

African Disability Rights Yearbook 2016

The *African Disability Rights Yearbook* aims to advance disability scholarship. Coming in the wake of the United Nations Convention on the Rights of Persons with Disabilities, it is the first peer-reviewed journal to focus exclusively on disability as human rights on the African continent. It provides an annual forum for scholarly analysis on issues pertaining to the human rights of persons with disabilities. It is also a source for country-based reports as well as commentaries on recent developments in the field of disability rights in the African region.



African Disability Rights Yearbook 2016



ISSN: 2311-8970

Pretoria University Law Press
PULP
www.pulp.up.ac.za

PULP

Editors

Charles Ngwenya

Convening Editor, Professor of Law, Centre for Human Rights, Faculty of Law, University of Pretoria

Ilze Grobbelaar-du Plessis

Senior Lecturer, Department of Public Law, Faculty of Law, University of Pretoria

Heléne Combrinck

Associate Professor, Faculty of Law, North-West University (Potchefstroom)

Serges Djyou Kamga

Associate Professor, Thabo Mbeki African Leadership Institute, University of South Africa

Assisted by

Thuto Moratuo Hlalele

Special Projects Coordinator & LLM/MPhil (Sexual and Reproductive Rights in Africa) Coordinator, Centre for Human Rights, Faculty of Law, University of Pretoria

Isabeau de Meyer

Centre for Human Rights, Faculty of Law, University of Pretoria

International advisory board

Tsitsi Chataika

Senior Lecturer, Department of Educational Foundations, Faculty of Education, University of Zimbabwe

Luke Clements

Professor, School of Law, Leeds University, United Kingdom

Therese Degener

Professor, University of Applied Sciences, Bochum, Germany

Anna Lawson

Professor, School of Law, Leeds University, United Kingdom

Janet Lord

Senior Researcher, Harvard Law School Project on Disability, Harvard University

Christopher Mbazira

Professor, Faculty of Law, Makerere University, Uganda

Charlotte McClain-Nhlapo

World Bank (serving on the Advisory Board of the African Disability Rights Yearbook in her personal capacity)

Bonita Meyersfeld

Professor, Director, Centre for Applied Legal Studies, School of Law, University of the Witwatersrand, South Africa

Lawrence Mute

Lecturer, School of Law, University of Nairobi; Member of the African Commission on Human and Peoples' Rights, the African Commission Working Group on Older Persons and Persons with Disabilities, and Chair of the African Commission's Committee for the Prevention of Torture in Africa

Michael Ashley Stein

Executive Director, Harvard Law School Project on Disability, Harvard University; Professor, William & Mary Law School, United States

Gerard Quinn

Professor, Centre for Disability Law and Policy, National University of Ireland, Ireland

Monica Mbaru

Justice of the Labour Court, Kenya

THIS YEARBOOK SHOULD BE CITED AS (2016) 4 ADRY

The *African Disability Rights Yearbook* publishes peer-reviewed contributions dealing with the rights of persons with disabilities and related topics, with specific relevance to Africa, Africans and scholars of Africa.

The *Yearbook* appears annually under the aegis of the Centre for Human Rights, Faculty of Law, University of Pretoria.

The *Yearbook* is an open access online publication, see www.adry.up.ac.za

For subscriptions to receive printed copies and for guidelines to contributors, also see www.adry.up.ac.za

African Disability Rights Yearbook

Volume 4 2016

Pretoria University Law Press
PULP

2016

African Disability Rights Yearbook

Published by:

Pretoria University Law Press (PULP)

The Pretoria University Law Press (PULP) is a publisher at the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa. This book was peer reviewed prior to publication.

For more information on PULP, see www.pulp.up.ac.za

Printed and bound by:

BusinessPrint, Pretoria

To order, contact:

PULP

Faculty of Law

University of Pretoria

South Africa

0002

Tel: +27 12 420 4948

pulp@up.ac.za

www.pulp.up.ac.za

Cover:

Yolanda Booyzen, Centre for Human Rights

ISSN: 2311-8970

EISSN: 2413-7138

Open access online: <http://www.adry.up.ac.za>

© 2016

The financial assistance of the Open Society Foundations is gratefully acknowledged



OPEN SOCIETY
FOUNDATIONS

TABLE OF CONTENTS

EDITORIAL v

SECTION A: ARTICLES

- 1 Stigma as barrier to the implementation of the Convention on the Rights of Persons with Disabilities in Africa 3
Mark Mostert
- 2 Realising the inclusion of youth with disabilities in political and public life in Kenya 25
Lucianna Thuo
- 3 Reading 'disability' into the non-discrimination clause of the Nigerian Constitution 53
Ngozi Chuma Umeh
- 4 Legislative mechanisms for combating violence against children with disabilities in selected African jurisdictions: A critical appraisal 77
Enoch Chilemba
- 5 My right to know: Developing sexuality education resources for learners with intellectual disability in the Western Cape, South Africa 100
Rebecca Johns & Colleen Adnams
- 6 (Re)thinking sexual access for adolescents with disabilities in South Africa: Balancing rights and protection 124
Paul Chappell
- 7 The development and use of Sign Language in South African schools: The denial of inclusive education 141
Willene Holness
- 8 Implementing article 33 of CRPD: Tanzanian approach 191
Abdallah Possi

SECTION B: COUNTRY REPORTS

- Angola 213
Eduardo Kapapelo
- Gabon 231
Christophe Tchudjo & Victorine Maptue Toguem
- Senegal 247
Abdoulaye Thiam & Seydi Ababacar Sy Sow

SECTION C: REGIONAL DEVELOPMENTS

The jurisprudence of the committee on the rights of persons
with disabilities and its implications for Africa 269
Innocentia Mgijima

The right to work and employment in Southern Africa:
A commentary on how selected employment laws fare
against article 27 of the CRPD 283
Dianah Msipa

BOOK REVIEW

Don Kulick & Jens Rydström *Loneliness and its opposite:
Sex, disability, and the ethics of engagement* 303
Paul Chappell

EDITORIAL

The editors of the *African Disability Rights Yearbook (ADRY)* are pleased to announce the publication of the fourth volume of *ADRY*. Section A of this volume features eight articles by: Mark Mostert exploring stigma as a barrier to the implementation of the CRPD in the African region; Lucianna Thuo on the inclusion of youth with disabilities in Kenyan political and public life; Ngozi Umeh on the intersection between 'disability' and the Nigerian Constitution; Enoch Chilemba on mechanisms for addressing violence against children with disabilities in selected African countries; Rebecca Johns and Colleen Adnams on sexuality education for learners with disabilities in a South African province; Paul Chappell on sexual access for adolescents with disabilities in South Africa; Willene Holness on the development of Sign Language in South African schools; and Abdallah Possi on the implementation of the CRPD in Tanzania.

Section B contains reports on three countries: **Angola** by Eduardo Kapapelo; **Gabon** by Maitre Christophe Tchudjo and Victorine Maptue Toguem; and **Senegal** by M. Abdoulaye Thiam and M. Seydi Ababacar Sy Sow.

Section C contains two commentaries by: Innocentia Mgijima-Konopi on the jurisprudence of the Committee on the Rights of Persons with Disabilities and its implications for the African region; and Dianah Msipa on the right to work and employment for persons with disabilities in the Southern Africa region.

This volume ends with a book review. Paul Chappell reviews *Loneliness and its opposite: Sex, disability, and the ethics of engagement* by Don Kulick and Jens Rydström.

Editors

Charles Ngwena (convening editor)

Ilze Grobbelaar-du Plessis

Heléne Combrinck

Serges Djoyou Kamga

SECTION A: ARTICLES

STIGMA AS BARRIER TO THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN AFRICA

Mark P Mostert*

Summary

A major social challenge to the implementation of the Convention on the Rights of Persons with Disabilities (CRPD) in Africa relates to the widespread stigma attached to the characteristics of disability and those who embody them. The article (a) discusses the phenomenon of social stigma as an underlying contextual lens around Africans with disabilities; (b) examines how stigma generally impacts the lives of Africans with disabilities; (c) applies (a) and (b) to the illustrative examples of stigma related to the treatment of people with albinism in Tanzania, persons with leprosy in Nigeria, and general perceptions of disability in Kenya; and (d) suggests several ways forward to diminish and eventually eradicate the significant damaging effects of stigma attached to disability characteristics and the Africans who live with disabilities, thereby paving the way for increased and more effective implementation of the CRPD in Africa.

1 Context

For people with disabilities, there has been a significant transformation over the past 20 years from viewing disability based on a medical model to that of a more socially-oriented model. Historically, the medical model of disability viewed disability and its manifestations as a medical and clinical

* Regent University, Virginia Beach, Virginia, USA.

phenomenon intrinsic to the individual; something to be examined, diagnosed, managed and 'cured' where possible. Characteristically, this model recognised disability not only as a phenomenon intrinsic to the individual, but concomitantly emphasised the constraints imposed by disability in relation to non-disabled persons. In the medical model, therefore, the health and related professions sought ways of ameliorating these difficulties by accommodating the disability (to a greater or lesser extent) so that the disabled would better fit in with a society based on normalcy. In so doing, the medical model, predictably, classified persons according to their disability and its severity, essentially dividing the world into those with and those without disabilities or, stated differently, the abnormal and the normal. Furthermore, this divide attributed to those with disabilities a palpable sense of being incapable and dependent. The manifestations of these *sequelae* are often visible in the layperson's perception that people with disabilities are either to be pitied for their disabling condition or celebrated as brave and resilient in overcoming their lot in life. Furthermore, this model implies that the individual is responsible, by happenstance, for bearing the burden of the disability, thereby abrogating society from any responsibility to close the abled versus disabled divide. In sum, this view holds that disability tends to become central to the individual's identity rather than as adjunct to peoples' innate humanness and personhood and the notion that they have more, not less, in common with their non-disabled counterparts.

Not surprisingly, the disability community has viewed the medical model as restrictive and unresponsive to their needs. While those with disabilities do not seek to ignore or refuse medical and other assistance related to their condition, they often perceive medical outlooks as socially exclusionary and sometimes degrading. Consequently, they view the necessary support and resources as disproportionately misdirected inward (that is, to their disability) versus outward (that is, to making society more accommodating and inclusive for them despite their disability).

More recently, and in direct response to the shortcomings of the medical model of disability, a social model of disability has become the accepted norm in unpacking issues related to disability and society. The model emphasises the notion that disability is a social construct. That is, all human beings reside on any number of continua related to their physical, psychological and emotional makeup, creating unique individuals with an unlimited array of personal characteristics that transcend compartmentalisation and fixed categories. Put another way, the social model of disability de-emphasises the actual disability to a tangential rather than central influence. Thus, the decentralised social model of impairment replaces the centrality of disability in the medical model. That is, while some human characteristics may cause impairment (being blind or deaf, using a wheelchair, and so on), these characteristics

are not the ultimate definer of the person in whom they reside, but rather adjuncts to their individuality akin to any other human characteristic.¹

As such, the social model of disability assumes acceptance of the reality of impairment and requires a social willingness and ability to implement those vectors that will provide for fully-inclusive communities at every level. It was to this end that the United Nations Convention on the Rights of Persons with Disabilities (CRPD)² was devised.

2 Convention on the Rights of Persons with Disabilities

An examination of the CRPD reveals a set of criteria devised to address issues related to discrimination on the grounds of disability and the fundamental human rights of persons with disabilities the world over. What is immediately clear is that all these criteria assume that the starting point of any government or country is the goodwill and capacity of both the government and its citizens to implement the CRPD as effectively and efficiently as possible. However, such assumptions can be pragmatically challenging. For example, does the government in question have the political will to drive its effective implementation? Does the government have organisational and other structures to implement the CRPD, and are citizens well prepared for even a basic understanding, such as disability awareness, as outlined in the CRPD?

In the article, it is suggested that the issue of disability stigma often undermines the efforts of the CRPD and member states to the Convention.

3 The phenomenon of social stigma as an underlying contextual lens around Africans with disabilities

In terms of barriers to the implementation of the CRPD, it is submitted that a fundamental concern, and of particular importance to Africa, relates to the notion of stigma and its *sequelae* in how Africans with disabilities are considered by their non-disabled peers. Indeed, stigma seems to be a fundamental underlying cause of discrimination against Africans with disabilities in most settings, transcending national, ethnic and political boundaries. This stigma has repeatedly been acknowledged as significantly impacting, for example, public health interventions. Thus, unless the idea of stigma and its real world consequences are examined and addressed, the

1 A Stone-MacDonald & G Butera 'Cultural beliefs and attitudes about disability in East Africa' (2014) 8 *Review of Disability Studies: An International Journal* 2.

2 United Nations Convention on the Rights of Persons with Disabilities (2008).

implementation of the CRPD is likely to be much less successful than where such stigma has been significantly weakened or eradicated.

3.1 Concept of stigma

The term 'stigma', originally from the Greek describing a physical marking to clearly identify societal undesirables, has a long and notable history in both philosophy and, more recently, in psychology and related research. In the modern sense, its progenitor may be traced to Durkheim, who identified stigma as a broad social phenomenon distinguishing between socially-acceptable and unacceptable behaviour.

In the modern era, unpacking the meanings and implications of stigma is usually ascribed to Goffman who, as others, saw stigma as a characteristic that was both an undesirable and discrediting factor to whom it was applied, thereby lowering the status of the person so labelled.³ Or, in Goffman's words, stigma is

the phenomenon whereby an individual with an attribute which is deeply discredited by his/her society is rejected as a result of the attribute. Stigma is a process by which the reaction of others spoils normal identity.

Stated differently, 'stigma is a socially constructed reaction to deviance from an agreed-upon set of norms, and in the case of disability, is mediated by perceptions rather than functional limitations'.⁴

In my discussion, I use the framework of stigma as laid out by Link and Phelan⁵ to explain the phenomenon, before turning to how stigma operates among the treatment of people with albinism in Tanzania, persons with leprosy in Nigeria, and general perceptions of disability in Kenya.

3.1.1 Link and Phelan

Link and Phelan⁶ define stigma as

the convergence of interrelated components. Thus stigma exists when elements of labelling, stereotyping separation, status loss, and discrimination occur together in a power situation that allows them.

3 M Heijnders & S van der Meij 'The fight against stigma: An overview of stigma-reduction strategies and interventions' (2006) 11 *Psychology, Health, and Medicine* 353.

4 CL Saetermoe, D Scatone & KH Kim 'Ethnicity and the stigma of disabilities' (2001) 16 *Psychology and Health* 699.

5 BG Link & JC Phelan 'Conceptualising stigma' (2001) 27 *Annual Review of Sociology* 363.

6 As above.

This definition also acknowledges that, depending on social contexts, stigma may be a matter of degree, ranging from mild to severe.

A brief explanation of these definitional concepts follows.

Component 1: Labelling and differences

The roots of stigma begin when people distinguish among and label human differences. However, not all differences are labelled equally; many are usually ignored as being socially irrelevant because these differences have little, if any, broader social consequence (for instance, a person's name). However, other differences are conspicuously labelled as socially significant (for instance, skin colour, sexual orientation), thereby leading to varied forms of social grouping based on perceptions of difference, usually negative. It is clear that social grouping requires, at the very least, significant generalisation of the labelled, even while ignoring obvious variability within the labelled group (for instance, consigning peoples' skin colour to 'black' or 'white'). Furthermore, social phenomena chosen for labelling and grouping vary according to place and time (for example, in the nineteenth century, small foreheads and large faces were regarded as ape-like and, therefore, likely represented someone with criminal proclivities). In sum, stigma generates negative labels that become affixed to a group of persons who over time are oppressed or ignored based on the designated negative label.

Component 2: Associating human differences with negative attributes

Here stigma is formed when labelled differences are tied to a set of undesirable characteristics that comprise a stereotype. Researchers have recently started to address the nature of underlying cognitive processes that support the use of categories and how these categories are connected to stereotypes. Findings have demonstrated that categories and stereotypes are often made by people in split-second and probably unconscious decisions which, at least initially, serve as 'shorthand' to pass judgments about the labelled group.

Component 3: Separating 'us from 'them'

The third component of stigma relates to its ability to separate groups of people into antagonistic categories of 'us' versus 'them'. Here, the abovementioned connection between stereotypes and undesirable characteristics becomes the justification for the perception that 'them' are so essentially different from the 'us' that the 'them' are completely different types of people almost entirely irreconcilable with the 'us'. This, in turn, raises the probability that 'them' are so qualitatively different from the 'us'

that they may not even be considered human, thereby justifying many ways of treating 'them' poorly or abusively.

Component 4: Status loss and discrimination

As the sequence of components 1 to 3 accumulates, the labelled person or group begins to encounter a significant loss of social status and concomitant higher levels of discrimination. The targeted person or group will consequently be devalued, rejected, and even harmed physically, emotionally or psychologically. For example, this may lead to a significant reduction in the capacity of interacting with the labelling groups, resulting in the curtailment of basic human rights (for instance, the rights to freedom from harassment, to earning a living wage, to taking advantage of educational and other life-enhancing opportunities, and so forth). As would be expected, the previous components inevitably lead to a downward status spiral on any number of hierarchal continua. In sum, in the real world the loss of status generates very significant inequalities.

Following on from the abovementioned is the concept of discrimination. Labelling and stereotyping lead to overt discrimination against the labelled and stereotyped. Such discrimination is evident in various subcomponents, such as structural discrimination (that is, institutional discrimination via institutionally-accumulated practices that disadvantage the 'them' group even if individual discrimination is absent).

