "We have adopted a range of policies and measures to encourage public care and support for people with a disability and actively promote their wellbeing." President Hu went on to emphasize that China wants to "protect the rights and interests" of its disabled citizens so that they are "equal members of the society." Hu Jintao, Chinese President, Toast at Welcoming Luncheon of Beijing Paralympics (Sept. 6, 2008), available at <http://english.people.com.cn/90001/90776/90883/6494155.html>.

59. See *Cánjǐ rén jiàoyù tiáolì* (残疾人教育条例) [Regulations on the Education of Persons with Disabilities] (promulgated by the St. Council of the People's Republic of China, Aug. 23, 1994, effective Aug. 23, 1994), translation available at [http://www.cdpf.org.cn/english/lawsdoc/content/2008-04/10/content\\_84884.htm](http://www.cdpf.org.cn/english/lawsdoc/content/2008-04/10/content_84884.htm) (China) [hereinafter Regulations]; LPDP, *supra* note 57; U.N. ECON. & SOC. COMM'N FOR ASIA & THE PACIFIC, LEGISLATION ON EQUAL OPPORTUNITIES AND FULL PARTICIPATION IN DEVELOPMENT FOR DISABLED PERSONS: EXAMPLES FROM THE ESCAP REGION, U.N. Doc. ST/ESCAP/1651, U.N. Sales No. E.98.II.F.21 (1997); Hernandez, *supra* note 6, at 508.

60. Hernandez, *supra* note 6, at 508; *China's GDP*, WORLD BANK, <http://data.worldbank.org/country/china> (last visited Nov. 19, 2014).

61. Ben Blanchard, *China's Disabled Face Stigma, But Life Improving*, REUTERS (Sept. 4, 2008), <http://www.reuters.com/article/lifestyleMolt/idUSPEK26361820080904> ("Disabled people don't want to go outside, because they think ordinary people will be shocked . . . Other people look at you strangely—this has a psychological impact. Perhaps they don't do it maliciously . . . I don't like people looking at me. So it's better to stay at home."); Calum MacLeod, *Paralympics Aim to Change Chinese Prejudices*, USA

when people with disabilities are not allowed to leave their homes and attempt to contribute to society; it reaffirms the idea that they are only burdens to their families and communities and both fuels fear and perpetuates stereotypes.<sup>62</sup>

As an example of China’s failure, in 2008, Beijing hosted the Paralympic Summer Games, and it was a great opportunity to educate the nation on people with disabilities and attempt to change historical attitudes. The Games could have been an opportunity to raise awareness for human rights issues, but China did not meet these expectations. China published a pamphlet stating that, “[s]ome physically disabled are isolated, unsocial, and introspective. They can be stubborn[,] controlling[,] and] defensive and have a strong sense of inferiority,”<sup>63</sup> which contributes and reinforces prejudice and once again places the blame on the disabled—essentially condemning them and their “attitudes.”

This bias pervades university education as well. Colleges in China explain that they do not accept students with disabilities because their difficulties in securing employment tarnish the school’s reputation.<sup>64</sup> Some larger cities such as Beijing, Tianjin, and Changchun have established segregated higher education schools specifically for students with disabilities, but accommodation like this, even if equal with that provided to non-disabled students, is not sufficient.<sup>65</sup> As people with disabilities are denied education due to their inability to find employment after graduation, their job prospects correspondingly decrease due to lack of equal education, creating a cycle of discrimination.

TODAY (Sept. 5, 2008), [http://www.usatoday.com/news/world/2008-09-04-china\\_N.htm](http://www.usatoday.com/news/world/2008-09-04-china_N.htm) (“[H]er parents would never let her outside for fear she would lose face for the family.”).

