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Disability Rights in the USA and Abroad

By Robert L. Burgdorf, Jr. © 1998

In signing the Americans with Disabilities Act (ADA) into law in 1990, President Bush heralded the new Act as an “historic new civil rights Act ... the world’s first comprehensive declaration of equality for people with disabilities.” He added that other countries, including Sweden, Japan, the Soviet Union, and each of the twelve member nations of the European Economic Community, had announced their desire to enact similar legislation. The picture of the United States as the accepted leader in guaranteeing civil rights for people with disabilities, with other countries poised to follow the U.S. example, turned out to be only partially accurate. President Bush’s rosy predictions have not fully come to pass, and the reality is somewhat more complex than his comments suggested. A variety of historical, sociological, political, and cultural factors unique to each country have resulted in widely differing approaches to disability discrimination.

To be sure, a number of countries have passed laws prohibiting discrimination on the basis of disability since 1990, and the model of the ADA cer-

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tainly influenced many of these laws. For example, Australia passed a Disability Discrimination Act in 1992, and Great Britain enacted its Disability Discrimination Act in 1995. Each of these laws was affected, to a greater or lesser extent, by the U.S. enactment of the ADA, and borrowed concepts and language from it. The British and Australian laws illustrate, however, that various nations have followed very different paths in

passing laws that can be loosely considered “ADA-like.”

The Australian Disability Discrimination Act is extremely comprehensive, forceful, and specific. With some accuracy one can describe it as having out-ADAed the ADA. As one concrete example, while the Bush Administration insisted on inserting into the ADA language from the Civil Rights Act of 1964 exempting private clubs, the Australian statute has a specific section prohibiting clubs and associations from discriminating on the grounds of disability.

The British version of a Disability Discrimination Act, in contrast, is much less broad, specific, and substantial than the ADA. Critics have contended that the 1995 statute is too narrow in the range of activities it covers, too restrictive in the scope of persons afforded protection from discrimination, and too watered down in prohibiting acts of discrimination. A prominent civil liberties lawyer, Lord Lester, reportedly described the

British Act as “riddled with vague, slippery and elusive exceptions, making it so full of holes that it is more like a colander than a binding code.” Whether or not such attacks are fully justified, even a cursory reading of Great Britain’s law reveals that it is not nearly as extensive or definitive as its American counterpart.

A few countries had laws pro-

Canada is one of very few nations where nondiscrimination on the basis of dis- ability is a consti- tutional right.

hibiting discrimination on the basis of disability prior to the ADA. A 1982 amendment to the Canadian Charter of Rights and Freedoms made Canada one of the very few nations in which nondiscrimination on the basis of disability is a constitutional right. At the statutory level, the Canadian Human Rights Act has prohibited disability discrimination since 1985. The interpretation and implementation of the Canadian requirements was influenced to a limited degree by regulations and court decisions under a U.S. statute that

was a partial predecessor to the ADA — Section 504 of the Rehabilitation Act of 1973. The Canadian courts have proven to be very receptive to the spirit of disability nondiscrimination laws, in contrast to the sometimes technical and wary reactions of some American courts.

In July of 1990, just weeks before the ADA became law in the U.S., France enacted an unusual statute that makes discrimination by an employer against a worker or applicant based on disability or state of health a criminal offense punishable by imprisonment for up to a year and a fine of up to 20,000 Francs. Many other countries, however, have never passed laws prohibiting discrimination on the basis of disability. Of the three countries mentioned explicitly in President Bush’s address as having expressed a desire to enact ADA-like legislation — Sweden, Japan, and the Soviet Union — the first two have yet to act on this desire and the Soviet Union was dismantled without having done so.

The reasons for failing to adopt such legislation are many and often closely related to the structure, philosophy, and character of particular nations. Sweden, for example, does not have a law explicitly prohibiting discrimination on the basis of disability, although the government is presently considering and expected to propose a narrow measure that would prohibit some such discrimi-

nation in employment. As part of Sweden’s overall character as a welfare state, however, its laws guarantee all its citizens the right to work and prohibit employers from discharging workers or reducing their pay for any reason other than certain specified grounds — essentially only documented downsizing or serious work misconduct. Disability discrimina-

Japan relies mainly on encouraging rather than requiring nondiscrimination.

tion is, therefore, prohibited *sub silentio*. This welfare state rationale has limitations, however. Such generic guarantees do not protect workers with disabilities from discriminatory practices other than discharge or pay inequities, and do not require any type of workplace accommodation for employees with disabilities, nor do they apply to persons who are merely applicants for employment. Outside of employment, Swedish laws do not prohibit disability discrimination in other aspects of society, such as access to transportation or public accommodations.

Japan’s laws regarding people with

disabilities rely mainly on encouraging rather than requiring nondiscrimination. Illustrative is an article of the Disabled Person's Fundamental Law, as revised in 1993, that establishes "Responsibilities of the Nation" as follows: "The nation shall, on the basis of social solidarity, endeavor to cooperate in promoting the welfare of disabled persons." Likewise, a

vetoed earlier renditions of such legislation, but a compromise version was finally signed in December of 1995. Other countries that have enacted laws prohibiting discrimination on the basis of disability include New Zealand and Kuwait. South Africa included a prohibition against disability discrimination in its new constitution that took effect in 1996 and is considering legis-

Historically, the development of the ADA and similar laws rested upon the legacy of the earlier civil rights struggles and methodologies of African Americans, women, and other groups in achieving legal guarantees of equality under the law in the United States. In part, differences between U.S. laws and those of other countries can be explained by the fact that many of those countries have not had a similar civil rights tradition. The lack of a civil rights mentality among the public, politicians, and even the disability community itself makes the successful enactment of disability nondiscrimination laws quite an uphill battle in such countries.

The laws of many countries contain employment quota requirements— a feature not found in U.S. law.

1994 law popularly known as the Heartful Building Law promotes accessibility in buildings used by the public by declaring that owners of such buildings "are encouraged to modify designs" to incorporate accessibility. Local governments are authorized to give advice about accessibility, and may, if they wish, order modifications to construction plans. Such laws highlight the overriding importance of politeness and cooperation in Japanese society in contrast to the enforceable legal mandate approach prevalent in American legislation.

In the post-Soviet era, Russia has passed legislation that provides some protection against disability discrimination. President Boris Yeltsin twice

labeled it to implement it. Various other countries are continuing to consider such legislation.

The laws of Sweden, Japan, Russia, and many other countries, particularly including European countries, contain a major feature not found in U.S. law — employment quota requirements. Arguably, such systems invoke a "special protection" model at odds with the equality mandate upon which the ADA is based. Britain repealed its quota law when it passed its Disability Discrimination Act. The laws of some countries, however, include both quota requirements and antidiscrimination measures. A more complete discussion of quota systems is beyond the scope of this article.

Robert Burgdorf, Professor at the University of the District of Columbia School of Law, is a U.S. delegate to the Working Group on Persons with Disabilities in the Western Hemisphere for the Drafting of an Inter-American Convention for the Elimination of All Forms of Discrimination for Reasons of Disability. While working at the National Council on Disability, he wrote the original draft of the Americans with Disabilities Act that was introduced in Congress in 1988. Professor Burgdorf dedicates this article to Paul Hearne, President of the Dole Foundation, an old friend and long-time advocate for disability rights who passed away while the article was being prepared.