Component 5: Stigma and power

As the overarching glue holding the concept of stigma together, Link and Phelan note further that stigma relies on social, economic and political power to achieve its stigmatising aims. Clearly, this power resides in the stigmatisers ('us') used against the stigmatised ('them'). Thus, what matters in terms of stigma is that the 'us' group's perceptions and actions prevail over the 'them' group in all aspects of private and public life. Inevitably, therefore, collateral damage to the stigmatised means that they are often unable to rectify discrimination because of their powerlessness.

We now turn to the notion of stigma and Africans with disabilities.

4 Impact of stigma on the lives of Africans with disabilities

According to the United Nations (UN), there are approximately 85 to 90 million Africans with disabilities. Similarly, the World Health Organization (WHO) has broken down the overall prevalence, showing that approximately 40 per cent of Africans have disabilities, among whom 10 to 15 percent children of school-going age. Overall, therefore, there are

approximately 300 million African children with disabilities, almost all of whom are excluded from schools and other educational structures. Further, adults with disabilities are routinely excluded from proper (or any) employment, from social, political and economic life in general, and, by extension, excluded from being citizens fully participating in their communities. Furthermore, Africans with disabilities are much more likely than their non-disabled counterparts to suffer abuse, especially if they are disadvantaged in several ways (for instance by disability, being female, being a child, and so forth).

There are at least two foundational reasons undergirding the stigma of people with disabilities in Africa: First, there is a considerable lack of information regarding the causes of disabilities and their resulting characteristics. Second, the notion of including persons with disabilities as fully-participating citizens is anathema to the perceptions of many, if not most, Africans.⁷

4.1 Cultural beliefs and values

There is little doubt that across the continent, many cultural attitudes and beliefs negatively affect the way in which persons with disabilities are perceived, although positive perceptions are not unknown (for instance, among the Chagga in East Africa, those with physical handicaps are seen as pacifiers of evil spirits; in Benin those with physical handicaps are often selected as law enforcement personnel; the Turkana of Kenya perceive children with disabilities as a gift from God to be well taken care of, or else they risk the wrath of the deity). However, negative connotations attached to disabilities are likely to be much more prevalent. For example, in Ghana, Ashanti men with physical disabilities are prevented from becoming chiefs, and non-disabled chiefs can be destooled if they become disabled. Furthermore, children with visible disabilities are often killed or abandoned. In many African contexts, a child with a disability is perceived as a curse upon the whole family and a cause of shame and embarrassment. Other negative cultural beliefs connect disability to immoral behaviour by the mother or as punishment for immoral behaviour by other family members. Others attribute disability to a general sense of evil or otherworldly powers meting out disability as punishment for some perceived wrong or a generic sense that the cause of disability results from breaking social taboos (for instance, having sexual intercourse during pregnancy), witchcraft, magic, and other supernatural forces.⁷

7 AH Eideet et al 'Development process in Africa: Poverty, politics, and indigenous knowledge' (2014) 3 *African Journal of Disability* 1.

4.2 Disability and poverty

There is no doubt that disability and poverty are closely linked in a downward spiral trapping Africans with disabilities, especially females, children and young persons, in a web of hopelessness and despair. Indeed, almost half of all impairments of persons with disabilities are preventable and are linked directly to poverty.⁸ This link can occur in several ways. For example, economic poverty may lead to poor or no medical care (either preventative or responsive) increasing maternal and child disease rates. Or, the very poor are likely not to have access to rehabilitative services or medical devices that may assist in ameliorating their condition (for instance, wheelchairs), and they are often perceived as an economic drag on their families and the community as because they require additional resources but are often unable to contribute to the economic common good. In this regard, children and the youth seem to suffer most in this regard. In terms of needed services, poor communities are often the least accessible, making the provision of even basic services challenging, if not impossible.

4.3 Education

Education is generally viewed as a pivotal aspect in raising social and economic status, and is exponentially more important to people with disabilities who are often shunned from the workforce for no other reason than the perception that their disability means that they are unable to perform as employees. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) estimates that more than 90 percent of children with disabilities in the global south do not attend school, and of the 10 percent that do attend school, only half of these complete their primary education.⁹ This state of affairs results in literacy rates for adults with disabilities at around 3 percent. This dismal state of affairs is even more starkly realised by the fact that children and young persons without disabilities have a two or three times the likelihood of attending school.¹⁰

4.4 Disability and gender

Given that in Africa stigma is not only associated with disability but gender, females who are disabled are doubly disadvantaged (and triply so if they are children or young persons) and are far more likely to be the victims of domestic and communal abuse and to live in extreme poverty than either their non-disabled peers or males with disabilities. Female

8 P Parnes et al 'Disability in low income countries: Issues and implications' (2009) 31 *Disability and Rehabilitation* 1170.

9 K Koszela 'The stigmatisation of disabilities in Africa and the developmental effects' (2013) *Independent Study Project Collection Paper* 1639.

10 Parnes et al (n 8 above).

infants with obvious disabilities are also more likely to be abandoned or killed at birth, and in many places they have higher mortality rates than their male counterparts. They are also employed at rates far lower than men with disabilities. These issues can be complicated, for example, by caring for a family member with a disability, a task almost always left to females of the household and the community.

4.5 Employment

Generally, the unemployment rates of Africans with disabilities are twice that of their non-disabled peers, and in developing countries approximately 80 per cent of people with disabilities are either unemployed or underemployed. Those who are fortunate enough to be employed often face discrimination, abuse and marginalisation by non-disabled colleagues and managers who believe that the employee with a disability is automatically less capable and less productive than non-disabled workers.

4.6 Marginalisation, exclusion and discrimination

Given the above vectors, it is not surprising that the vast majority of Africans with disabilities are marginalised, discriminated against, and almost always excluded from the societies and communities in which they live. This, of course, means that they are denied many of their basic human and legal rights and other, more pragmatic vectors, such as access to education, health care, full civic participation, and the denial of hope for a better life. For example, families having members with disabilities are viewed negatively and appear less accepted in their communities.¹¹ Acceptance may also depend on how well the individual with a disability is able to conform to the behavioural and ritualistic norms of the community, with more acceptance being granted to less impaired individuals and less acceptance being shown to persons with more severe disabilities. Marginalisation, exclusion and discrimination are obviously part of the everyday lives of Africans with disabilities. For example, in Kenya it is unlawful for people with visual or hearing problems to become President, as the Constitution stipulates that the President should read English and Kiswahili without Braille or sign language; deaf children in Uganda are often seen as burdens to their family and are consequently hidden from public view to avoid the shame and embarrassment that having such a child is likely to engender in the wider community.

Given the aforementioned, we now turn to three illustrative cases of stigma among Africans with disabilities, namely, (a) people with albinism

11 Stone-MacDonald & Butera (n 1 above).

in Tanzania; (b) persons with leprosy in Nigeria; and (c) general perceptions of disability in Kenya.

5 Illustrative examples related to persons with disabilities in Africa

5.1 People with albinism in Tanzania

Generally speaking, the stigma of albinism in Tanzania starts with the birth of the child who is evidently and immediately different, given that the parents are black and the child white.¹² In many African minds, the characteristics of albinism are believed to be caused, among others, by the mother having had an affair with a white person, having shaken hands with a person with albinism, or having shared a meal with someone with albinism.¹³ Furthermore, albinism is often seen as a curse on the family and, in many instances, babies with albinism, especially among the Maasai, are either killed or abandoned to die. In other cultural communities, for example, the Digo of North Eastern Tanzania, babies with albinism are subjected to an elaborate 'death ritual' whereby an infant is dropped into a lake to see if it will survive, its subsequent death being proof of its sub-humanness.¹⁴ Other misperceptions hold that persons with albinism are not human, but rather ghosts. Should people with albinism be allowed to live, they are often regarded as witches, the cultural belief being that the sun makes their eyes red. They are also often regarded as lazy as they avoid working in the heat of the day to protect their vulnerable skins from the sun. However, in some Tanzanian cultural communities (for instance, the Sekuma of North Western Tanzania), persons with albinism are allowed to grow to adulthood, some of whom are then designated to be buried alive with a deceased Sekuma chief.¹⁵

The maltreatment of Tanzanians with albinism garnered international attention in 2008 with high-profile international reports that these people were being killed or maimed for various body parts ostensibly to be used for good luck charms or as ingredients in potions thought to have magical qualities. However, the killing of Tanzanians with albinism started earlier, in October 2006, in and around the city of Mwanza on the shores of Lake

12 M Thuku 'Myths, discrimination, and the call for special rights for persons with albinism in sub-Saharan Africa' (2011) *Under the Same Sun* 3.

13 AE Cruz-Inigo 'Albinism in Africa: Stigma, slaughter and awareness campaigns' (2011) *29 Dermatologic Clinics* 79.

14 Under the Same Sun 'History of attacks against persons with albinism' (2013) (PWA) <http://www.underthesamesun.com/sites/default/files/History%20of%20Attack%20against%20PWA.pdf> (accessed 25 August 2015).

15 Under the Same Sun (n 14 above).

Victoria. It is also worth noting that this region of Tanzania has the highest *percapita* number of witchdoctors in the country.¹⁶

By 2008, the spate of killings had finally reached proportions that could not be ignored by the nation. The Tanzanian government scrambled to deal with the problem once its extent had become known and in response to pressure from the international community. In a significant symbol of solidarity with Tanzanians with albinism, President Kikwete appointed a woman with albinism, Al-Shymaa John Kwegyir, to the National Parliament as a way of raising awareness of the albinism problem and to give Tanzanians with albinism a political voice at the highest level. Furthermore, in January 2009, Kikwete's government, in an attempt to end further killings, banned all traditional healers and witchdoctors from practising their trade. This last gesture, well-meaning as it was, was difficult to enforce given that traditional beliefs and perceptions around albinism were (and are) so deeply entrenched in the communal psyche. Subsequent to the banning of witchdoctors, the Tanzanian government declared the killing of persons with albinism a capital crime.¹⁷

It is worth noting that the targeting of Tanzanians with albinism focuses on an already-marginalised and excluded group whose isolation makes it easier for them to be the targets of mutilation and killing. This exacerbates an already dire set of circumstances for this population which encompasses, among others, (a) serious health issues, especially related to sun exposure and skin cancer; (b) their voluntary or involuntary withdrawal from the community as a result of ostracism or as a result of psychological or physical abuse; (c) a concomitant sense of low self-worth and a deep sense that society devalues them; (d) discrimination against their family and friends for being associated with the person with albinism; (e) the inability to participate fully (or even partially) in broader social settings; (f) a denial of the right to marry; (g) discrimination in employment; and (h) a concomitant denial of their most basic human, educational and legal rights.

5.2 Persons with leprosy in Nigeria

The stigma attached to leprosy remains a global phenomenon, especially in the developing world. In many countries, stigmatising attitudes towards persons with leprosy are as high as 80 percent of the general population. Significantly, the literature in this area also reveals that, while there is often a high level of understanding of the real causes of and treatment for leprosy, this understanding does not necessarily correlate with more

16 CP Dave-Odigie 'Albino killings in Tanzania: Implications for security' (2010) 3 *Peace Studies Journal* 68.

17 S Bucaro 'A black market for magical bones: The current plight of East African albinos' (2010) 15 *Public Interest Law Reporter* 131.

positive attitudes towards and acceptance of those who have the disease. There are generally four mediating factors related to the fear of leprosy, namely, (a) visible deformities; (b) perceived incurability and chronic course of the disease; (c) perceived infectiousness; and (d) perceived 'bad origin of disease'. Furthermore, given the fact that leprosy is also a 'visible' disease, it follows that persons with leprosy are among the groups most likely to self-isolate and to be reluctant to seek treatment for the condition.¹⁸

As in the case of stigma attached to albinism in Tanzania, the stigma attached to leprosy in Nigeria reveals similar areas of misperception, oppression, and a denial of human rights. While many Nigerians reveal a greater or lesser accurate view of leprosy and its causes, the stigma attached to leprosy is still undergirded by traditional negative beliefs. For example, some Nigerians believe that leprosy is caused by supernatural forces or as a result of a witchcraft curse preempted by the breaking of some form of social taboo (for instance, having sex with a menstruating female). Other negative perceptions of leprosy include reduced chances of marrying someone with leprosy or increased divorce rates when a spouse contracts the disease, or the perception that the condition is hereditary. Furthermore, the very nature of the disease, especially in more advanced cases, engenders prejudicial perceptions and reinforces the notion not only of 'us versus them', but also that those with leprosy are less than human and are to be shunned in any number of ways. Perhaps the greatest fall-out here is that persons with leprosy might delay seeking medical treatment, having self-isolated due to their diminished social and human status.

A significant finding related to stigma and leprosy is related to how the disease is viewed among different religious groups in Nigeria. For example, there is evidence that the stigma attached to leprosy is higher among Nigerian Christians who generally perceive leprosy as a punishment for sin, and lower among Muslims who accept leprosy as being part of God's will. Further, as with many medical and other disabilities, the stigma attached to leprosy is not limited to the person with the disease, but is often extended to the entire family, thereby further complicating social status within the community.

As may be expected, general attitudes towards Nigerians with leprosy means

devaluation, distancing hatred, rejection by family, exclusion, and labelling ... [and] fear was often found to be the root of these negative attitudes, eg, fear of exposure to the disease, fear of being infected, fear of association with a person affected by leprosy.

18 ML Wong 'Designing programmes to address stigma in leprosy: Issues and challenges' (2004) 15 *Asia Pacific Disability Rehabilitation Journal* 3.

This leads to a wide array of missed opportunities, especially those related to (a) acquiring life and employment skills; (b) employment; (c) participation in family and community life; (d) access to preventative and treatment healthcare; (e) access to and participation in educational pursuits; and (f) rejection by the family and the wider community; and so forth.¹⁹

5.3 General perceptions of disability in Kenya

Approximately 10 percent of the Kenyan population embodies some form of disability.²⁰ Of this number, approximately 25 percent are children of school-going age, accounting for fully one-third of all out-of-school children. This translates into of the estimated total special needs school age population of 750 000, while only approximately 90 000 have been assessed as in need of special education.²¹ Furthermore, this means that only 5 percent of children with disabilities are enrolled in educational institutions.²² This state of affairs is further complicated by the fact that, while some special education is offered via private schools, this is expensive and, therefore, usually not available to the average Kenyan. If special education is offered at public institutions, it is more likely to be found in urban areas, meaning that children with special needs have to be boarded, making even state education prohibitively expensive. This also raises another barrier to access as many children with disabilities are unable, due to their disability, to travel long distances to get to their schools, and even if they are able to do so, there is no guarantee that the school will be able to provide the necessary physical and educational accommodation. Another complicating factor arises when parents have to decide, due to financial and other constraints, in which child they should invest with whatever education is available. Predictably, this usually means that a child with disabilities is not designated for formal education.

In terms of the entire Kenyan population with disabilities, there are no accurate statistics gauging the extent of disabilities and, therefore, how they might be supported, but an approximation indicates that the special needs population is approximately 3.5 million people countrywide. The absence of accurate census efforts, especially in remote areas, is severely problematic.

19 WH van Brakel & BM Galarza 'Infectious diseases: A case study of leprosy-related stigma' (2013) *American Psychological Association* 139.

20 B Ingstad & L Grut 'See me, and do not forget me: People with disabilities in Kenya' (2007) SINTEF Health Research.

21 K Matua & BB Swadener 'Semiotics of disability in Kenya: The convergence of culture and post-coloniality' (2013) 5 *PowerPlay: A Journal of Educational Justice* 518.

22 NA Hsieh 'Of curses and cows: Barriers to the realisation of special needs education in Kenyan Maasai communities' (2015) <http://www.bluekitabu.org/bluekitaburesearch-institut/nathaniel-hsieh-maasai-spec.pdf> (accessed 13 August 2105).

As is the case with albinism and leprosy, disability in general in Kenya is viewed as being caused by any number of negative forces. For example, many Kenyans believe that a disability is a curse from a supernatural or mysterious otherworldly force,²³ or as a result of witchcraft spells placed either upon the family or the individual with disabilities.²⁴ In the larger social context, there is the widespread belief that taboo activities, such as adultery or incest, can result in a child born with disabilities. In addition, traditional medicine practices hold, for example, that incorrect or no 'massaging' of an infant at birth is likely to result in ill health. Others believe that disability is simply the deliberate plan of an unseen deity. Also, there is the widespread belief that disability can result from some broken taboo by the mother (for instance, eating eggs during pregnancy) or by other closely-related family members.²⁵ Some beliefs resulting in stigma are even more specific: For example, among the Nandi, killing an animal without provocation during a wife's pregnancy is believed to cause disability in the newborn child, while among the Abagusii, children born with cleft palates are thought to be the result of parents making fun of someone with a disability.²⁶ However, it must also be noted that, as is the case in Tanzania and Nigeria, not all traditional beliefs are negative. For example, many families of children with disabilities take good care of these children and do all they can to advocate for their rights in the family and the community. Furthermore, in many instances, people with disabilities are allowed to take part in important ritual events, which in turn increases social standing in the community. In other communities, it is the disability itself that ensures that the community cares for and values the person with disabilities. For example, certain tribes believe that a person with a disability is the sacrificial lamb to evil spirits, and that taking care of said person ensures that no other evil will befall the community. Others, such as the Turkana, believe that children with disabilities are actually a gift from God and that they should be well taken care of to avoid the wrath of the supernatural for not taking care of their disabled charges.²⁷

Other Kenyans believe that disability is a punishment meted out to the parents of children with a disability. In this regard, studies conducted among the Maasai reveal that mothers often see their children with disabilities as defective and have been known to expose their infants to harsh conditions to precipitate their demise.²⁸ Other stigmas are attached to both family and community perceptions of disability. For example, a

23 NO Ogechi & SJ Ruto 'Portrayal of disability through personal names and proverbs in Kenya: Evidence from Ekegusii and Nandi (2002) 3 *Wiener Zeitschrift für Kritische Afrikastudien* 63.