62. Zhi, *supra* note 5, at 292.

63. Ashling O’Connor, *Beijing Olympic Games Guide Angers Disabled*, THE AUSTRALIAN (May 28, 2008), <http://www.theaustralian.com.au/archive/news/games-guide-angers-disabled/story-e6frg6t6-1111116460420?nk=ed152cb90c4aab0aa3ee539ddf730b05>; *see also* Kent Ewing, *China’s Paralympics Possibilities*, ASIA TIMES (Sept. 9, 2008), <http://www.atimes.com/atimes/China/J109Ad01.html>.

64. Elisabeth Rosenthal, *College Entrance in China: ‘No’ to the Handicapped*, N.Y. TIMES (May 23, 2001), <http://www.nytimes.com/2001/05/23/world/college-entrance-in-china-no-to-the-handicapped.html?sec=&spon=&pagewanted=all>.

65. Zhi, *supra* note 5, at 288.

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This perception of the disabled confirms that China has not yet moved from the medical model to the social model of disability. While there may be benefits of the medical model, such as greater awareness and education of preventable, and curable, illnesses,<sup>66</sup> these benefits are minimal, as many disabilities cannot be cured.<sup>67</sup> Once a country reaches a certain level of education and health, as China has, it must also be emphasized that many disabilities are neither preventable nor treatable.

China's adherence to the medical model has led to views on mental disability that focus on lack of will; some think that mental illness could be prevented by "self-discipline, exercise of power and the avoidance of morbid thoughts,"<sup>68</sup> that it is punishment for transgressions of a past life,<sup>69</sup> or that it can be cured through scholarly readings of Chairman Mao.<sup>70</sup> Options common under the medical model are "cures" for the disability, such as surgery, institutionalization, or abortions to prevent the births of children with disabilities.<sup>71</sup> These misunderstandings focus blame on the individual with a disability for not being able to co-exist in a "normal" society with everyone else, instead of the social model which looks to the society to ensure equality for all individuals. Switching to a social model

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66. For example, not consuming alcohol during pregnancy or wearing eyeglasses if one's vision is correctable.

67. Deborah Kaplan, *The Definition of Disability*, THE CTR. FOR AN ACCESSIBLE SOC'Y, <http://www.accessiblesociety.org/topics/demographics-identity/dkaplanpaper.htm>. However, China is emphasizing immunizations and iodine treatments in certain regions in order to prevent disability. *Protection of Disabled Children*, PEOPLE'S DAILY, <http://english.peopledaily.com.cn/whitepaper/13%284%29.html>. It also hosted a Birth Defects Prevention Day in 2006. *China Hosts Birth Defects Prevention Day*, MARCH OF DIMES (Sept. 12, 2006), available at [https://web.archive.org/web/20061016072008/http://www.marchofdimes.com/aboutus/15796\\_21500.asp](https://web.archive.org/web/20061016072008/http://www.marchofdimes.com/aboutus/15796_21500.asp).

68. GLORIA ZHANG LIU, CHINESE DISABILITY AND CULTURE: INFORMATION FOR U.S. SERVICE PROVIDERS 8 (2001), available at <http://cirrie.buffalo.edu/culture/monographs/china.php>.

69. *Id.*

70. Sharon LaFraniere, *Life in Shadows for Mentally Ill in China*, N.Y. TIMES (Nov. 10, 2010), [http://www.nytimes.com/2010/11/11/world/asia/11psych.html?\\_r=2&hp](http://www.nytimes.com/2010/11/11/world/asia/11psych.html?_r=2&hp).

71. Zhi, *supra* note 5, at 290.



of disability is a “critical reorientation of perspective” for society which China has not achieved.<sup>72</sup>

Moreover, Chinese government officials and citizens sometimes view people with disabilities as a burden to society.<sup>73</sup> One reason for this attitude is the prevailing practice of children taking care of their parents as they age.<sup>74</sup> This cultural practice has recently been passed into a law requiring that offspring visit and care for their elderly parents,<sup>75</sup> and there is an assumption that disabled offspring cannot adequately perform their duties. If this assumption is true, it is not inherently because of disability but because of the dearth of opportunity, both educational and vocational, for people with disabilities.<sup>76</sup> It is a problem with the society, not a problem with the individual.

In addition, one of China’s most famous laws, the 1979 One Child Policy,<sup>77</sup> institutionally encourages discrimination against people with disabilities, or “ableism.”<sup>78</sup> The One Child Policy generally allows parents to have only one child to ease the burden of overpopulation. However, this policy allows parents to have a second child if the first child is disabled.<sup>79</sup> These

72. Report of the U.N. Consultative Expert Group Meeting on International Norms and Standards Relating to Disability (Dec. 8–12, 1998), <http://www.un.org/esa/socdev/enable/disberk0.htm>.

73. Xin Mao, *Chinese Geneticists’ View of Ethical Issues in Genetic Testing and Screening: Evidence for Eugenics in China*, 63 AM. J. HUM. GENETICS 688, 692 (1998) (“This survey . . . suggests that most Chinese still regard disabilities as a severe burden for both family and society.”); see also Zhi, *supra* note 5, at 283–84 (quoting comments by Xiao Fei, a former professor at Beijing Normal University: “If we can limit the number of these people . . . the country will shed some of its burden.”).

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74. *Shanghai’s Youth Care for Their Parents*, CHINA DAILY (Oct. 19, 2006), <http://www.china.org.cn/english/China/184859.htm>.

75. Clifford Coonan, *China Law Forces Adult Children to Visit and Care for Their Elderly Parents*, THE INDEPENDENT (July 1, 2013), <http://www.independent.co.uk/news/world/asia/china-law-forces-adult-children-to-visit-and-care-for-their-elderly-parents-8681677.html>.

76. Zhi, *supra* note 5, at 283.

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77. See Laura Fitzpatrick, *A Brief History of China’s One-Child Policy*, TIME (July 27, 2009), available at <http://www.time.com/time/world/article/0,8599,1912861,00.html> (detailing the history and social costs of the One Child Policy).

78. See Thomas Hehir, *Eliminating Ableism in Education*, 72 HARV. EDUC. REV. 1, 4 (2002).

79. Therese Hesketh, et al., *The Effect of China’s One-Child Family Policy After 25 Years*, 353 NEW ENG. J. MED. 1171, 1171 (2005). The policy also al-

practices imply that a disabled child does not even “count” as a human child, and parents who give birth to children with disabilities need the opportunity to try again. Further, in 1994, China passed a law banning “marriage between those ‘with certain genetic diseases of a serious nature unless’ — they agree to sterilization or long-term contraception,”<sup>80</sup> and recommending abortion for irregularities detected in utero.<sup>81</sup> Even more startlingly, compulsive sterilizations and abortions continue in China.<sup>82</sup>

## 2. *Legal Implementation of the International Disability Law*

Chinese domestic laws—along with the more than twenty international human rights treaties that China has signed—make up a domestic framework for the protection of the rights of people with disabilities.<sup>83</sup> China’s constitution offers special protection for people in need, including those with disabilities, and moreover guarantees equal rights for all citizens.<sup>84</sup> At least thirty national laws address the issues of protecting the rights of people with disabilities; in some cases, the laws include positive obligations.<sup>85</sup> Discouragingly, however, enforce-

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laws parents to have a second child if the first one was injured in the 2008 Sichuan earthquake. *China’s One-Child Policy to Make Exceptions*, MSNBC (May 26, 2008, 12:54 PM), <http://www.msnbc.msn.com/id/24829234>.

80. Tom Post, *Quality Not Quantity*, NEWSWEEK (Nov. 28, 1994), <http://www.newsweek.com/id/112412>.

81. *Id.*

82. Simon Elegant, *Why Forced Abortions Persist in China*, TIME (Apr. 30, 2007), available at <http://www.time.com/time/world/article/0,8599,1615936,00.html>.