24 J Monk & J Wee 'Factors shaping attitudes towards physical disability and availability of rehabilitative support systems for disabled persons in rural Kenya'(2008) 29 *Asian Pacific Disability and Rehabilitative Journal* 93.

25 As above.

26 Ogechi & Ruto (n 23 above).

27 Stone-MacDonald & Butera (n 1 above).

28 Hsieh (n 22 above).

person with a disability is often viewed as less able to contribute to the greater economic good of the family and community. Such persons are, therefore, not only seen as a financial and resource liability internally, but also by the larger community, resulting in the shaming of the family with a member with disabilities and a concomitant probability that the family member with a disability is kept isolated from the larger community based on shame and loss of social status. This is reflected in surveys of Kenyans with disabilities who feel discriminated against within their own families and by the wider society.

As noted above, such levels of stigma seriously affect Kenyans with disabilities to fulfil their human potential and to fully participate as citizens of their country, similar to the state of affairs found in Tanzania and Nigeria.²⁹

Given the conditions related to the stigmatisation of people with disabilities in Tanzania (albinism), Nigeria (leprosy) and Kenya (general disability issues), it is imperative that strategies be developed to mitigate the considerable influence of stigma.

6 Ways forward to more effective implementation of the CRPD in Africa

The CRPD provides an extraordinarily clear blueprint for addressing the needs of persons with disabilities worldwide. However, the CRPD is likely to be ineffective if it cannot be implemented to its fullest degree because of barriers to its implementation, in this case, the formidable barrier of stigma attached to disability across the entire African continent. In this part of the discussion, I examine the shaping and development of macro- to micro-forces necessary to eliminate the stigma surrounding disability and in its place to generate the willingness not only of African governments, but among Africans themselves, to more fully accept and include people with disabilities.

Heijnders and Van der Meij³⁰ provide a useful analytical framework of stigma-reduction strategies at several levels from micro to macro: (a) intrapersonal (treatment, counselling, cognitive-behavioural therapy; empowerment; group counselling; self-help; advocacy; and support groups); (b) interpersonal (care and support; home care teams; community-based rehabilitation); (c) organisational/instructional (training programmes; revised policies); (d) community (education; contact; advocacy; protest); (e) governmental/structural (legal/policy interventions; rights-based approaches).

29 Ingstad & Grut(n 24 above).

30 Heijnders & Van der Meij (n 3 above).

6.1 Intrapersonal level interventions

At this level, the primary focus is on changing individual behaviour via knowledge, encouraging more positive self-perceptions, personal empowerment, and economic support to reinforce and maintain positive attitudes and behaviour. The literature in this regard is mixed as to efficacy, with some studies reporting efficacy under certain conditions, while other studies indicate limited efficacy overall. Self-help, advocacy and support groups seek to provide support among people with disabilities to develop positive self-identity, self-esteem, and an array of coping skills. As with other aspects, the literature in this area is very limited, but generally tends to indicate that these interventions are effective, at least to some extent.

6.2 Interpersonal level interventions

Here the idea is to modify the environment in which people with disabilities reside, especially in terms of the impact of social support and networks on health status and behaviour. For care and support, generally assumed to be positive and helpful, there is some research indicating that people receiving such care and support may actually run the risk of emphasising the negative aspects of disability. Home care teams are generally viewed as helpful, especially in terms of modifying positive behaviour towards the person with a disability being cared for. However, there is no research specifically establishing efficacy or inefficacy of the home care team idea. Community-based rehabilitation uses community development to rehabilitate and equalise opportunities for the social integration of people with disabilities. Again, the research literature here is scant with only vague indications that community-based rehabilitation engenders positive outcomes for people with disabilities.

6.3 Community level

Here the aim is to increase knowledge related to specific disability conditions and to address stigma within specific community groups. Education is usually the first strategy, singly or in combination with other strategies, to reduce the stigma attached to disability. Clearly, 'educational strategies' cover a wide variety of approaches and the literature here, as in other areas where literature exists, reveals mixed efficacy results. In addition, the notion of contact refers to encouraging positive interactions between the public and persons with disabilities at the point of contact to reduce the stigma attached to disability. The limited literature here shows some positive findings, while also noting that there are some dangers involved; for example, that disclosing one's disability status could have negative follow-on effects. Advocacy programmes and strategies seek to promote the rights of persons with disabilities at the national and

governmental level by advocating changing laws and policies that are unfavourable to persons with disabilities. Apparently there is no literature that has examined the effects of advocacy at this level. Finally, the idea of protest is to actively suppress disability stigma of individuals, groups, and organisations/governments by peaceful protest and public opposition to these stigmas. There is no literature addressing protest efficacy in improving the lot of persons with disabilities.

6.4 Governmental/structural level

Here strategies are aimed at intervening in the legal and policy arenas to concomitantly reduce discrimination against and oppression of persons with disabilities while increasing the enforcement of the legal and human rights of people with disabilities. The literature here does not address issues of efficacy. Aside from these general areas, which appear to be empirically unsupported, several other steps forward are suggested to reduce disability stigma and increase the chances of the effective implementation of the CRPD.

6.5 Obligation of African governments

The coming into being of the CRPD was, rightfully, hailed as a major international advance in addressing the plight of the billion or so people with disabilities worldwide. Many governments, including those in Africa, were eager to ratify the Convention as a very visible and tangible gesture to their citizens with disabilities and to demonstrate their solid commitment to improving the lives of these citizens. This is reflected in the actions of Tanzania, Nigeria, and Kenya, all of whom have ratified the Convention and its Protocol.

However, ratifying these important documents is only the very first step towards the implementation of the CRPD, a task that is complicated in Africa by the restraints of inadequate resources, poor organisational structures and, perhaps, the lack of sheer political and humanitarian will of governments to address the issue.³¹ In other words, signing the CRPD does not automatically guarantee full or even partial implementation. Furthermore, even the most vigorous attempts at implementing the CRPD are likely to be significantly muted when they run up against the spectre of disability stigma, because no matter the efficacy of implementation, these attempts will largely be wasted in a social milieu that views persons with disabilities as at best an underclass and, at worst, worthy of abuse or death. Clearly, without the full force of each government's inclination to prioritise the issue of stigma reduction, the implementation of the CRPD is likely to be uneven or even impossible. While there is little doubt that addressing

31 Koszela (n 9 above).

the issue of stigma is a grassroots challenge, it must be acknowledged that governments wield tremendous power that can make a very real difference at all levels of society. Perhaps the most notable recent example of this is the very successful ABC/AIDS reduction strategy in Uganda.³² Each government must address and incorporate important external aspects to support implementation by working closely with national and regional disability organisations and non-governmental organisations (NGOs) who are in the frontlines in confronting stigma, as well as with international bodies, such as the UN CRPD Secretariat, UNESCO, the WHO, the World Bank, and so forth.³³

Finally, the above critique does not imply that African governments are uniformly neglectful of their citizens with disabilities, but argues that, at whatever level of support and assistance governments are already providing, much remains to be done at almost every level.

6.6 Educational programmes to alleviate stigma

There is little doubt that educational programmes to erase stigma attached to disabilities must take into account as a first premise the role of cultural perceptions, beliefs, values, and actions that feed the disability stigma in the first place, and how these vectors influence the course of programmatic goals and objectives,³⁴ and that stigma-reduction educational programmes must be carefully matched to the unique culture, community, and mindset of the population to which it is applied.

Of particular interest here is building a corpus of research around effective and empirically-tested knowledge-based strategies, that is, strategies that provide a major pushback against disability stigma, replacing them with empirically-based knowledge. However, this is easier said than done. For example, in Nigeria, once medical interventions proved highly effective in treating and preventing leprosy, it was assumed that the stigma surrounding the disease and those who carried it would diminish. However, this turned out not to be the case. Similarly, 'health education' efforts – educating people about the true medical causes and *sequelae* of disease – did not necessarily translate into lower levels of stigma, most certainly because these campaigns were either too generic or failed to take into account local social and normative nuances in the communities in which they were introduced.³⁵

32 EM Murphy et al 'Was the "ABC" approach (abstinence, being faithful, using condoms) responsible for Uganda's decline in HIV?' (2006) 3 *PLOS Medicine* 1443.

33 Koszela (n 9 above).

34 Stone-MacDonald & Butera (n 1 above).

35 Z Gussow & GS Tracy 'Stigma and the leprosy phenomenon: The social history of a disease in the nineteenth and twentieth centuries' (1970) 44 *Bulletin of the History of Medicine* 425.

There are other documented examples of well-meaning but ultimately unsuccessful strategies related to disability. For example, the historic use of a biomedical approach of 'early detection and cure' (or management of the disability) was not successful in many areas, probably, as noted above, because it did not take into account cultural factors related to stigma and disability.³⁶ Another example holds that in developing countries, including Africa, many health professionals hold negative, stereotypical and mythical views of disability despite their medical training. Such negative biases mean that those with a disease, especially in more advanced and visible stages, may be turned away from hospitals and clinics, or subjected to insensitive treatment.

Other sigma-reduction strategies include, for example, (a) encouraging and using non-discriminatory language, beginning with people-first language (person with a disability versus a disabled person, and so forth); (b) integrating services for people with disabilities into the general health care system rather than having these services in separate (and often unequal) settings; (c) encouraging the mass media to provide less negatively-biased and sensational reports about persons with disabilities; (d) teaching self-advocacy skills to people with disabilities; (e) changing negative language to more positive and accurate representations (for instance, changing the term 'leprosy' to its medical term 'Hansen's disease'); (f) providing medical and psychosocial counselling to people with disabilities to increase their self-help and self-advocacy skills; (g) conducting emancipatory research (that is, encouraging people with disabilities to have more prominent roles in the research process); (h) integrating disability awareness into all public institutions (for instance, schools, government departments, the public health sector, and so forth); and (i) encouraging community self-support groups, and so on.

Overall, however, there is very little empirical research evaluating the many programmes assumed to reduce the stigma attached to disability in Africa and even less attention being paid to identifying gaps in this rather meagre database.³⁷

6.7 Non-governmental organisations and other grassroots organisations

Historically, church missionaries and religious institutions, later working alongside NGOs at the eradication of the stigma attached to disability, have dominated services and support for Africans with disabilities. However, these well-meaning efforts were often seen as not taking full account of local perceptions, beliefs and communal knowledge of

36 Van Brakel & Galarza (n 19 above).

37 Wong (n 18 above).

disability, a first step to starting a conversation that will eventually reduce disability stigma.

6.8 Need for more empirical research

There is a need for more empirical research around disability stigma across a wide array of topics (for instance, research about the impact of traditional beliefs and stigma; conducting censuses for establishing an accurate picture of the extent of disability countrywide; research on the extent of resources for every aspect of every disability; the connection between illness and attached stigmas; physical versus intellectual disabilities; mild versus severe disabilities; the bi-directional relationship between disability and poverty, and so forth) in every African country. Generally, the research base is scattered and unfocused, although pockets of fairly deep research do exist (for example, research related to specific diseases causing medical and other disabilities; research on certain social aspects of disease and disability). Perhaps of immediate concern is the fact that there is very little or no research related to the stigmatisers, the available literature being overwhelmingly in favour of studying the victims of stigmatisation. Additionally, there needs to be an emphasis on a holistic research approach to stigma reduction which incorporates relevant theoretical, behavioural, psychosocial, and cultural models as a means of providing a comprehensive framework for deeper investigations.

Building empirical research databases will have the cumulative effect of providing meta-answers to vexing problems in the area of disabilities and is also entirely necessary in order to form the undergirding sound base upon which national policy can be devised, articulated and implemented.

In terms of research design, given the heavily embedded nature of stigma attached to disability, a combination of quantitative and qualitative approaches seems best, as well as the incorporation of a transdisciplinary approach to examine stigma from a variety of interconnected methods and disciplines. Furthermore, qualitative and other ethnographic approaches may best be suited to the uncovering of deep understandings of stereotypical perceptions and attitudes, their contribution to disability stigma, and in explaining the complex interactions at work psychologically, emotionally and intellectually among both the stigmatised and stigmatisers. In terms of quantitative research, there is a significant need for randomised controlled trials to establish which stigma-reduction strategies work better than others and also to establish the validity and reliability of any formal assessment quantitative instruments.

6.9 Advocacy

By definition, the stigma attached to persons with disabilities means that they are invariably seen as having a low or no social status. Clearly, the full

participation in civic life is a major path towards empowerment and higher social status. Perhaps the most effective way of enhancing social status and fuller inclusion in society is the ability of disability advocates, persons with disabilities themselves and their organisations to advocate for their unqualified inclusion at all levels of society. Over time, such advocacy will allow these entities to gain and build on political power to the point that they will have a national influence on those who are able to provide support and resources for those with disabilities, including their governments and international entities offering such support.³⁸

Such advocacy, of course, is only attained incrementally and is especially taxing among Africans with disabilities who have, over the course of their lifetime, been socialised into accepting their lowly lot in life and who often do not possess the requisite tools to make the transition from being oppressed and downtrodden to being empowered and politically influential. That said, there are encouraging signs that the advocacy movement continues to grow and is ever more vocal in the demands for equals rights, treatment, and societal participation (for instance, the Secretariat of the African Decade of Persons with Disabilities (SADPD), the Southern African Federation of the Disabled (SAFOD), and Disabled People's Organisations (DPOs), etc).³⁹

6.10 Socio-economic rehabilitation

Africans with disabilities are almost always among the most poverty-stricken in society, because they are discriminated against, ostracised, denied entry or advancement in the workforce and, generally, have to rely for survival on the kindness of others or on begging. Socio-economic rehabilitation refers to the notion of people with disabilities, or those generally in poverty, becoming empowered enough to engage in economic activity that enhances their lives and allows them to provide for themselves and even for others. This, in turn, boosts self-esteem, a goal-directed sense of self-efficacy, and reciprocally enhances the status of the person with a disability among non-disabled members of the community.

6.11 Collaborating with religious leaders

Van Bakel and Galarza⁴⁰ suggest that another avenue for combating disability-related stigma is to collaborate with religious leaders in the community, given that these leaders usually have significant standing in their communities and, therefore, may well be able to influence and change social attitudes towards persons with disabilities. While it is true

38 Koszela (n 9 above).

39 Ingstad & Grut (n 35 above)

40 Van Brakel & Galarza (n 19 above).

that some religious leaders may reinforce negative disability stereotypes, particularly related to the causes of disability, it is equally true that these leaders can promulgate positive attitudes (for instance from biblical or Koranic texts) and valid information related to disabilities to end many of the myths surrounding disability. Equally, concerted efforts must be made to reduce the influence of traditional healers and witchdoctors who perpetuate damaging myths, stereotypes and fear of disability by all means possible.⁴¹

7 Conclusion

The CRPD is a significant and progressive set of ideas, strategies and policies that, if properly implemented, are likely to immeasurably improve the lives of Africans with disabilities across the continent. However, no matter how well-meaning implementation plans might be, they may be derailed by the very real, entrenched and change-resistant phenomenon of stigma. Given that stigma, either overtly or covertly, underlies and forms perceptions about Africans with disabilities, it must, as a matter of course, be significantly reduced or completely eliminated as a precursor to the implementation of the CRPD. Clearly, with most African governments already having ratified the CRPD and, therefore, already obligated to implement the CRPD in the coming years, they will face considerable challenges in doing so, given that reducing stigma has largely not been addressed. Furthermore, a careful examination of extant strategies designed to reduce stigma reveals that these are, at best, partially effective, ineffective, or devoid of enough empirical evidence to make solid decisions as to which strategies should be used and which should be discarded.

41 Under the Same Sun (n 14 above).

CHAPTER 2

REALISING THE INCLUSION OF YOUNG PERSONS WITH DISABILITIES IN POLITICAL AND PUBLIC LIFE IN KENYA

Lucianna Thuo*

Summary

Voting is central to citizenship. It is mainly through political participation that the voices of persons with disabilities are amplified and their rights implemented. However, more than being a tool of empowerment and agency, voting is a marker of dignity; those deprived of the franchise not only feel disempowered but dishonoured. The Kenyan Constitution seeks to radically overhaul the exclusion experienced by minorities and marginalised groups, including the youth and persons with disabilities. Notably, article 54(2) requires the progressive implementation of the principle that at least 5 per cent of all elective and appointive positions are held by persons with disabilities.

This article assesses constitutional and legislative provisions on participation in political and public life by young persons with disabilities. It also reviews the measures proposed by the Persons with Disabilities Bill 2015 to realise the inclusion of youth in public life. It further proposes to take advantage of the broad wording of article 54(2) of the Constitution which, unlike the gender rule, does not limit the state to specific measures of implementation. This provision, therefore, offers wide latitude in the approaches that may be used to secure greater inclusion in public life of young persons with disabilities. Among other measures, strategic litigation seeking creative remedies, such as a compelling mandamus (which has been effective in securing socio-economic rights), might provide the impetus needed to ensure greater inclusion of young persons with disabilities in all spheres of public life in Kenya.