83. Zhang, *supra* note 16, at 538–39; see also Press Release, *Human Rights Watch*, China: As Paralympics Launch, Disabled Face Discrimination (Sept. 3, 2008), available at <http://www.hrw.org/en/news/2008/09/03/china-paralympics-launch-disabled-face-discrimination>. R

84. XIANFA art. 45, § 1 (1982).

85. Zhang, *supra* note 16, at 540 (“Citizens of the People’s Republic of China have the right to material assistance from the state and society when they are . . . disabled. The state develops the social insurance, social relief and medical and health services that are required to enable citizens to enjoy this right. The state and society ensure the livelihood of disabled members of the armed forces, provide pensions to the families of martyrs and give preferential treatment to the families of military personnel. The state and society help make arrangements for the work, livelihood and education of the blind, deaf-mute and other handicapped citizens.”). R

ment of disabled rights in China has been so weak that living conditions for some disabled may be called modern slavery.<sup>86</sup>

a. *Chinese Domestic Framework*

China’s Disabled Person’s Federation (“Federation”) was founded in 1988, marking a beginning for publicizing the challenges of people with disabilities in the nation.<sup>87</sup> The Federation is tasked with representing the interests of Chinese citizens with disabilities. In 1990, the LPDP was enacted to protect “the lawful rights and interests of, and developing undertakings for, disabled persons, and ensuring their equal and full participation in social life and their share of the material and cultural wealth of society.”<sup>88</sup> This legislation represented a substantial step forward in recognizing the rights of people with disabilities.<sup>89</sup>

The 1990 LPDP defines a disabled individual as “one who suffers from abnormalities of loss of a certain organ or function, psychologically or physiologically, or in anatomical structure and has lost wholly or in part the ability to perform an activity in the way considered normal,” and it “refers to those with visual, hearing, speech, or physical disabilities, intellectual disabilities, psychiatric disabilities, multiple disabilities and/or other disabilities.”<sup>90</sup> The criteria are set by the State Council and characterize people with disabilities as different and in need of help in accordance with the medical model. In comparison, the Convention defines disability as “result[ing] 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.”<sup>91</sup> In order to join the international community in the protection of the rights of people with disabilities, China should implement these educational measures regarding prevention of illness simultaneously with awareness measures that

86. Zhi, *supra* note 5, at 280–81. R  
87. MATTHEW KOHRMAN, BODIES OF DIFFERENCE 32 (2005).  
88. LPDP, *supra* note 57, art. 1. R  
89. JENNIFER NORINS ET AL., IMPACT OF THE SPECIAL OLYMPICS WORLD GAMES ON THE ATTITUDES OF YOUTH IN CHINA 2 (2006), available at <http://media.specialolympics.org/soi/files/healthy-athletes/Impact-of-China-Games-on-Youth-Attitudes.pdf>.  
90. LPDP, *supra* note 57, art 2. R  
91. Disabilities Convention, *supra* note 13, pmbl. R

people with disabilities have the same rights, and needs, as everyone else. At the moment, however, Chinese laws fall short.

b. *Governmental Implementation of the Convention*

The Convention has the potential to significantly improve the lives of people with disabilities, but it must be properly implemented and followed by its signatory states. But the Convention requires only that the process of change begins and that civil society be actively engaged in it—the “choice and design of precise implementation measures is properly left to the discretion of States.”<sup>92</sup> The key to implementation under the Convention is a society-government dialogue to identify substantive areas of concern and remedial proposals. It was designed to be implemented nationally and ensure a meaningful transition of international norms into national-level action.<sup>93</sup> The Convention requires state parties to designate one or more focal points for implementation, allowing for participatory dialogue between society and the government.<sup>94</sup> It encourages the establishment of coordination mechanisms to facilitate action and clearly identify who in the government may be contacted for discussion.<sup>95</sup> Under the Convention, civil society is to be fully involved in the monitoring process.

In China, however, implementation has fallen short—there is a “gulf between the government’s promises and its actions.”<sup>96</sup> The Convention requires the participation of interest groups in the monitoring of domestic implementation of the document.<sup>97</sup> However, in China, very few non-governmental

92. Tara J. Melish, *The UN Disability Convention: History Process, Strong Prospects, and Why the U.S. Should Ratify It*, 14 HUM. RTS. BRIEF 37, 44 (2007).

93. Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons With Disabilities*, 83 WASH. L. REV. 449, 456–59 (Nov. 2008).

94. Disabilities Convention, *supra* note 13, art. 33.

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95. *Id.*

96. Jonathan Kaiman, *China’s Disabled Pupils Face Exclusion Amid Pressure to Adapt*, WASH. POST (July 13, 2013), <http://www.theguardian.com/global-development/2013/jul/16/china-disabled-pupils-human-rights-watch> (“[M]any schools fail to accommodate the needs of their disabled students, and some simply turn them away. Even if disabled pupils complete their compulsory education, colleges require them to undergo physical examinations and are permitted to reject them based on the results.”).

97. Disabilities Convention, *supra* note 13, art. 33.

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organizations (NGOs) are allowed to register as NGOs—the procedure is complex and many smaller organizations cannot meet the requirements, leaving them vulnerable to governmental legal action. Otherwise, non-profits may register as corporations but then have to pay higher tax rates. Because of these difficulties, NGOs have trouble gathering sufficient resources such as funding, volunteers, and professional help to effectuate their goals.<sup>98</sup> Advocates for reform in economics and trade are often allowed to work un-impeded, but arrests and criminal charges are common in politically sensitive areas, which can greatly stunt progress.<sup>99</sup> In one harrowing example of poor domestic enforcement and support, a woman killed her disabled daughter after she could no longer afford medical treatment for her mental disabilities. Liao Fei, a professor of social psychology, commented that the girl’s death could have been avoided if her mother had had somewhere to turn.<sup>100</sup> China currently lacks the “appropriate domestic law and the fiscal and human capacity to provide inclusive education” for students with disabilities.<sup>101</sup>

c. *Judicial Implementation of the Convention*

Chinese officials have said that signing international treaties makes them binding in domestic courts, and if the “lawful rights and interests of disabled persons are violated, the offended persons or their agents shall have the right to appeal to the competent authorities for disposition, or to institute lawsuits at people’s courts in accordance with [the] law.”<sup>102</sup> But it is not a surprise when Chinese courts do not apply international human rights treaties, “because even fundamental rights in China’s Constitution have yet to be applied directly by Chi-

98. Dongwei Liu, *NGOs Emerge in China but Face More Challenges*, THOMPSON REUTERS FOUNDATION (Oct. 7, 2013), <http://www.trust.org/item/20131007121609-glxo2/>.

99. *NGO Law Monitor: China*, INT’L CTR FOR NOT-FOR-PROFIT LAW, <http://www.icnl.org/research/monitor/china.html> (last updated Nov. 5, 2014).

100. ‘*Mercy Killing’ Mother Spared Jail*, CHINA.ORG.CN (Oct. 31, 2008), [http://www.china.org.cn/china/local/2008-10/31/content\\_16693964.htm](http://www.china.org.cn/china/local/2008-10/31/content_16693964.htm).

101. Hernandez, *supra* note 6, at 519.

102. Zhonghuá rénmín gònghéguó zhíyè jiàoyù fǎ (中华人民共和国职业教育法) [Vocational Education Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., May 15, 1996), art. 15, *translation available at* [http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content\\_1383614.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383614.htm) (China).

nese courts . . . . [T]he major [problem] lies in the non-enforceability in courts of constitutional provisions.”<sup>103</sup>

There are nine core human rights treaties, and of these nine, China has ratified six.<sup>104</sup> There are different approaches to interpreting China’s constitutional law regarding international treaties. Some argue that in light of the silence of China’s constitution about international treaties, international law always applies in domestic courts, adhering to a monist view of international law.<sup>105</sup> Others, however, read Article 142 of China’s General Principles of Civil Law as requiring the finding of a conflict between domestic and international law before applying international law.<sup>106</sup>

Without judicial enforcement of constitutional rights, it will be very difficult for human rights to progress in China. Until then, there may be little recourse available, even through international bodies. As a signatory to the Convention, China needs to hold itself accountable for the effective enforcements of its policies.