1 Introduction

The right to political participation is based on the idea of citizens being the ultimate repository of sovereignty within a state.¹ It is widely accepted that, subject to reasonable restrictions necessary to preserve the integrity of

* LLM (Human Rights and Democratisation in Africa) (Pretoria); Law Lecturer, Kabarak University Law School, Kenya; lucianna.thuo@gmail.com

1 GH Fox 'The right to political participation in international law' in GH Fox & BR Roth (eds) *Democratic governance and international law* (2000) 48 50.

the electoral system, citizens have the right to participate in politics and the conduct of public affairs within a state. It is mainly through political participation that the voices of persons with disabilities are amplified and their human rights implemented.²

Even though political participation connotes more than the right to vote, it is asserted that the right to vote is easily the most important participation right, as it forms the basis for securing other rights. According to the United States (US) Supreme Court:³

No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

2 Participation as a marker of civic dignity

Political participation is an attribute of citizenship, and the idea that one must be sufficiently interested in the affairs of a state to be allowed to take part in deciding the affairs of the state. The requirement of citizenship in order to vote is argued to aid in preserving cohesion and the bonds of a national community.⁴

Citizenship demands an equal distribution of entitlements, the equal recognition of standing and the protection of the rights and interests of all citizens. The right to vote, therefore, is seen as a marker of equal citizenship. According to Fiala-Butora et al,⁵ 'we are not equal because we vote, *we are equal because we are allowed to vote*'.⁶ Therefore, as noted by Karlawish et al, disenfranchisement results in a systematic neglect of the issues that are most important to the disenfranchised group,⁷ and the phenomenon referred to by Prince as 'absent citizenship'.⁸

Moreover, Fishkin⁹ asserts that the right to vote is inextricably linked with dignity. He posits that '[i]t is a dignity inhering in the idea that my

2 J Fiala-Butora et al 'The democratic life of the Union: Toward equal voting participation for Europeans with disabilities' (2014) 55 *Harvard International Law Journal* 71 83.

3 *Wesberry v Saunders* 376 US 1 17-18 (1964) (United States Supreme Court).

4 A Blais et al 'Deciding who has the right to vote: A comparative analysis of election laws' (2001) 20 *Electoral Studies* 41 52.

5 Fiala-Butora et al (n 2 above) 100.

6 As above.

7 JHT Karlawish et al 'Identifying the barriers and challenges to voting by residents in nursing homes and assisted living settings' (2008) 20 *Journal of Aging and Social Policy* 65 66.

8 MJ Prince 'Absent citizens: Disability politics and policy in Canada' in MJ Prince *Electoral participation of electors with disabilities: Canadian practices in a comparative context* (2012) 24.

9 J Fishkin 'Equal citizenship and the individual right to vote' (2011) 86 *Indiana Law Journal* 1289 1336.

vote counts just as yours counts – that I am, with respect to the right to vote, your equal’.

The indignity is egregious where disenfranchisement is part of a wider experience of unequal treatment.¹⁰

Representation is not sought solely for the protection of interests. Having a voice in the manner in which public affairs are conducted, whether directly or indirectly, is also a matter of public recognition, causing one to feel that one ranks equally with one’s countrymen. To be bound by laws in which one has no voice not only results in feelings of exclusion, but also of betrayal and indignity. In the words of Mill.¹¹

It is a personal injustice to withhold from anyone ... the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people. Everyone is degraded, whether aware of it or not, when other people, without consulting him, take upon themselves unlimited power to regulate his destiny.

The link between the vote, citizenship and dignity is well articulated by Shklar,¹² who notes that the right to vote has always been contested both historically and theoretically. She equates the right to vote to the right to earn as determinants of one’s social standing. Voting and earning are not only seen in light of agency and empowerment; they are also a mark of social standing, and attributes of citizenship.¹³ Voting implies the right to act on one’s own behalf, while earning signifies one’s inclusion as full citizens in civil and political society.

Shklar points out that of all the civic activities identified as belonging to citizens of a state, that is, to rule, to fight, to make laws and to vote, only the right to vote could be expressed by all citizens, as this was tied to the protection of interests. Without the capacity to participate in public affairs, one is in no better condition than a slave – not to one man but to the entire society – because one is at the mercy of the multitude, without any means of protecting oneself.¹⁴ Since every citizen has interests to protect, there is no apparent reason for excluding anyone from citizenship. Therefore, where every citizen has rights to protect and interests to promote, any exclusion from public life denies their civic personality and their social dignity.¹⁵

10 Fishkin (n 9 above) 1296.

11 JS Mill *Considerations on representative government* (1861) https://ebooks.adelaide.edu.au/m/mill/john_stuart/m645r/chapter8.html (accessed 7 September 2014).

12 J Shklar *American citizenship: The quest for inclusion. The Tanner lectures on human values* (1989) 387.

13 As above.

14 PS Foner (ed) *Life and writings of Frederick Douglass* (1955) 509, cited in Shklar (n 12 above) 407.

15 Shklar (n 12 above) 396.

Many persons with disabilities experience social exclusion and marginalisation and, in some cases, are institutionalised, leading to feelings of isolation. Persons with disabilities are often viewed by society and the government as needy rather than valuable members of the society.¹⁶ In many countries, these persons are not considered a threat or a force to be reckoned with; therefore, while their votes are desirable during elections, their input into laws and policies are hardly solicited after elections.¹⁷

This marginalisation limits their opportunities to participate in decision making and policy formulation affecting them,¹⁸ which exacerbates their feelings of isolation, discouragement and powerlessness.¹⁹

3 Background: Understanding participation trends among young persons with disabilities

The youth is defined as persons ‘who have attained the age of eighteen years but have not attained the age of thirty-five years’.²⁰ Whereas there are inaccurate statistics on the number of youths with disabilities in Kenya,²¹ it is estimated that 15 per cent of the population consists of persons with disabilities, of which 60 per cent are youth.²²

Despite their numbers, Kenyan youths have little impact on the development of policy, decisions and legislation. Many youths feel that they do not receive the respect of communities but are merely pawns in elections and other decision-making processes.²³

Moreover, research shows that the majority of Kenya’s youths are ‘unemployed, underemployed or underpaid’; meaning that only a small segment of the youth generates their own income.²⁴ Youths with disabilities are more exposed to poverty than their counterparts without disabilities. Poverty results in a lack of trust and a lack of engagement not

16 SP Harris ‘Civic engagement and disability: Using advocacy and technology to advance the political participation of people with disabilities’ University of Illinois at Chicago 38, <http://www.uic.edu/cuppa/ipce/interior/CivicEngagement&DisabilityFullReport.pdf> (accessed 14 September 2015).

17 Harris (n 16 above) 38.

18 Harris 32.

19 Harris 33.

20 Art 260 Constitution.

21 Equal Rights Trust (ERT) & Kenya Human Rights Commission *In the spirit of harambee: Addressing discrimination and inequality in Kenya* (2012) 132.

22 Action Network for the Disabled (ANDY) *Baseline survey on the accessibility of the electoral processes to persons with disabilities in Kenya* (2013) 7.

23 National Democratic Institute for International Affairs (NDI) *Engaging young people in politics in conflict and post-conflict settings: A toolkit* (2007) 4.

24 KS Njonjo *Youth fact book: Infinite possibility or definite disaster?* (2010) 126.

just in elections, but also in other institutions. This lack of trust manifests in the non-participation in political affairs.²⁵

In addition to lowering their income levels and increasing their distrust in authority, poverty causes this constituency to feel disgraced, through no fault of their own, which contributes to a feeling of being second-class citizens.²⁶ They lose their social standing because of deeply-entrenched societal beliefs that tie work with dignity.

Whether to pursue interests specifically linked to their disability or interests coinciding with the wider segment of society, young persons with disabilities need to participate politically to shape their communities and to become recognised and valued as members of society.²⁷ Non-participation in decision making reinforces the barriers to youth participation in society.

Moreover, without the participation of youths with disabilities, it is unlikely that the inclusion of persons with disabilities in political and public life will be realised. Not only do they form the majority of the population, but also youths have a greater potential for political and public participation for various reasons: being willing to take political risks; having more time to devote to political causes than the older generation; and having fewer allegiances to traditional voting patterns and political party loyalties.²⁸

In addition, research on voting trends indicates that voting patterns are formed within the first three elections of attaining the age of majority,²⁹ and seldom change past the age of 35 years.³⁰ This means that those who do not vote are unlikely to start doing so later in life. Therefore, it is imperative that youths, and particularly those with disabilities, are involved in civic life early on, to increase their involvement in decision making and policy formulation throughout their lives and to reduce voter apathy.

Furthermore, the Kenyan Constitution has sought to address the marginalisation of various vulnerable groups, including the youth, indigenous communities, persons with disabilities and women. While

25 NDI (n 23 above).

26 Shklar (n 12 above) 434.

27 International Foundation of Electoral Systems (IFES) and National Democratic Institute for International Affairs (NDI) *Equal access: How to include persons with disabilities in elections and political processes* (2014) 19.

28 As above.

29 A Ellis *Tuning into democracy: Challenges of young people's participation* (2007) 2.

30 As above.

there has been active debate and litigation as to how women's participation rights are to be realised,³¹ limited public engagement or litigation³² has occurred on the exclusion from public life of other marginalised groups, such as persons with disabilities.

4 Normative content of the right to participate in political and public life

4.1 International level

At the international level, article 25 of the International Covenant on Civil and Political Rights (ICCPR) sets out the right to political participation as including the right to vote and to be elected, the right to participate in the conduct of public affairs and the right to have access to the public service. Although these rights were first enunciated in article 21 of the Universal Declaration of Human Rights (UDHR), the ICCPR is considered the most authoritative statement on participation rights as it has been widely ratified.³³ Whilst article 25 rights are *stricto sensu* the only political rights,³⁴ the rights to assemble and associate and the freedoms of opinion, expression and information are prerequisites for the realisation of article 25 rights.³⁵ The only permissible restrictions to political rights are those established by law and which are based on objective and reasonable criteria.³⁶

Participation in the conduct of public affairs covers a wide range of avenues for participation. It includes taking part in public administration and the formulation of policy at all levels; membership of legislative office

31 See Advisory Opinion 2 of 2012 *In the Matter of Gender Representation in the National Assembly and the Senate* on whether article 27(8) was immediately realisable or subject to progressive realisation, *FIDA Kenya & Others v Attorney-General & Another* [2011] eKLR, which challenged the gender composition of the Supreme Court; *National Gender and Equality Commission v IEBC* High Court Petition 147 of 2013, which challenged the process of allocation of party list seats under art 90 of the Constitution for, *inter alia*, the exclusion of youths, persons with disabilities and women; and *Centre for Rights Education and Awareness (CREAW) v Attorney-General & Another* [2015] eKLR which challenged the non-publication of a Bill to give effect to the 2/3 gender rule.

32 See, eg, *National Gender and Equality Commission v IEBC* High Court Petition 147 of 2013, which challenged the process of allocation of party list seats under art 90 of the Constitution for, *inter alia*, the exclusion of youths, persons with disabilities and women. *Northern Nomadic Disabled Person's Organisation (NONDO) v Governor County Government of Garissa & Another* [2013] eKLR concerned the exclusion of persons with disabilities from county government. Both cases are discussed later in this article.

33 As at 9 March 2016, 168 state parties had ratified the ICCPR; https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsdg_no=IV-4&chapter+4&lang=en (accessed 9 March 2016).

34 UN OHCHR 'Thematic study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities' (2011) A/HRC/19/36, 3 (OHCHR Report).

35 As above.

36 UN Human Rights Committee, General Comment 25 para 4.

or the exercise of executive power; deciding public issues through a referendum or other electoral process; and engaging in public debate and dialogue with representatives or through advocacy.³⁷ Of the three elements identified by article 25, the right to vote and to be elected is the easiest to measure, because statistics are taken throughout the process.³⁸ For this reason, the article addresses the right to vote more elaborately.

Article 29 of the Convention on the Rights of Persons with Disabilities (CRPD) is slightly more elaborate than article 25 of the ICCPR in addressing the participation rights of persons with disabilities. It obliges the state to not only avail political rights but also to ensure that persons with disabilities have the opportunity to ‘effectively and fully participate’ and that this participation be ‘on an equal basis with others’. This means that a legislative provision would not automatically meet the muster of article 29. Moreover, to address interests peculiar to persons with disabilities, the state is required to create an atmosphere conducive to their participation in public life by encouraging these persons to join any non-governmental organisation (NGO) or the administration and activities of political parties and to form and join in the activities of disabled peoples’ organisations (DPOs) representing their interests at international, regional, national and local levels.³⁹

The right to participation in political and public life is important as it ensures that the ‘cycles of oppression and marginalisation’ which have been experienced by persons with disabilities are not perpetuated.⁴⁰ However, participation cannot be effective if the relevant systems, information and facilities are not accessible. Therefore, article 29 of the CRPD must be read together with article 9, which addresses questions of accessibility of the physical environment as well as information and communication, which is discussed below. The right to legal capacity, provided for in article 12, is also central to participation, and has in some countries been used to disenfranchise certain persons with disabilities, such as those with intellectual disabilities. The article does not address legal capacity at length, since Kenya, unlike many Western countries, does not have a formal guardianship system. The law does, however, require that one be of sound mind before being eligible to register as a voter, and the implications of this are discussed below.

4.2 Regional level

Regionally, the right to political participation is addressed in article 13 of the African Charter on Human and Peoples’ Rights (African Charter) and

37 OHCHR Report (n 34 above) 4.

38 Ellis (n 29 above) 2.

39 Art 29(b).

40 Harris (n 16 above) 4.

the African Charter on Democracy and Governance (ACDG). Article 13 of the African Charter gives every citizen the right 'to participate freely in the government, either directly or through freely chosen representatives'. The weight of article 13 as a participatory rights provision has been called into question because the provision neither refers to the right to vote in genuine and periodic elections nor mirrors the non-discrimination imperative of the ICCPR and the CRPD.⁴¹ Nevertheless, the African Commission on Human and Peoples' Rights (African Commission) has drawn inspiration from international law and ruled as unjustifiable the denial of voting rights to persons with mental disabilities on the basis of a perceived inability to make rational decisions.⁴² The ACDG further supplements the African Charter by requiring states to promote the participation of persons with disabilities, among other groups with special needs, in governance through measures such as systematic and comprehensive civic education.⁴³

Although neither instrument makes express reference to the right to political participation by persons with disabilities, articles 16 and 17 of the Draft Protocol on the Rights of Persons with Disabilities in Africa (Disability Protocol), prepared by the African Commission's Working Group on Rights of Older Persons and Persons with Disabilities, proposes to remedy this.⁴⁴ It obliges states to take legislative and other measures to ensure that persons with disabilities, including persons with psychosocial and intellectual disabilities, participate in political and public life on an equal basis with others, including by availing civic education material in accessible formats; ensuring access to political party membership; the right to vote and hold political and public office by persons with disabilities; facilitating assisted voting; and ensuring accessibility to polling stations.⁴⁵

The Disability Protocol also recommends increased representation and participation of persons with disabilities in national and local legislative bodies.⁴⁶ It further calls on states to repeal or amend laws restricting the right to vote or hold office on the basis of disability,⁴⁷ and to support the self-representation efforts and capacity of persons with

41 Fox (n 1 above) 66.

42 *Purohit & Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) paras 47-48.

43 ACDEG, art 31.

44 The Protocol was adopted by the African Commission at its 19th extra-ordinary session held on 16-25 February 2016 in The Gambia. The Protocol is now pending submission to the treaty-making process of the African Union, following which it will become a binding legal instrument open to ratification.

45 Arts 17(2)(a)-(c) Draft Protocol.

46 Art 17(2)(d). Unlike the previous drafts, which had recommended that at least 5% of the seats in these bodies be reserved for persons with disabilities, the final draft simply requires the realisation of greater inclusion. This may be due to the realisation of the difficulty of implementing these hard quotas, as the Kenyan experience has demonstrated. A brief discussion on implementing hard quotas for gender inclusion will follow later in this article.

47 Art 16(e).

disabilities through DPOs and NGOs, thus mirroring article 29 (b) of the CRPD.

4.3 Right to participation in political and public life in Kenya

The right to participation in Kenya is addressed in the Constitution, and elaborated upon in the Elections Act,⁴⁸ the Political Parties Act 2011,⁴⁹ the Elections (General) Regulations 2012 and, more specifically for persons with disabilities, the Persons with Disabilities Act (PWDA).⁵⁰

4.4 Constitution

The participation provisions in the Constitution are expansive. According to Mumbi J in *Centre for Rights Education and Awareness v Attorney-General & Another*.⁵¹

The Constitution of Kenya has been described as one of the most progressive in the world. It envisions a society based on the rule of law, non-discrimination and social justice. At its core is the belief that there can only be real progress in the society if all citizens participate fully in their governance and that all, male and female, persons with disabilities and all hitherto marginalised and excluded groups get a chance at the table.