#### IV. PROPOSED IMPROVEMENT

The Convention asks for continuous progress towards implementing the delineated goals and rights.<sup>107</sup> China is making progress, but more resources need to be allocated for edu-

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103. Sanzhuan Guo, *Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects*, 8 CHINESE J. INT’L L. 161, 166–68 (2008) (arguing for a bill of rights).

104. *Id.* at 161; *The Core International Human Rights Instruments and Their Monitoring Bodies*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (listing the following: the International Convention on the Elimination of All Forms of Racial Discrimination (enacted 1965), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social, and Cultural Rights (1966), Convention on the Elimination of All Forms of Discrimination against Women (1979), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Convention on the Rights of the Child (1989), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), International Convention for the Protection of All Persons from Enforced Disappearance (2006), Convention on the Rights of Persons with Disabilities (2006), and their optional protocols).

105. *See, e.g.*, Guo, *supra* note 103.

106. *See id.* at 163–64.

107. Disabilities Convention, *supra* note 13, art. 4(2).

cating schools, teachers, parents, and students about the laws, their rights, and best practices to include students with disabilities fully.

China ratified the Convention in 2008 and recognized education as a human right.<sup>108</sup> While the Convention itself is tasked with enforcement through its monitoring and adjudication committees, complaints can only be made through the Optional Protocol, which China did not ratify.<sup>109</sup> China's ratification has been celebrated as a great step forward for disability rights in the nation,<sup>110</sup> but implementation of the rights, and not mere ratification, is the goal. Thus, other mechanisms must be used to ensure enforcement.

The Convention alone cannot impose sanctions or conduct investigations, but instead it relies on state-submitted reports, which are produced every four years.<sup>111</sup> Internationally, foreign actors are unlikely to impose indirect sanctions, such as conditioning support or aid or trade policies, on China's implementation of the Convention,<sup>112</sup> especially considering that many signatory countries have not fully implemented the Convention.<sup>113</sup> Despite the lack of coercive measures or sanctions in the Convention, the United Nations can use the Con-

108. *Convention and Optional Protocol Signatures and Ratification*, UN ENABLE <http://www.un.org/disabilities/countries.asp?id=166> (last visited Nov. 19, 2014).

109. See Disabilities Convention, *supra* note 13; *Complaints Procedures*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> (last visited Nov. 20, 2014); *Convention and Optional Protocol Signatures and Ratification*, *supra* note 108.

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110. See generally Shen Zhifei, Vice President of China Disabled Persons' Federation, Statement of China at the High-Level Intergovernmental Meeting of ESCAP (Sept. 19, 2007), available at [http://www.cdpf.org.cn/english/exchanges/attache/2008-04/10/content\\_84880.htm](http://www.cdpf.org.cn/english/exchanges/attache/2008-04/10/content_84880.htm); UN: *Beijing Paralympics Boost China's Cause of the Disabled*, CHINA DAILY (Sept. 15, 2008), [http://www.chinadaily.com.cn/paralympics/2008-09/15/content\\_7031159.htm](http://www.chinadaily.com.cn/paralympics/2008-09/15/content_7031159.htm).

111. Disabilities Convention, *supra* note 13, arts. 31–36.

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112. Hathaway, *supra* note 26, at 502–04.