Besides non-discrimination being a national value,⁵² article 27 establishes disability as one of the grounds on which a person may not be discriminated against. The Constitution also imposes a duty on all state organs and public officers to address the needs of vulnerable groups in society, including persons with disabilities.⁵³

Article 38, which provides for political rights, must be read together with articles 54 and 83. On one hand, every adult citizen is entitled to vote and be a candidate for public office and to hold office in a political party. Article 54(1) further requires that persons with disabilities be treated with dignity and respect and be addressed in a manner that is not demeaning. On the other hand, article 83(1)(b) excludes a person of unsound mind from qualifying as a voter and, by extension, from holding office, since one must be a registered voter to qualify as a candidate for any election in Kenya.⁵⁴ The term 'unsound mind' is considered both derogatory and problematic as it is undefined both in the Constitution and in related electoral legislation. Further, whereas the Penal Code (section 11), the

48 Act 24 of 2011.

49 Act 11 of 2011.

50 Act 14 of 2003.

51 *CREAW v A-G* (n 31 above).

52 Art 10(1)(b).

53 Art 21(3).

54 See arts 99(1)(a), 137(1)(b), 180(2) & 193(1)(a) of the Constitution.

Criminal Procedure Code (sections 162-163) and the Mental Health Act (section 26) provide for an adjudication procedure to determine whether a person is of 'sound mind', these laws are restricted to criminal procedure and the management of the financial affairs of a person alleged to suffer from mental illness. The Elections Act does not contain an adjudication procedure for challenging exclusion from registration.

Article 54(2) seems to borrow from the approach taken by article 29 of the CRPD and article 25 of the ICCPR. It envisages inclusion not only in politics but also in all aspects of public life. It requires the inclusion of persons with disabilities not only in elective positions – which was the approach of the previous Constitution – but also in all appointive offices. The 'five per cent rule' in article 54(2) is akin to the 'two-thirds gender rule' in article 27(8), as it requires the state to ensure the progressive realisation of the principle that at least 5 per cent of the members of elective and appointive bodies are persons with disabilities. Parallels between these two provisions are discussed below.

The Constitution elaborates on the rights of youths, and it requires the state to take affirmative action measures to ensure that youths have the opportunity to participate in all spheres of life, including political life.⁵⁵

The general principles of the electoral system in article 81 also require the electoral system to comply with the principle of fair representation of persons with disabilities. This principle is reflected in the composition of the National Assembly, which includes 12 members nominated to represent special interests, including the youth and persons with disabilities;⁵⁶ and the composition of the Senate, which includes two youths and two persons with disabilities (with equal gender representation) elected by proportional representation using party seats.⁵⁷ Parliament is required by article 100 to enact legislation to enhance the representation in Parliament of all marginalised groups, including persons with disabilities and the youth.

In line with the prescription in the ICCPR of equal access to the public service, the values and principles of public service also require the participation of persons with disabilities in the formulation of policy. The principle of fair competition and merit for appointments and promotions is made subject to, *inter alia*, the principle of affording equal and adequate opportunities for the appointment, training and advancement of persons with disabilities in public service.⁵⁸ Parliament is yet to enact legislation to

55 Art 55(b).

56 Art 97(1)(c).

57 Art 98.

58 Art 232.

give effect to the values and principles of public service set out in article 232.⁵⁹ Nevertheless, the CRPD Committee commended Kenya for the introduction of a disability-mainstreaming indicator in performance contracting for public services.⁶⁰

4.5 Elections Act

The Elections Act⁶¹ gives effect to the constitutional provisions on elections and electoral boundary delimitation. The Electoral Code of Conduct requires political parties and referendum committees to guarantee the security and full participation of, *inter alia*, persons with disabilities as candidates and voters, in addition to ensuring their free access to public meetings, their activities and other political events.⁶²

However, to qualify for nomination as a candidate for any election, the Elections Act requires one to hold a ‘certificate, diploma or other post-secondary school qualification’, while candidates for presidency or deputy-presidency are required to hold a degree certificate from a recognised university.⁶³ These educational requirements are often prohibitive for persons with disabilities who wish to vie for elective positions, as discussed below.

The Act also specifies how special seats for the representation of marginalised groups, including persons with disabilities, will be allocated to parties following an election.⁶⁴ It further grants the Independent Electoral and Boundaries Commission (IEBC) power, under section 109(o), to make regulations providing for assisted voting for persons with special needs, including persons with disabilities.

4.6 Political Parties Act⁶⁵

The Constitution and the Electoral Code of Conduct require political parties to respect the rights of marginalised groups to take part in the political process.⁶⁶ In a provision appearing to give effect to articles 38 and 81 of the Constitution, the Act further makes the inclusion of minorities and marginalised groups, including persons with disabilities, both in the

59 The Public Service Values and Principles Bill 2014 is still pending adoption by parliament.

60 CRPD Committee Concluding Observations in relation to the initial report of Kenya CRPD/C/KEN/CO/1, adopted by the Committee at its 14th session, 17 August-4 September 2015 1.

61 Act 24 of 2011.

62 Sec 16, Second Schedule to Elections Act.

63 Sec 22; see also secs 24 & 25 as read with arts 99(1) and 193(1)(b) of the Constitution.

64 Sec 36.

65 Act 11 of 2011.

66 Art 91(1)(e) and Second Schedule to Elections Act.

membership and in the governing bodies of the parties a prerequisite for full registration.⁶⁷

To implement the inclusion of marginalised groups, the Act establishes the Political Parties Fund. At least 30 per cent of the funds allocated to each party ought to be used to secure the inclusion of women, the youth, persons with disabilities, ethnic and other minorities and other marginalised groups in Parliament and county assemblies.⁶⁸

4.7 Persons with Disabilities Act

The PWDA⁶⁹ preceded the CRPD, and its limited provisions on political participation should, therefore, be understood in this light. It entitles every adult person with a disability to vote and to use a personal assistant where necessary who is sworn to secrecy; to accessible polling stations and assistive devices to exercise their civic rights.⁷⁰ The Act makes it an offence for the assistant to fail to comply with the voting instructions of the person with a disability and to conceal a person with disability, which deprives them of the opportunity to participate in public life.⁷¹ Proposed amendments to the Act are discussed below.

4.8 Elections (General) Regulations

The Regulations⁷² are enacted by the Independent Electoral and Boundaries Commission (IEBC) under section 109 of the Elections Act. To incentivise persons with disabilities to vie for elections, the Regulations entitle these persons to pay only half of the nomination fees charged for any election.⁷³ Further, Regulation 72 sets out the guidelines for assisted voting, but only provides for the use of a personal assistant.

4.9 Persons with Disabilities Bill 2015⁷⁴

Despite having ratified the CRPD in 2008, Kenya is yet to bring its disability legislation in compliance with the CRPD and the Constitution.

67 Secs 7(2)(b) & (c).

68 Sec 26.

69 Act 14 of 2003.

70 Secs 29 & 30.

71 Sec 48 & 45 respectively.

72 Legal Notice 128 of 2012.

73 Regs 19(a), 25(a), 29(a), 33(a) & 37(a).

74 The author wishes to acknowledge that the Bill is undergoing stakeholder review and is likely to change by the time of publication. The version discussed here is the one published by the Commission on the Implementation of the Constitution (CIC) in 2015 and may have undergone significant changes by the time of publication. See <http://www.cickenya.org/index.php/legislation/item/491-persons-with-disabilities-bill-2015> (accessed 20 June 2016).

Several attempts to amend the PWDA have been unsuccessful, in part due to the limited representation in Parliament of persons with disabilities, and a reluctance on the part of the media to raise awareness on disability rights.⁷⁵ The lack of awareness on disability rights and the low media coverage have in part been attributed to the fact that there are no incentives to actors and institutions to avail information in disability-friendly format.⁷⁶ Nevertheless, by virtue of articles 2(5) and (6) of the Constitution, international law (including the CRPD) is directly applicable to Kenya, even in the absence of legislation having been enacted to implement it.⁷⁷

None of the previous attempts at amendment has extensively addressed political participation rights. The furthest these attempts have gone was to require that national and county governments reserve at least 5 per cent of all state and public service positions for persons with disabilities,⁷⁸ and that reasonable accommodation measures be adopted to overcome restraints faced by persons with disabilities.⁷⁹ Although this Bill has been criticised for being 'full of nice-sounding ideas' without adding 'anything valuable' to the Constitution,⁸⁰ it addresses some of the concerns raised by the CRPD Committee in its Concluding Observations to Kenya's initial report. This section reviews the 2015 Bill and whether, if passed, it will facilitate greater participation in political and public life.

The 2015 Bill is a marked improvement on previous Bills. As opposed to piecemeal amendments to the PWDA, the 2015 Bill proposes to overhaul the entire Act. However, the Bill is yet to be tabled in Parliament, as it is still undergoing internal review and stakeholder consultation.⁸¹

Part III of the Bill sets out *in extenso* the rights of persons with disabilities. It elaborates on the constitutional provisions and reflects the CRPD. Whereas the Constitution places a greater burden on the state to realise the rights of persons with disabilities, the Bill proposes a more collaborative approach between the National Council of Persons with Disabilities, the national and county governments and the private sector.⁸²

75 K Njogu 'Media and disability in Kenya' (2009) 24 *Disability Studies Quarterly* <http://dsq-sds.org/Article/view/983/1171> (accessed 13 September 2015).

76 African Union for the Blind 'State of disabled peoples' rights in Kenya (2007) Report' 26.

77 See *CK & Others v Commissioner of Police Meru* Petition 8 of 2012; *Mitu-Bell Welfare Association v A-G* [2013] eKLR, where the courts directly applied international law in the absence of implementing legislation.

78 See clause 4(1) of the Persons with Disabilities (Amendment) Bill 2014.

79 n 78 above, clause 11.

80 J Cottrell Ghai 'The Constitution and disability: The good and the not so good' <http://www.the-star.co.ke/news/constitution-and-disability-good-and-not-so-good> (accessed 31 October 2015).

81 Commission for the Implementation of the Constitution (CIC) <http://www.cickenya.org/index.php/legislation/bill-tracker> (accessed 19 September 2015).

82 See eg clauses 8 & 31(2).

Clause 30 addresses the right of children with disabilities to a name and registration immediately after birth, as set out in article 18 (2) of the CRPD. This right is not expressly provided for in the PWDA. This right must be read together with the right to documents of registration and identification set out in clause 33; which entitles every person to a birth certificate, a national identity card, passport or other identification. Possibly in order to address the lack of accurate statistics on persons with disabilities, the Council will also be tasked with the registration of persons with disabilities and the issue of disability identification cards.⁸³ However, it is unclear whether disability identification cards will be of equal status to national identity cards, and as such will be used for voter identification and registration in the absence of national identity documents.

Clause 31 provides specifically for young persons with disabilities. Among other proposed measures, the state is required to 'promote full, inclusive and accessible education, training and employment and programmes for youths with disabilities' and to promote their inclusion in mainstream youth organisations and programmes.⁸⁴ Clause 31 may be read together with clause 39, which seeks to ensure accessibility of children with disabilities to inclusive and free early childhood, primary and secondary education on an equal basis with others. The obligation to ensure access to education is placed on both the national and county governments, and the courts are given the power to order the unconditional admission of a person with a disability.⁸⁵ The Council and the governments are tasked with ensuring that learning institutions take into account the needs of persons with disabilities as well as providing individualised support measures.

Persons with mental disabilities, who are often the most excluded from education due to their special needs, are also specifically provided for in the Bill. The draft, if adopted, would require the Cabinet Secretary in charge of education to develop an adaptable education framework which would award a certification of completion to children with mental disabilities. This certificate would enable participation in elections where a person desires to be elected to office under the Elections Act.⁸⁶ The 2015 Bill also entitles every person with a disability to special measures to accelerate their equal participation in, *inter alia*, the political field.⁸⁷

As indicated by the Office of the United Nations High Commissioner for Human Rights (OHCHR), the right to information is a prerequisite to participation and effective decision making.⁸⁸ The proposed Bill, if passed, would also oblige both public and private institutions to provide

83 Clause 8(c)(i).

84 Clauses 31(a) & (b).

85 Clause 39(10).

86 Secs 22, 24 & 25.

87 Clause 38.

88 OHCHR Report (n 34 above) 3.

information to the public, including through the internet, radio and television stations, to ensure that the information is in accessible format and technologies appropriate for different kinds of disabilities.⁸⁹ It is unfortunate that the Bill does not create penalties for non-compliance with this provision. The Bill further seeks to make sign language a common course in all institutions of higher learning.⁹⁰

To give effect to article 29(b) of the CRPD, clause 47 proposes the mandatory inclusion of at least one male and one female with a disability in the governing body of each political party registered with the Council.⁹¹ It would require the IEBC to ensure the participation of persons with disabilities by facilitating voting procedures, material and facilities which are accessible and easy to understand and use; by protecting the rights of persons with disabilities to vote in secret and to offer their candidature in elections; and allowing assisted voting and facilitating the use of assistive and appropriate technology. This clause largely improves on Regulation 72, which currently benefits only particular categories of persons with disabilities, such as the visually impaired, and which fails to ensure secrecy of the ballot. The clause also requires the Inspector-General of Police to provide protection to persons with disabilities who declare candidature in the general elections.

The Council is also mandated to vet persons with disabilities who desire to vie in any election or declare their interest in any appointive position,⁹² and to issue a clearance certificate. Again, it is unclear whether the vetting process undertaken by the Council is complementary to, in lieu of or done alongside vetting by the IEBC.

Clause 55 restates the PWDA's prohibition on concealment of persons with disabilities by a parent, guardian or next of kin,⁹³ which denies them opportunities, including the right to participate in public life. However, it proposes a harsher penalty by raising the fine upon conviction to 200 000 shillings, up from 20 000 shillings in the PWDA.

Moreover, to address inaccessibility, the Bill restates the obligation of both private and public institutions to ensure accessibility, and to ensure that new buildings meet the accessibility guidelines set out in the Third Schedule. The proposed penalty for non-compliance with an adjustment order is a fine not exceeding 5 million shillings (up from 20 000 in the PWDA),⁹⁴ and/or imprisonment for a term of five years or both. This provision would go a long way towards addressing the inaccessibility of voting stations and booths, government offices as well as the format of

89 Clause 43.

90 Clauses 43(6) & 7.

91 Clause 47(2).

92 Clause 47(8).

93 Sec 45.

94 Sec 26(2).

civic and voter education used by the IEBC. It would also address the CRPD Committee's concern about the current lack of measures to sanction non-compliance with accessibility standards.⁹⁵

5 Obstacles to realising the right to participate in political and public life by Kenyan youths with disabilities

Despite the elaborate provisions on including both youths and persons with disabilities in political and public life in Kenya, political participation by youths with disabilities remains minimal. Although some barriers to inclusion are specific to youths with disabilities, other barriers affect all persons with disabilities. The barriers to their participation are roughly split into five categories: architectural and physical; attitudinal and cultural; informational and communication; legal and policy; and factors related to socio-economic status.⁹⁶ The main barriers are discussed below.

5.1 Architectural and physical

Many institutions have made strides in making their facilities accessible, but physical inaccessibility remains a huge barrier to participation. Public transport remains largely inaccessible and costly for most persons with disabilities due to the design of public service vehicles and the attitude of the operators, who often decline to transport wheel-chair users or charge them extra for loading their wheelchairs.⁹⁷ Many persons with disabilities, therefore, avoid activities that would require them to leave home, including voting and participating at political rallies. Moreover, few voter registration offices and polling stations are accessible.⁹⁸

In addition, many polling stations are overcrowded during voting, and are characterised by long queues. The long queues are a great strain on persons with disabilities and, in some cases, these persons abstain from voting for fear of stampedes during the voting exercise.⁹⁹

95 CRPD Concluding Observations (n 60 above) para 17.

96 Prince (n 8 above) 28.

97 KNCHR *From norm to practice: A status report on implementation of the rights of persons with disabilities in Kenya* (2014) 33-34.

98 Although there are few statistics on this issue, an analysis by the Kenya National Commission on Human Rights (KNCHR) indicated that little had been done to ensure the participation of persons with disabilities prior to the 2013 elections. See KNCHR *Living and voting with dignity and justice* (2012) 41. The CRPD Committee recommended that Kenya guarantee full accessibility of polling stations and ensure that information on elections is available in accessible formats. See Concluding Observations (n 60 above) para 52(b).

99 ANDY (n 22 above) 5.

Furthermore, even where youths with disabilities succeed and are elected or appointed to office, many government offices and public buildings are not accessible and the information on policies is not available in accessible format.¹⁰⁰ Having persons with disabilities in office helps to highlight the accessibility issues and allows persons with disabilities to impact on projects and funding priorities.¹⁰¹

5.2 Attitudinal and cultural

Attitudes towards persons with disabilities remain a major hindrance to their equal and full participation in society. Many youths with disabilities are concealed by their families from birth, thus being excluded from birth and national registration.¹⁰² Others are deprived of registration documents because of the ethnic community to which they belong, such as youths of Somali and Nubian origin.¹⁰³ Before youths from these ethnic groups are registered, they are required to provide 'evidence' of their citizenship and go through a vetting process.¹⁰⁴ The CRPD Committee noted that birth registration figures are also low in refugee camps and those of internally displaced persons (IDPs).¹⁰⁵ The lack of valid national identification precludes voting and vying for elective office.¹⁰⁶

Even where they are registered, there is no provision in the identity card or voter registration form for the category of disability of a person, making it difficult for electoral officials to know what kind of support is required. The disability identity cards proposed by the 2015 Bill might aid in providing the requisite electoral support.¹⁰⁷

Some persons with disabilities also experience stigma in voter identification and national registration processes because they do not have fingers for imprinting during the identification process.¹⁰⁸ This stigma causes them to opt out of national registration and voter registration exercises. In some cases, persons with disabilities have reported the use of insensitive language during the registration process.¹⁰⁹

Despite a constitutional stipulation for their inclusion, persons with disabilities were also excluded from party nomination lists in 2013. Their exclusion was challenged in the case of *National Gender and Equality*

100 IFES & NDI (n 27 above) 60.

101 As above.

102 M Redley et al 'The voting rights of adults with intellectual disabilities: Reflections on the arguments, and situation in Kenya and England and Wales' (2012) 56 *Journal of Intellectual Disability Research* 1026 1031.