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113. Special Rapporteur on Disabilities, *Global Survey on Government Action on the Implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities: Results Analysis*, 47 (Oct. 2006), available at [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.un.org%2Fdisabilities%2Fdocuments%2Fsreports%2Fgsr30jan07.doc&ei=ITRuVLK0Iq\\_fsATv9IHQDg&usg=AFQjCNHsVYcNwwEeIEAEMxIakfSSs7\\_GUw&sig2=qk7rayWvLTBLROv8IQHdew&cbvm=bv.80185997,d.cWc](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.un.org%2Fdisabilities%2Fdocuments%2Fsreports%2Fgsr30jan07.doc&ei=ITRuVLK0Iq_fsATv9IHQDg&usg=AFQjCNHsVYcNwwEeIEAEMxIakfSSs7_GUw&sig2=qk7rayWvLTBLROv8IQHdew&cbvm=bv.80185997,d.cWc).

vention to persuade China and other member States to update current laws and practices to the current international standards.<sup>114</sup> China, with the United Nations' help, can seek assistance and guidance from non-governmental organizations and human rights organizations in order best to effectuate the goals of the Convention.

An important first step in progressing away from discrimination is the promotion of integration, rather than isolation, of people with disabilities.<sup>115</sup> China must re-write its laws to reflect the right of all students to an equal education while allowing reasonable accommodations for students with special needs. Until people with disabilities are afforded equal education they will not have equal opportunities to succeed; until people with disabilities show the ability to succeed, discrimination will continue. In developing countries, only two percent of people with disabilities receive formal education.<sup>116</sup> If this figure does not change, there will never be equality between people with disabilities and people without disabilities.

Merely enacting the laws at the national level, however, is not enough to combat discrimination fully. Scholars suggest that domestic compliance with international law depends partially on framing the issue to match already existing national norms, which is an extremely challenging task.<sup>117</sup> China has its own understanding of human rights, and it is possible that as it grows and acquires power in the international arena it may continue to pursue its own agenda in this realm.<sup>118</sup>

As an alternative to the futile pursuit to get China to change its laws, China may be persuaded to work with local and international activist groups to understand better the challenges facing students with disabilities and to learn to formalize concepts, such as inclusive education, necessary to disabled students' success.<sup>119</sup> The United Nations may persuade signatory states like China to implement better the Convention at

114. See Hernandez, *supra* note 6, at 520; *see generally*, Disabilities Convention, *supra* note 13.

115. Zhi, *supra* note 5, at 288.

116. See U.N. Secretary-General, *supra* note 2.

117. MARGARET E. KECK & KATHERINE SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 17-18 (1998).

118. China's agenda being the de-emphasis of the individual for the sake of the nation. SCEATS & BRESLIN, *supra* note 53, at 2, 8-9.

119. Hernandez, *supra* note 6, at 522.

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the domestic level. Persuasion is especially useful when the state must allocate both short- and long-term financial resources to the amelioration of the problems.<sup>120</sup> In the United States, the challenge of publicizing and changing norms was done through mass protest and media campaigns. In China, local leaders, such as the established Disabled Persons Federation,<sup>121</sup> need to be involved with the incorporation of international law into domestic practices. While the high initial cost and various other obstacles to proper implementation of these human rights may deter China's efforts, international coercion could overcome any initial objections. Not educating students with disabilities would be more expensive to China in the long run, so cost should not be a factor.<sup>122</sup>

Teachers, too, need to be trained to properly educate students with disabilities. One large obstacle for teachers is the Chinese grading system. Teachers in China are graded on student test scores,<sup>123</sup> and admitting students with disabilities into their classrooms could adversely affect their jobs. This policy will have to change, as it incentivizes inappropriate actions by teacher and schools. Teacher training will not only benefit the children in the classroom setting, but proper training can help to decrease disability discrimination.<sup>124</sup> Rural areas are especially disadvantaged, because the best teacher-training courses are in the biggest cities in China.<sup>125</sup> In addition, because class sizes in China, on average, are very large,<sup>126</sup> more teachers

120. See José E. Alvarez, *Do States Socialize?*, 54 DUKE L.J. 961, 970 (2005).

121. CHINA DISABLED PERSONS FEDERATION, [www.cdpcf.org.cn/english](http://www.cdpcf.org.cn/english) (last visited Nov. 26, 2014).