103 ERT (n 21 above) 4.

104 ERT (n 21 above) 168.

105 Concluding Observations (n 60 above) para 36.

106 As above.

107 Clause 8(c)(i) Persons with Disabilities Bill 2015.

108 ANDY (n 22 above) 5.

109 ANDY 17.

Commission & Others v IEBC & Others,¹¹⁰ where women, youths and persons with disabilities had been left out of the party lists forwarded to the IEBC. Although the members of parliament had already been gazetted and could, therefore, not be removed by a court order, the High Court ordered a repeat of the election exercise in relation to county assemblies, to include these marginalised groups. In *NONDO v Governor County Government of Garissa & Another*,¹¹¹ the petitioners also challenged the exclusion of persons with disabilities from county executive committee appointments, which they argued did not comply with the requirements of article 54(2) of the Constitution. While ruling that it was necessary for county governments to be more proactive in ensuring the inclusion of person with disabilities, the Court declined to nullify the appointments for non-compliance with article 54(2) because it could not be demonstrated that the members of the DPO had applied and been denied appointments. Having noted that the county government had not complied with the Constitution and that persons with disabilities are often so marginalised that they are unaware of such appointments, it is unfortunate that the Court declined to order the inclusion of persons with disabilities to comply with the Constitution. These cases demonstrate the need for continuous sensitisation on disability rights.

Persons with mental and intellectual disabilities, in particular, face restrictive attitudes about their voting capacity both from their caregivers and from electoral officials.¹¹² Discriminatory attitudes on the part of caregivers have a far-reaching impact on participation in public life.¹¹³ The stigma sometimes manifests in violence, with some persons with intellectual disabilities reportedly having been shoved out of voting queues in the 2013 elections.¹¹⁴ Their desire to offer leadership is often belittled, and some who have endeavoured to vie for public office have had to drop out due to mudslinging by fellow candidates.¹¹⁵ Moreover, the public and caregivers often have the erroneous perception that all persons with disabilities' needs are met by their families, including the right to political participation, making it unnecessary to encourage them to exercise their political rights.¹¹⁶ The everyday challenges faced by persons with disabilities to meet their socio-economic needs, coupled with these discriminatory attitudes, have the result that for many realising their political rights is not a priority.

110 n 32 above.

111 As above.

112 Mental Disability Advocacy Centre (MDAC) *The right to legal capacity in Kenya* (2014) 6 24.

113 ERT (n 21 above) 133.

114 MDAC (n 111 above) 38.

115 MDAC 39.

116 Cambodian Disabled People's Organisation (CDPO) *Disability inclusion in the voter registration process* (2015) 31.

5.3 Informational and communication barriers

Mass media plays a critical role in shaping public opinion. Therefore, the lack of information in accessible format deprives youths with disabilities of the opportunity to participate in civic life. A survey by KNCHR indicates that this barrier is experienced more by persons with auditory and visual impairments than by those with physical disabilities.¹¹⁷ Despite the introduction of sign language in 2010 for all programming of national and international significance,¹¹⁸ sign language is only available for parliamentary broadcasts and news on selected television stations. There is also a general lack of awareness of disability rights, and poll officials are not trained to communicate with persons with disabilities. Persons with disabilities are reported not to have voted in 2013 as they could not communicate with poll officials using sign language.¹¹⁹

While the use of technology provides a great platform for persons with disabilities to take part in public debates and to voice their views while circumventing attitudinal barriers,¹²⁰ it is only effective if information that is availed is in accessible format. Persons with intellectual disabilities, for example, require information in easy-to-read format. Persons with visual impairments require facilities such as screen readers.¹²¹ Whereas technology holds great potential for increasing participation by youths with disabilities, the high costs of the necessary devices, internet and training on their use preclude many youths, especially those in rural areas, from acquiring the necessary equipment to facilitate their participation.¹²²

Moreover, the complexity of the electoral system poses a challenge to all persons, but more so to persons with disabilities. In Kenya, six elections are held on the same day.¹²³ The complexity of voting is exacerbated by the fact that voter education drives are often not designed for and targeted at persons with disabilities.¹²⁴

5.4 Legal and policy

As discussed above, article 83 of the Constitution excludes persons of 'unsound mind' from registering to vote. This term is derogatory and

117 KNCHR (n 97 above) 34-35.

118 It is provided for in sec 39 of the PWDA but was operationalised by Legal Notice 182 of 2010.

119 KNCHR (n 97 above) 35.

120 Harris (n 16 above) 10.

121 <http://www.disabled-world.com/disability/accessibility/websitedesign/> (accessed 16 September 2015).

122 Harris (n16 above) 39; see also ERT (n 21 above) 138.

123 The six elections are presidential, gubernatorial, senatorial, parliamentary (both Senate and National Assembly) as well as elections for the woman representative to the National Assembly drawn from each county.

124 CDPO Report (n 115 above) 11.

undefined in Kenyan law. This provision treats mental capacity as synonymous with legal capacity.¹²⁵ Whereas the provision does not automatically exclude persons with disabilities, in practice mental illness and intellectual disabilities are conflated, and the lack of a legal definition allows electoral officials to exclude persons perceived to be of unsound mind from voting.¹²⁶

The educational requirements introduced by the Constitution and electoral laws also affect youths with disabilities disproportionately. Youths with disabilities often have lower levels of education because of inaccessibility, poverty, the lack of implementation of the Special Needs Education Policy of 2009, stigma, high dropout rates of girls with intellectual disabilities as a result of sexual abuse, among other factors.¹²⁷ A lack of access to education deprives them of the capacity for active citizenship.¹²⁸ By operation of law, low education levels also divest them of the opportunity to vie for or be appointed to public office. The Elections Act is in the process of being amended, and the provision on education has been amended to require higher educational levels for members of county assemblies. This provision is expected to come into effect in the 2022 elections. Despite calls for a similar affirmative action measure for persons with disabilities,¹²⁹ the threshold is yet to be lowered for persons with disabilities seeking elective office.

Furthermore, Regulation 72, the only provision on assisted voting, only envisages voting with the help of personal assistants. It does not take into account the diversities among persons with disabilities, increasing the likelihood of double marginalisation of people with other types of disability, such as intellectual disability.

5.5 Socio-economic factors

Under this category, the barriers to participation by persons with disabilities are rooted in their socio-economic status. Because many youths with disabilities have lower levels of education, they have low-income levels. Both poverty and disability result in stigma and social exclusion, and ultimately result in limited electoral participation. Poverty further precludes persons with physical and sensory disabilities from accessing

125 The Kenya National Commission on Human Rights (KNCHR) and The Open Society Initiative for Eastern Africa (OSIEA) 'How to implement Article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya: A briefing paper' 50.

126 L. Mute 'Shattering the glass ceiling: Ensuring the right to vote for persons with intellectual disabilities in Kenya' (2010) 2 *Thought and Practice: A Journal of the Philosophical Association of Kenya (PAK)* 4.

127 KNCHR Report (n 97 above) xi.

128 J Lord et al *Human Rights. YES!* (2012) 47.

129 See clause 7 of the Election Laws (Amendment) (No 3) Bill 2015.

assistive devices and technologies necessary for participation.¹³⁰ Without resources, it is also impossible to mount effective campaigns for election to public office. It is asserted that even the reduced nomination fees introduced by the Elections Regulations are beyond the reach of most persons with disabilities who wish to vie for elective office.¹³¹

Political participation cannot be effectively ensured without addressing the underlying factors, such as poverty, which serve to place youths with disabilities at the periphery of public life. As one author aptly points out, it is possible for the law, with one hand, to accord civil and political rights to persons with disabilities, while with the other to effectively disenfranchise them by upholding policies that ignore their particular situation and needs.¹³² For these barriers to be minimised, it is necessary to have a significant allocation of resources.¹³³

6 Strategies for securing inclusion of youths with disabilities in Kenya

It is difficult to establish a single 'gold standard' for participation that would take into account all the diverse circumstances, obstacles and barriers faced by youths with disabilities around the world, especially since electoral systems and political contexts are ever-changing.¹³⁴ Nevertheless, it is necessary to propose strategies that can be adopted because the inclusion of youths with disabilities in Kenya will not happen organically. Concrete steps for the realisation of Convention rights are needed.

Firstly, it is crucial to establish the scope of the state's obligations in relation to the inclusion of persons with disabilities and the mechanisms to be adopted by the state in realising the inclusion of persons with disabilities in political and public life. While the lack of a clear formula under article 54(2) of the Constitution provides wider room for disability advocates seeking creative avenues for inclusion, it also poses a danger of non-compliance by the state.

130 ERT (n 21 above) 134.

131 ANDY (n 22 above) 25.

132 P Alston 'Disability and the International Covenant on Economic, Social and Cultural Rights' in T Degener & Y Koster-Dreese (eds) *Human rights and disabled persons: Essays and relevant human rights instruments*, cited in F Mégret 'The Disabilities Convention: Towards a holistic concept of rights' (2008) 2 *International Journal of Human Rights* 261 265.

133 Mégret (n 132 above).

134 Prince (n 8 above) 41.

The courts, rather than legislation, proved to be effective forums for challenging and eventually removing impediments to voting and representation faced by African-Americans.¹³⁵ The courts removed these impediments by addressing themselves to the constitutional rights of every citizen.

In Kenya, strategic litigation has been employed to clarify the scope of the state's constitutional obligations towards women in relation to the two-thirds gender rule.¹³⁶ The Supreme Court in *Advisory Opinion No 2 of 2012*¹³⁷ ruled that provision was to be progressively rather than immediately realised through legislation; and the state was under an obligation to enact legislation within five years of promulgation of the Constitution – as set out in the Fifth Schedule – that is, by 27 August 2015.

When it became apparent that the Attorney-General had not put the necessary mechanisms in place to adopt legislation in time, CREAM initiated litigation to compel the Attorney-General to publish a Bill setting out a formula of facilitating women's inclusion in Parliament. The High Court found that the Attorney-General, by failing to publish the Bill, had violated his constitutional obligation and threatened the right of women to equality as established in article 27(8), read with articles 81(b) and 100 of the Constitution. He was ordered to prepare and publish a Bill for deliberation by Parliament within 40 days. Whereas strategic litigation is yet to resolve the exclusion of women from elective and appointive positions, it has sparked public debate on inclusion and strategies to secure greater political participation by women.

Article 22(3) of the Constitution also gives wide remedial powers to the High Court in cases involving the violation of fundamental rights, by stating that 'the Court may grant appropriate relief ...' This allows the Court to craft creative remedies – including a compelling *mandamus* to report back periodically – that are appropriate to secure the rights and freedoms set out in the Bill of Rights.

A compelling *mandamus* has been found to be an efficacious remedy in cases involving the right to housing where there is no specific legislation and guidelines to regulate evictions. This remedy was given to ensure that the right to accessible and adequate housing was not 'aspirational and merely speculative'.¹³⁸ In *Mitu-Bell Welfare Association v A-G*,¹³⁹ the parties were ordered to report to the Court within 90 days on the progress made by the state in resolving the grievances of the petitioners and in realising the right to housing in Kenya. In the *Satrose Ayuma* case, the state was

135 Shklar (n 12 above) 408.

136 *CREAW v A-G* (n 31 above).

137 As above.

138 *Satrose Ayuma & Others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & Others* High Court Petition 65 of 2010.

139 High Court Petition 164 of 2011.

ordered to file an affidavit within 60 days of the judgment detailing proposed measures to realise the right to adequate housing in Kenya. Further, the state was ordered to engage with the petitioners on a programme of action for evictions, to be supervised by independent observers.¹⁴⁰

The National Council of Persons with Disabilities (Council) or DPOs can use strategic litigation to enforce constitutional participation rights and to seek such creative remedies aimed at ensuring compliance with the quota established by the Constitution and other legislative provisions. The state would then have to report on the extent to which it has given effect to the quotas at all levels of government, both in elective and appointive offices; as well as on the extent to which physical and informational accessibility has been complied with to enable them to hold office. The Court would then have the opportunity to assess the reasonableness of the measures taken and to give appropriate directions. This would ensure that court judgments actually result in greater inclusion in public life. However, for strategic litigation to be effective, it would require ownership of constitutional values by the state and political will. Unfortunately, the Kenyan government has been known to reject and fail to implement decisions of the High Court on constitutional matters.

The Council may also consider lobbying for a Disability Advisory Council or Ombudsperson to advise the executive on inclusion and ways in which barriers to participation can be removed. These advisory councils have worked well in Namibia, Australia, Sweden and the US.¹⁴¹

The IEBC, the elections management body, can also actively engage in several ways in the inclusion of youths with disabilities. First, it can, in partnership with cross-disability DPOs, introduce a training programme for its staff and poll officials to sensitise them on disability issues and persons with disabilities' rights and how to engage with persons with disabilities in the electoral process.¹⁴² Such training would provide a useful avenue for resolving misconceptions about disability, especially when it comes to persons with mental or intellectual disabilities,¹⁴³ thus allowing them to better serve persons with disabilities in the electoral process.¹⁴⁴ To make it more effective, this training should be extended to all stakeholders in the electoral process, such as political parties, the judiciary, police, the Political Parties Disputes Tribunal and the media.

Second, the IEBC should include more persons with disabilities, representing diverse disabilities, in the management of elections and

140 See paras 111(ii)(d) & (e).

141 Lord et al (n 128 above) 53.

142 A Ward et al 'Ensuring the enfranchisement of people with disabilities' (2009) 20 *Journal of Disability Policy Studies* 79 82, cited in Prince (n 8 above) 28.

143 MDAC (n 111 above) 26.

144 Prince (n 8 above) 7.

conduct of pre- and post-election assessments.¹⁴⁵ Their first-hand experience with the barriers in the electoral process would enable them to advise on the accessibility of electoral systems and procedures and provide guidance in identifying gaps and priorities for removing these barriers. The voter register, for example, can include statistics indicating the level of support needed by persons with disabilities.¹⁴⁶ The inclusion of youths with disabilities as staff of donor partners and implementing organisations would also strengthen their participation in electoral and political processes, especially given the high level of dependence of donor funding for elections in Kenya,¹⁴⁷ by making the inclusion of persons with disabilities part of their agenda.

Third, the IEBC should use sections 109(n) and (o) of the Elections Act to pass specific regulations providing for voting for persons with various disabilities. Regulation 72 appears to only address the needs of people with physical disabilities. There is also no provision for tactile ballots or accessible electoral material. Further, the regulations should provide for the transmission of results in accessible format, to allow for participation of persons with disabilities at all stages of the electoral process.¹⁴⁸

It is also recommended that the IEBC consider adopting mobile polling stations for all elections to address the accessibility needs of persons with disabilities.¹⁴⁹ A recent proposal by the Commission to cap the number of voters per polling station at 700 would also address concerns about overcrowding and long queues.¹⁵⁰ Polling officials should also prioritise persons with disabilities in voting queues.

The Registrar of Political Parties, as the manager of the Political Parties Fund, should firmly uphold the inclusion of youths with disabilities by political parties as required by section 26 of the Political Parties Act as a criterion for receiving funding allocated to political parties.

145 J Lord et al 'Facilitating an equal right to vote for persons with disabilities' (2014) 6 *Journal of Human Rights Practice* 115-122.

146 Lord et al (n 145 above) 125-126.

147 Kenya is currently ranked the eighth largest recipient of donor funding, and this also manifests in the electoral process. See <http://www.fundsforngos.org/featured-Articles/ten-ten-grantmaking-donors-ngos-kenya/> (accessed 5 October 2014) and USAID 'Support for Kenya's 2013 elections: Rapid assessment review' <http://www.usaid.gov/sites/default/files/documents/1866/Kenya%2527s%25202013%2520Elections.pdf> (accessed 5 October 2014).

148 IFES & NDI (n 27 above) 56.

149 ANDY (n 22 above) 25. Regulation 90 of the Elections (General) Regulations allows the IEBC to arrange for special voting but only for presidential elections. Extending this to other elections would be a great stride towards inclusion.

150 Election Laws (Amendment) (No 3) Bill 2015, clause 13.

To build capacity for public participation, civic engagement trainings for youths with disabilities can provide an avenue for early targeting of youths, thus securing their continued participation in political and public life throughout their lifetime.¹⁵¹ This can be done through grassroots campaigns and school programmes – which are considered more personal than civic education campaigns and advertisements¹⁵² – the most commonly used by the IEBC. Training sessions would provide the fora to engage with youths with disabilities on their internal political efficacy, namely, their belief that they are competent to participate,¹⁵³ and help them identify areas where they can influence policy. Mock elections are proposed as a way of helping youths with disabilities learn the habit of voting at all levels of learning.¹⁵⁴ Alternatively, where literacy levels are low, entertainment events such as caravan tours – already popular in Kenya – can be used to disseminate information on civic engagement by youths with disabilities.¹⁵⁵

Civic engagement training can be complemented by capacity-building training for youths interested in taking up leadership positions. Research has shown that training sessions build the confidence of those already engaging in policy issues or provide confidence once participants realise that they can influence policy and know how they can go about it.¹⁵⁶ Consequently, there is increased external political efficacy, namely, that persons with disabilities believe that they can influence policy through their efforts.¹⁵⁷

Use of technology, such as the internet and social media, to engage in public issues and with policy makers is a viable option for increasing the participation of youths with disabilities.¹⁵⁸ Research by Giannoumis et al indicates that it may be a pre-condition for their participation on an equal basis with others.¹⁵⁹ Social media has gained increasing relevance in Kenya as a platform for setting and advancing political agendas.¹⁶⁰ The government has already embraced technology by introducing laptop computers to all public primary schools, although it is not clear whether this extends to educational institutions and facilities for persons with disabilities.¹⁶¹ Since non-discrimination is a national value guiding policy

151 Ellis (n 29 above) 2.

152 Ellis 10.

153 Harris (n 16 above) 23.

154 Ellis (n 29 above) 10.

155 As above.

156 Harris (n 16 above) 23-24.

157 Harris 24.

158 Harris 14.

159 GA Giannoumis & J Kline 'Active citizenship through the use of new technologies – The experiences of three generations of persons with disabilities' DISCIT No MS4 (2015).

160 C Odinga 'Use of new media during the Kenya elections' unpublished Master's thesis, University of Uppsala, 2013 18.

161 See <http://www.cio.co.ke/news/main-stories/jubilee-government's-laptop-project-will-be-implemented-in-18-months#> (accessed 31 October 2015).

making in Kenya, DPOs can use this project as an avenue to lobby for governmental investment in technology in educational institutions and facilities for persons with disabilities.

While the form of the media may pose challenges to persons with certain kinds of disabilities (such as those with intellectual disabilities who require information in easy-to-read format and persons with visual impairments), the use of technology provides an avenue for circumventing the challenge of inaccessibility which excludes many youths with disabilities from political participation. Accessing government websites would provide access to information without requiring these persons to physically access buildings.¹⁶² The use of technology by persons with disabilities will be bolstered once the 2015 Bill is passed, as it will create an obligation to ensure that everyone providing a service or information to the public avails it in accessible format.

To facilitate greater inclusion, various technologies may be employed. The state at both levels of government should embrace accessible formats by engaging with youths with disabilities either directly or through DPOs to find out exactly how to meet their communication needs.¹⁶³ Screen readers identify the content of a webpage, which can then be translated to the user through text-to-speech, sound icons or braille output devices for persons with visual impairments.¹⁶⁴ Sub-titled or sign language videos for persons with auditory impairments, speech recognition software for persons who cannot use a mouse or keyboard and screen reader software for persons with learning difficulties¹⁶⁵ are some of the useful tools that can be used by the IEBC for conducting civic and voter education among persons with disabilities.¹⁶⁶ The IEBC can also adopt a 'twin-track approach': Youths with disabilities are featured in general voter education material alongside developing material specifically targeted at youths with disabilities.¹⁶⁷

Persons with disabilities themselves can also take up self-advocacy; a powerful avenue to not only advocate for their rights, but which also serves to shift societal perceptions by demonstrating that youth with disabilities can be trusted with decision-making and with leadership positions.¹⁶⁸ It is advisable to build the capacity of persons with disabilities at an early age in order to have a greater chance of improving participation in political and public life.¹⁶⁹

162 Harris (n 16 above) 26.

163 Harris (n 16 above).

164 <http://www.disabled-world.com/disability/accessibility/websitedesign/> (accessed 16 September 2015).

165 As above.

166 IFES & NDI Report (n 27 above) 47.

167 As above.

168 KNCHR briefing paper (n 125 above) 113.

169 Harris (n 16 above) 9.

Self-advocacy paves the way for peer mentoring and modelling. Peer mentoring has been described as a 'significant empowerment strategy' for political participation.¹⁷⁰ It helps to demonstrate to persons with disabilities that they can have an impact on society. Persons with disabilities who are already engaged in political and public life model to youths with disabilities behaviour that can have an impact on society and, in so doing, it gives the latter a stronger desire to get involved.¹⁷¹ The greater their participation in political and decision-making activities, the more powerful they feel and the greater their confidence in their ability to effect change.¹⁷²

Moreover, it has been noted that not only are there few DPOs working on electoral access,¹⁷³ but DPOs are also generally weaker than their CSO counterparts, possibly due to a lack of education and resources.¹⁷⁴ This affects the self-confidence of persons with disabilities and the realisation of their rights.¹⁷⁵ Beyond project management training, they also lack capacity in the area of elections and how political processes relate to disability.¹⁷⁶ To strengthen their role in facilitating persons with disabilities to exercise their participation rights, it is necessary to build their capacity through training before elections.¹⁷⁷ It is also proposed to work with cross-disability DPOs, as they are more receptive to political activism than DPOs representing one constituency.¹⁷⁸

7 Conclusion

The Constitution and proposed legislation contain elaborate measures seeking to ensure accessibility of voting procedures and public offices to people with disabilities. The inclusion of youths with disabilities in political and public life in Kenya is realisable, if strategies to secure their inclusion are targeted at persons with disabilities from an early age.

The 2015 Bill is by far the best attempt to amend the PWDA. It addresses many avenues of excluding persons with disabilities, such as the denial of educational opportunities, which ultimately have an impact on their participation in political and public life. If the Council, both levels of government, the private sector and persons with disabilities work together, the barriers to political participation will be minimised and the ambitious

170 Harris 34.

171 As above.

172 Harris (n 16 above) 35.

173 CDPO (n 115 above) 32.

174 IFES & NDI (n 27 above) 60.

175 CDPO (n 115 above) 32.

176 IFES & NDI (n 27 above) 61.

177 IFES & NDI 60.

178 IFES & NDI 30.

constitutional guarantee of including persons with disabilities in all elective and appointive positions will be realised.

Whereas discrimination on the grounds of disability is a global phenomenon, the extent of the discrimination in developing countries like Kenya is deeper, culturally embedded and occurs in settings of severe resource limitations, making it more challenging to address. Home-grown solutions are, therefore, necessary to secure the inclusion of youths with disabilities in public life. Like any other group that has suffered marginalisation the world over, the inclusion of youths with disabilities will not be improved without gravitas, demonstrated through such actions as strategic litigation to seek clarity on the implementation of article 54(2) and other provisions of the Constitution. Strategic litigation has served to clarify the scope of the state's responsibility in ensuring the realisation of the right to political participation by women. The courts have demonstrated that it is possible to hold the state to account where it fails to take specific measures to remedy the exclusion of a protected group.¹⁷⁹ This model can now be employed by other marginalised groups, such as persons with disabilities. Such litigation might prove useful for DPOs in order to breathe life into article 54(2) of the Constitution.

If youths with disabilities step up to claim what is rightfully theirs under the Constitution, it will not only secure their rights, but also give impetus to other marginalised groups to actively seek the implementation of their rights, including participation rights. As Robert Kennedy once said:¹⁸⁰

Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy, those ripples build a current which can sweep down the mightiest walls of oppression and resistance.

179 *CREAW v A-G* (n 31 above).

180 R Kennedy 'Ripple of hope' speech delivered at the University of Cape Town, South Africa, 1966.

CHAPTER 3

READING 'DISABILITY' INTO THE NON-DISCRIMINATION CLAUSE OF THE NIGERIAN CONSTITUTION

*Ngozi Chuma Umeh**

Summary

World Health Organisation estimates place the number of disabled persons in Nigeria at approximately 20 per cent of the country's population. This article uses the 1999 Nigerian Constitution, as amended, as the main pivot for discussion with respect to 'disabled people'. The provisions of the Nigerian Constitution relating to non-discrimination are ambivalent with respect to disabled peoples' rights. In spite of significant strides towards constitutional amendments in Nigeria, state actors, as a matter of self-interest, have continued to overlook the alienation of disabled people from legal, socio-economic and political processes. An analysis of the provisions of the Constitution on non-discrimination reveals a contradiction in law that outwardly embraces equality but inwardly effectuates inequality in relation to disabled people. Nonetheless, it is argued that, despite the inherent contradictory constitutional provision, the possibility of reading disability into the non-discrimination clause is not entirely lost. It is contended that the law should be more inclusive and protective of the needs and aspirations of underprivileged and disadvantaged members of society.

1 Introduction

The 1999 Constitution of the Federal Republic of Nigeria (Nigerian Constitution) is the supreme law of Nigerian society and has binding force on *every one* in Nigeria. Its major objective lies in promoting good governance and the welfare of *all* persons in Nigeria based on the principles of equality and justice.¹ The Constitution contains a Bill of Rights, which includes civil and political rights as fundamental rights, and socio-

* LLD Candidate University of Pretoria, South Africa.

1 See the preamble to the Nigerian Constitution, emphasis mine.

economic rights, as Fundamental Objectives and Directive Principles.² Chapter IV, on civil and political rights, is rendered justiciable by the Constitution, while the chapter on socio-economic rights is considered non-justiciable and has been referred to as progressive rights.³ However, it is to be noted that the right to non-discrimination falls under the Chapter IV group of rights, which is rendered justiciable and considered a basic right under Nigeria's constitutional values.⁴

Nevertheless, the right to non-discrimination as provided for in the Constitution does not exemplify the inclusive equality of all persons in Nigeria as posited under the Constitution as well as other relevant international instruments adopted by Nigeria. Nigeria admits to the imperative of rendering equality to everyone in its constitutional Preamble, but without substantially illustrating same in relation to vulnerable people, such as disabled persons. It is true that Nigeria has adopted and ratified the Convention on Rights of Persons with Disabilities (CRPD). However, its provisions regarding the right to non-discrimination subtly assumes similarity of equality needs for all persons.⁵

The normative thrust following the CRPD has been described as inclusive equality which finds foundation in securing substantive equality and human dignity for persons with disabilities in any given legal system.⁶ Recently, the demand for equality and non-discrimination, especially in relation to disabled persons, has globally gained impetus. In the past few decades, some countries have experienced the emergence of equality literature and jurisprudence with inclusive interpretations which have gained wide acceptance. Unlike the Nigerian constitutional provision on non-discrimination, which is geared towards the idea of formal equality, substantive equality is pursued in these countries.

In distinguishing formal equality from substantive equality, Dupper highlights that formal equality means the legal treatment of persons in the same manner irrespective of their situation or circumstances, while substantive equality takes into account the circumstances of people and requires the law to ensure equality of outcome.⁷ Ultimately, substantive equality goes beyond formal equality by appreciating that individuals in

2 The Fundamental rights are contained in Chapter IV while the Fundamental Objectives are contained in Chapter II of the Nigerian Constitution.

3 See sections 6(6)(b) and 6(6)(c) of the Nigerian Constitution.

4 See Chapter IV of the Nigerian Constitution, section 42.

5 Nigeria adopted and ratified the CRPD and its Optional Protocol on the 30 March, 2007 and 24 September, 2010 respectively. Furthermore, under the Law of Treaties, states are expected to be sincere towards treaty obligations, see article 26 of the Vienna Convention on the Law of Treaties 1969, United Nation, *Treaty Series* vol 1155 331.

6 CG Ngwenya 'Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education' (2013) 1 *African Disability Rights Yearbook* 139 141.

7 O Dupper 'Affirmative action and substantive equality: The South African experience' (2002) *South African Mercantile Law Journal* 275 277.

different situations and circumstances cannot compete favourably.⁸ It endorses the notion of treating people unequally in order to bring about equality of opportunities.⁹ Substantive equality, thus, may be likened to an idea of egalitarian justice which aims at securing equal human values and respect for everyone.¹⁰ This definitely underscores the need to make accommodations within socio-economic and political environments. It further entails that judges come to the decision table adopting a purposive interpretation approach towards the law in interpreting cases brought before them. The accent is on interpretations and decisions which give 'value-based interpretive effect' to the elimination of unfair discrimination which should always be pursued in order to ensure substantive protection for individuals in society.¹¹ Ultimately, this value ought to incorporate the development of full human personality- it recognises human diversity and aspires to restore human worth.

Therefore, the guarantee of equality may be juxtaposed with state law, policy or administrative practices in determining whether the commitment to equality has been achieved. For some time now, Nigeria's constitutional provision on non-discrimination has sustained the idea of formal equality.¹² Consciousness about substantive equality as a means towards overcoming the denial of opportunities under Nigeria's socio-political environment is still to come. Also, the Nigerian Constitution is yet to address disability as a discrete status, especially in the context of equality and non-discrimination. The wording of section 42 supports the forgoing claims. Thus, the question raised is whether disability can be read into the non-discrimination clause of the Nigerian Constitution.

To foster discussions around the foregoing, this discourse is divided into five sections, the introduction being the first section. The second section discusses the international law framework on non-discrimination. The third section exemplifies the way in which some jurisdictions have interpreted equality provisions. The fourth section is an examination of the Nigerian situation in order to evaluate Nigeria's position *vis-à-vis* international law standards of protection against non-discrimination. The fifth section contains the conclusion.

8 C Albertyn & B Goldblatt 'Facing the challenge of transformation: The difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248.

9 CG Ngwena 'Equality for people with disabilities in the work place: An overview of the emergence of disability as a human rights issue' (2004) 29 *Journal of Juridical Science* 167 169.

10 MH Rioux 'Towards a concept of equality of well-being: Overcoming social and legal construction of equality' (1994) 7 *Canadian Journal of Law and Jurisprudence* 127.

11 G Beth 'Context and interpretation in anti-discrimination law' (2002) 26 *Melbourne University Law Review* 325 329; O Pollicino 'Legal reasoning of the court of justice in the context of the principle of equality between judicial activism and self-restraint' (2004) 5 *German Law Journal* 283 287.

12 Sec 42 Nigerian Constitution.

2 International standards of protection regarding non-discrimination against disabled persons: Scope of the right to non-discrimination

No general definition exists of the concept of non-discrimination. However, non-discrimination remains foundational to international human rights law.¹³ Under international law, the principles of equality and non-discrimination have been widely acknowledged as related concepts.¹⁴ This means that realising the right to non-discrimination is synonymous with sustaining equality in the real sense among individuals and groups in society. The right to non-discrimination is contained in different United Nations (UN) human rights instruments.¹⁵ These human rights instruments prohibit discrimination on numerous grounds, and often the phrase 'other status' is used to exemplify that the prohibited grounds of discrimination are not exhaustive.

Emerging from the above is the understanding that the prohibited grounds for discrimination are not a rigid category, and that disability is a prohibited ground even if it is not specifically listed in early human rights instruments. With the coming into effect of the CRPD, disability was decisively placed on the list of internationally prohibited discrimination grounds.

- 13 W Aseka & AS Kanter 'The Basic Education Act of 2013: Why it is one step forward and two steps back for children with disabilities in Kenya' (2014) 2 *African Disability Rights Yearbook* 33 40; A Bayefsky 'The principle of equality and non-discrimination in international law' (1990) 11 *Human Rights Law Journal* 1; EW Vierdag *The concept of discrimination in international law* (1973) 2.
- 14 See, eg the articulations of CCPR General Comment 18 on non-discrimination, adopted at the 37th session by the Human Rights Treaty Bodies 10 November 1989, UN Doc. HRI/GEN/1/Rev.1a 26 (1994); Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, arts 1(b) & 3(1) & (2); the CRPD, adopted 13 December 2006 UNGA/A/RES/61/106. See Bayefsky (n 13 above) 2; W McKean *Equality and non-discrimination under international law* (1983) 288.
- 15 Such as art 2 of the Universal Declaration of Human Rights, adopted 10 December 1945, GA Res. 217 A (III); arts 2 & 26 of the International Covenant on Civil and Political Rights, adopted 16 December 1966 by United Nations General Assembly Resolution 2200A (XXI) and entered into force on 23 March 1976, in accordance with art 49; art 2(2) of the International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966 by United Nations General Assembly Resolution 2200A (XXI) and entered into force on 3 January 1976, in accordance with art 27; art 5 of the CRPD (n 14 above); art 2 of the African Charter Human and Peoples' Rights, adopted June 27 1981 OAU DOC CAB/LEG/67/3 Rev. 5, 21 ILM. 58 (1982) entered into force 21 October 1986; reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 29.

In terms of what amounts to discrimination, few international human rights instruments specifically provide what constitutes discrimination.¹⁶ From the basic provisions in the instruments, it may be gathered that the term 'discrimination' involves any distinction, exclusion or restriction based on specified prohibited or analogous grounds, and having the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, 'on equal footing'; of all rights and freedoms.¹⁷ Put differently, the communication that could be derived from the provisions of the instruments regarding the meaning of discrimination indicates that to differentiate or distinguish is allowed (and in the sense of positive discrimination), provided that the differentiation made is not unfair. However, discrimination takes on an unhelpful meaning when it renders different treatment to individuals based on a specified prohibited or analogous ground which has a disparate impact.

As a follow-up to the thoughts above, the Human Rights Committee – an international human right supervisory body – observes that a breach of the principle of non-discrimination occurs where (i) equal cases are treated differently; (ii) differentiation does not have an objective and reasonable justification; and, (iii) there is no proportionality between the aim sought and the means used.¹⁸ The Committee further emphasises that

(t) the enjoyment of rights and freedoms *on an equal footing*, however, does not mean identical treatment in every instance.¹⁹

The foregoing understanding was also given effect to by Tanaka J of the International Court of Justice (ICJ) in the *South West Africa case* where he stated:

The principle of equality before the law does not mean ... absolute equality, namely, the equal treatment of men without regard to individual, concrete circumstances, but it means ... relative equality, namely the principle to treat equally what are equal and unequally what are unequal ... to treat unequal matters differently according to their inequality is not only permitted but required.²⁰

The theory of non-discrimination as articulated under international law deliberately requires the equal treatment of equals as well as the treatment

16 Eg, in art 1(1) of the Convention on the Elimination of All Forms of Racial Discrimination, adopted by UNGA Res 2106 (xx) of 21 December 1965, entered into force 1969, in accordance with art 19; art 2 Convention on the Elimination of All Forms of Discrimination Against Women, adopted by UNGA Res 34/180 of 18 December 1979, entered into force in 1981; art 2 CRPD.