122. See TURE JONSSON & RONALD WIMAN, EDUCATION, POVERTY AND DISABILITY IN DEVELOPING COUNTRIES, TECHNICAL NOTE FOR THE POVERTY REDUCTION SOURCEBOOK, at 3 (2001), available at <http://www4.congreso.gob.pe/comisiones/2006/discapacidad/tematico/educacion/Poverty-Education-Disability.pdf>; see also Peters, *supra* note 36, at 5 (stating that incentives built into fiscal policies could be the most effective way to allocate resources).

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123. Hellen McCabe, *The Beginnings of Inclusion in the People's Republic of China*, 28 RESEARCH & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 16, 19 (2003).

124. *Id.*

125. Ellsworth & Zhang, *supra* note 57, at 62.

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126. China has, by far, the highest number of students per classroom at both the primary and lower secondary level according to a recent Organization for Economic Co-operation and Development Survey. OECD, HOW DOES CLASS SIZE VARY AROUND THE WORLD? 2 (2012), available at <http://www.oecd.org/edu/skills-beyond-school/EDIF%202012—N9%20FINAL.pdf>; see

need to be hired to achieve better education. Smaller class sizes will benefit all students, not merely the students with disabilities. Without changes to the teacher-education system, both national and international laws will have little effect.<sup>127</sup>

Chinese laws need to reflect the shift away from the disease model of disability, and remove language from statutes recommending rehabilitation, aid, and behavioral modifications for people with disabilities. The medical model counteracts the goals of the Convention by perpetuating the stereotype that disabled persons must be considered separately and taught to deal with their differences. The social model must be adopted in order to realize fully the rights of disabled individuals under international and domestic Chinese law.

V. CONCLUSION

When we hold up the mirror of disability to Chinese society, we can see where China is strong and where China is weak.<sup>128</sup> If the Convention is correctly implemented and enforced in China, millions of lives will be improved and China could become a model for other developing nations to follow.<sup>129</sup>

Gains have recently been made in the field of disabled rights. In the planning for the 2008 Beijing Olympics, China spent tens of millions of dollars on facilities for the disabled, including a recent education project between farmers and people with disabilities through the Heilongjiang Disabled Persons Federation.<sup>130</sup> China has made great strides, and interest groups are working with the government to revise laws which effectuate the human rights of people with disabilities. After ratifying the Convention, the Chinese government has begun to recognize the needs of the disabled. Jobs are being created, barriers are being reduced in city life, and universities are recruiting students with disabilities.

also Patricia Potts, *A Western Perspective on Inclusion in Chinese Urban Educational Settings*, 4 INT'L J. INCLUSIVE EDUC. 301, 305-06 (2000) (providing approximately forty as the average class size for China).

127. Hernandez, *supra* note 6, at 519.

128. *Chen Guangcheng*, *supra* note 1.

129. Hernandez, *supra* note 6, at 499.

130. *Mental Patients Well Recuperate [sic] on Therapy Farm*, PEOPLE'S DAILY ONLINE ENGLISH (Apr. 02, 2004), [http://en.people.cn/200404/02/eng20040402\\_139299.shtml](http://en.people.cn/200404/02/eng20040402_139299.shtml).

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Accordingly, China needs to begin implementing the modern standards of the Convention, including moving away from ableist policies and medical definitions of disabilities towards inclusive policies and the social model of disability. In the process, people with disabilities will be regarded as equal in status to people without disabilities. As the nation grows politically and economically, the focus will eventually shift away from policies to help the nation grow stronger towards policies to effectuate the human rights of its citizens. The faster the nation grows, the sooner human rights goals may be reached.

Increasing pressure from within and without on China's commitment to human rights will help reach these goals. As China finds itself more and more on the world's stage, it has greater incentives to recognize fully the rights of all citizens, and in the near future I believe they will. China has the economic resources and political will to succeed. Soon we will hold up the mirror of disability to China and see that it is no longer a society disabled.