17 General Comment 18 (n 14 above), para 7, my emphasis.

18 General Comment 18 para 13.

19 General Comment 18 Para 8, my emphasis.

20 ICJ Rep. 1962, 425-428.

of unequal matters or individuals differently according to their difference.²¹ Identical treatment often referred to as formal equality, may demand that individuals be treated in the same way by providing that people should not be discriminated against as human beings. However, it is not useful in providing vulnerable groups tangible equality in terms of a distribution. Further steps may be required in order to bring a historically-marginalised group up to a threshold level of equality by considering their circumstances as well as socio-political barriers. For instance, treating disabled persons in the same way will not remove socio-political and economic barriers, neither will it encourage differential treatment in the provision of accommodations in order to ensure equality of opportunity and bring about equality of outcomes or substantive equality.²²

International law also requires there to be a legitimate objective and a relational proportionality between the legitimate objective and the act or omission under review. At all times, the articulations should be understood as implying that the purpose for different treatment must be legitimate and the means chosen must be appropriate and proportionate to the intended objective.

Furthermore, under international human rights law, discrimination need not be direct or intentional for it to constitute unfair discrimination.²³ Indirect discrimination is also considered unfair as it accentuates the reality and effect of discrimination in the same way as direct discrimination.²⁴ 'Distinctions' imply that the act or omission does not necessarily have to be directed against the individual or group alleging discrimination, but may occur through the promotion of one or some individuals at the expense of others.

In the African region, the right to non-discrimination is also guaranteed under the African Charter on Human and Peoples' Rights (African Charter). The African Charter in article 2 also provides a non-exhaustive list of prohibited grounds of discrimination like other international human rights instruments. This can be seen in the use of the phrase 'other status'. Article 18(4) goes further by recognising disabled persons as a protected group entitled to special measures of protection in

21 See also the articulations made by Tanaka J in the South West African case. In fact, the principle of non-discrimination is largely influenced by the pronouncements made by Tanaka J in his historic dissenting opinion in *South West Africa (Second Phase)*, (1966) ICJ Reports, Advisory Opinion and Orders. His articulations on non-discrimination pervade today's international law on the subject. The case concerns claims brought before the International Court of Justice by Ethiopia and Liberia against South Africa in relation to its governance of South West Africa. Tanaka J in his dissent opposed the ICJ's decision to dismiss the claims brought by Ethiopia and Liberia.

22 Dupper (n 7 above) 277, see also arts 5(3) & (4) of the CRPD.

23 Dupper (n 7 above)

24 As above; gathered also from a reading of S Farrior 'Equality and non-discrimination under international law' in S Farrior (ed) *The library of essays on international human rights* (2015) 569.

line with their physical and moral needs. As is later argued, its contents hold much in relation to the right to non-discrimination of disabled persons in Nigeria if appropriately constructed.

Nigeria is an African state that has domesticated the African Charter as part of its legislation,²⁵ and the African Charter is further exemplified here because it is considered the major instrument upon which the African human rights system is founded.²⁶ Furthermore, the African Charter has been identified as providing the foundation for further elaboration of the rights of disabled persons in subsequent African regional human rights treaties.²⁷

That said, it may be gathered that international human rights law upholds the substantive equality approach over and above formal equality for disabled persons in the enjoyment of all existing human rights. Particularly, the CRPD, as an international law instrument, gives concrete expression to substantive equality in its recognition of human diversity and in its subscription to the social model of disability.²⁸ Evidently, the cardinal objective of advancing towards the substantive equality approach under international law is to discourage as well as to offer positive opportunities for redressing direct and indirect discrimination embedded in negative socio-political considerations. Indeed, some jurisdictions have moved towards establishing the legal and juridical background for the attainment of substantive equality. In this instance, the equality jurisprudence of Canada and South Africa is considered instructive.

3 Non-discrimination and its interpretation in the selected jurisdictions

One important encouragement in exemplifying the two jurisdictions is that the South African Constitutional Court has borrowed the Supreme Court of Canada's juridical sensitivity in determining and strengthening arguments relating to the issue of discrimination. Second, South Africa belongs to the African region, like Nigeria, and is also comparable to Nigeria in terms of population, human diversity, and yet is able to provide

25 By virtue of the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act 2 of 1983.

26 J Biegon 'The promotion and protection of disability rights in the African human rights system' in I Grobbelaar-Du-Plessis & T van Reenen (eds) *Aspects of disability in Africa* (2011) 53-61.

27 Especially in relation to the adoption of the African Charter on the Rights and Welfare of the Child; the African Women's Protocol; the African Children's Charter and the Draft Protocol to the African Charter on the Rights of Persons with Disabilities (n 14 above).

28 Ngwena (n 6 above) 145. For a detailed articulation of the social model, see M Oliver *Understanding disability: From theory to practice* (1996); JE Bickenbach *Physical disability and social policy* (1993).

pragmatic directions towards the realisation of equality for its diverse citizens.

3.1 Canada

The Canadian Charter provides that '[e]very individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and *in particular* without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.²⁹ It further encourages affirmative action in respect of disadvantaged groups or individuals.³⁰ This means that the Charter contemplates not just a negative duty to desist from discrimination, but also a positive duty to provide accommodations in order to redress unfair discrimination. It broadens the list of protected grounds to include analogous grounds. There is also the acknowledgment that equality goes beyond rendering sameness of treatment. Canadian courts have followed this direction and have progressively developed conceptions of substantive equality. Thus, in the Canadian case of *Andrew v Law Society of British Columbia*,³¹ it was held that

[d]iscrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.³²

The Supreme Court of Canada found that the grounds of discrimination enumerated in section 15(1) of the Canadian Charter were not exhaustive but covered analogous grounds, and 'may even be broader than that'. This finds justification in the use of the term 'in particular' under section 15(1). Furthermore, the Supreme Court rejected the formal equality approach of the trial court on the reasoning that a formal guarantee of equality is not intended by section 15, because it will not 'necessarily result in equality' in the application of the law.³³

Furthermore, in the case of *Egan v Canada*,³⁴ the Supreme Court of Canada had to determine whether a violation of the right to non-discrimination had occurred. In 1995, *Egan v Canada* was one of three cases concerning equality and non-discrimination decided by the Canadian

29 Sec 15(1) of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982. Canada also has statutory provisions prohibiting discrimination; this exists at the federal, state and provincial levels.

30 Canadian Charter (n 29 above), sec 15(2).

31 (1989) 1 S.C.R. 143; this decision of the Supreme Court was first to interpret sec 15 of the Canadian Charter.

32 As above, per Dickson, Robert George McIntyre, William Rogers; Lamer, Antonio; Wilson Bertha & L'Heureux JJ at 174.

33 Per Dickson et al (n 32 above).

34 (1995) 2 SCR 513.

Supreme Court.³⁵ Although the three cases illustrate the divided opinion of the justices of the Supreme Court regarding equality claims, what is worth noting in the decisions is the recognition by a greater majority of justices that discrimination relates to any insensitive treatment based on an enumerated or analogous ground. There is also the acknowledgment that the impact of the discriminatory law or act on a claimant is a decisive factor. Therefore, it may be reasoned that the approach or test adopted by the Supreme Court to interpret the non-discrimination and equality clause is not only open-ended, but lends weight also to the impact of the discrimination in order to determine unfair discrimination. Arguably, judicial opinion appears divided with respect to the application of the foregoing judicially-articulated tests to the facts in issue.

However, the Canadian Supreme Court, in determining whether there was a violation of the right to non-discrimination in *Egan v Canada*, followed the analysis made in the *Andrew* case above. The Court per Cory J considered whether the law drew a distinction based on individual characteristics of the complainant and whether the distinction resulted in unfair discrimination. The Court pointed out that it is unfair discrimination if:

- (a) the basis of the distinction is one of the listed grounds or one that is analogous to the listed grounds; and (b) the distinction has the effects of imposing a disadvantage, obligation, or burden that is not imposed on others, or if it withholds or limits access to benefits or advantages that are available to others.³⁶

The Court also emphasised that the right to non-discrimination was a commitment to recognising every individual's worth and dignity.³⁷ Therefore, achieving equality must involve the elimination of distinctions that perpetuate the idea that a person is 'less capable, or less worthy of recognition or value as a human being ... equally deserving of concern, respect and consideration'.³⁸ This, naturally, extends to reflections concerning the characteristics of the group affected by the distinction and the effect of the distinction on the group.³⁹ However, the Canadian Charter has a limitation clause in section 1, but the limitation becomes reasonably justifiable where 'the objective is of sufficient significance and

35 The other two cases are *Miron v Trudel* (1995) 2 SCR 418 and *Thibaudeau v Canada* (1995) 2 S.C.R 627.

36 *Egan* case (n 34 above) Paras 130-132; McLachlin, Iacobucci Sopinka and L'Heureux JJ concurred with Cory J.

37 *Egan* case (n 34 above) paras 36-37.

38 *Egan* case paras 38 & 56.

39 *Egan* case paras 58-68.

the process adopted is not arbitrary, unfair, and impairs the right as little as possible'.⁴⁰

Significantly, *Eldridge v British Columbia (Attorney-General)*⁴¹ provides a useful insight in relation to the duty to provide accommodations as well as the application of section 1 of the Charter to section 15 claims. In *Eldridge*, the Canadian Supreme Court applied a reasonableness test to resource provision and distribution. The Court stated that the right to equality placed a responsibility on state actors to distribute resources to ensure that vulnerable groups have the advantage of public benefits. The Court found that government had failed to reasonably justify a denial of medical interpretation services to the appellants and had not accommodated the appellants' needs to the point of undue strain on state resources. This purposive approach emerging from *Eldridge* puts the focus on the inequality that needs to be remedied, thus establishing the idea of substantive equality. The idea of employing a substantive equality analysis in relation to section 15 was reaffirmed by the Supreme Court in the case of *R v Kapp*.⁴²

In the *Kapp* case, it was held that section 15(1) should not be construed in a manner that finds an ameliorative action (like affirmative action and positive discrimination) aimed at combating disadvantage to be discriminatory and in violation of section 15.⁴³ Essentially, sections 15(1) and (2) were held as working together to promote substantive equality. Where state actors can show that the objective of the impugned law or Act is to ameliorate a disadvantage experienced by a group or individual, then the law or action is considered valid under section 15(2) and should not be challenged pursuant to section 15(1).⁴⁴ However there are concerns by some groups or individuals regarding claims of under-inclusiveness.⁴⁵

3.2 South Africa

The South African Constitutional jurisprudence regarding the right to equality and non-discrimination, as articulated in section 9 of its

40 S Fredman 'Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India' Report submitted on the authority of the European Network of Legal Experts in the field of non-discrimination to the European Commission (2012) 10.

41 (1997) 3 SCR 624.

42 2008 SCC 41.

43 As above para 38.

44 *Kapp* (n 43 above) paras 3 & 41. See also the decision of the Supreme Court in *Alberta v Cunningham* (2011) SCC 37, para 45.

45 M Butler 'Section 15 of the Canadian Charter of Rights and Freedoms: The development of the Supreme Court of Canada's approach to equality rights under the Charter' (2013) 83 *Background Paper*, S Moreau '*R v Kapp*: New directions for section 15' (2009) 40 *Ottawa Law Review* 283.

Constitution, has been described as transformative.⁴⁶ Apart from providing a general equality guarantee, it contains specific anti-discrimination provisions and extends the list of protected grounds. Additionally, it encourages the provision of accommodations, authorises affirmative programmes, and introduces the concept of unfair discrimination.⁴⁷

The South African Parliament has established statutory protection against discrimination which also covers broad characteristics as well.⁴⁸ As is the case in Canada, the South African Constitution contains a limitation clause in section 36 which courts have interpreted as permissible only when it is reasonably justifiable. South African courts have similarly developed conceptions of substantive equality by looking at direct discrimination, unfair discrimination, indirect discrimination and the effect of discrimination. The Constitutional Court has had to address these issues in a number of cases before it.

For instance, in *Prinsloo v Van der Linde*,⁴⁹ the Court had to examine the issue of discrimination and differentiation. The Court was of the view that differentiation based on certain justifiable factors or grounds did not amount to discrimination, except where the differentiation made was unfair. This means that differentiation may or may not bring about unfair discrimination. In this regard, the Court had to take into consideration the history of South Africa and the effects of the apartheid system. According to the Court, 'discrimination has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them'.⁵⁰ Unfair discrimination, therefore, could be ascertained from the effect legislation, policy or practice has on a claimant's self-worth as a human being.⁵¹

In *Harksen v Lane*,⁵² the South African Constitutional Court further developed the test for determining unfair discrimination. This involves assessing:

- (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination is on a specified ground or not;

46 M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *South African Public Law* 155; Albertyn & Goldblatt (n 8 above) 248; *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC) para 74 per Krieger J.

47 Sec 9 Constitution of the Republic of South Africa, 1996.

48 See the Employment Equity Act (EEA) of 1998, which provides protection against discrimination in the work place, and the Promotion of Equality and Prevention of Unfair Discrimination Act 2000, which provides protection against unfair discrimination in the public and private sectors where the EEA is not applicable.

49 1997 6 BCLR 759 (CC).

50 *Prinsloo v Van der Linde* (n 49 above) para 31

51 *Prinsloo v Van der Linde* para 32

52 1998 (1) SA 300 (CC).

- (b) the nature of the provision or power and the purpose sought to be achieved by it, if its purpose is manifestly not directed, in the first instance, at impairing the complaints in the manner indicated above, but is aimed at achieving a worthy and important societal goal;
- (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

The following factors, which do not constitute a closed list according to the Court, assist in determining whether discrimination has occurred in an unfair or fair manner.⁵³ The factors also have a cumulative effect in regard to context.⁵⁴ This means that determining unfair discrimination requires contextually a subjective-objective interpretation. In other words, it relates not only to the subjective experiences of the complainant(s), but questions will also arise as to what constitutes the reasonable man's view with respect to someone with similar characteristics and under similar circumstances.

Again, in *President of the Republic of South Africa v Hugo*,⁵⁵ the South African Constitutional Court reiterated the need to develop a concept of unfair discrimination which recognises that achieving equality is inconsistent with applying similar treatment in all circumstances. Accordingly, what is required is a careful appreciation of the *impact of the discriminatory action upon the particular people concerned*.⁵⁶

The non-discrimination and equality jurisprudence in the two jurisdictions discussed are laudable as they motivate and exemplify considerable moral commitment towards persuasive foreign jurisprudence that can positively affect the quality of human rights protection.⁵⁷ However, it must be stated that some justices in the exemplified jurisdictions nonetheless render the application of the judicially generated international standards on non-discrimination uneven in terms of application. This can be seen from a reading of the ratio behind some of the minority decisions.⁵⁸ Each of the justices appears to take a different approach when applying the test for determining unfair discrimination.

53 *Harksen v Lane* (n 52 above) para 50.

54 As above.

55 *Hugo* (n 46 above).

56 *Hugo* para 41 (my emphasis)

57 In this instance, the Canadian and South African courts exemplified judicial dispositions.

58 Eg, In the Egan case (n 34 above), it was observed that the Court was severely divided in an attempt to determine whether the right to non-discrimination had been violated. The same scenario occurred in *Miron v Trudel* as well as in *Thibaudeau v Canada* (n 34 above).

Nevertheless, drawing from the South African and Canadian jurisprudence, the concept of non-discrimination puts a high premium on extended analogous grounds of discrimination, the provision of accommodations, substantive treatment and human dignity as basic decisive factors. Therefore, it would not be wrong to say that international law standards on non-discrimination share certain connections with comparative law.⁵⁹ Broadened analogous grounds analyses usually help to query the distinction made in order to ascertain its effects on a claimant's dignity. In this way, eliciting impact serves equality by insisting on the substantive treatment of individuals who are not similarly situated. Substantive equality recognises individual differences and has been noted to take into account the circumstances of disabled persons in addition to the demand for disabled persons' full equality under the law and in human affairs.⁶⁰ These standards accord with the social model of disability, which requires the socio-political environment to take practical action in order to eliminate barriers that perpetuate marginalisation and inequality for disabled people.

Using the normative equality values gathered from international law, as well as the Canadian and South African jurisprudence, the next section appraises Nigerian non-discrimination law with a view to ascertaining Nigeria's response *vis-à-vis* international law standards of protection on non-discrimination. The main argument is on the possibility of reading disability into the non-discrimination clause of the Nigerian Constitution.

4 The Right to non-discrimination under Nigerian law

4.1 Constitutional disposition

Section 42(1) of the Nigerian Constitution provides:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion, shall not by reason only that he is such a person:

- (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of

59 Art 38(1) (c) of the ICJ Statute considers the general principles of law recognised by civilised nations as one of the sources of international law. By the same token, the decisions on human rights by foreign courts are one of the sources of international human rights law. See J Dugard *International law: A South African perspective* (2005) 38; C Botha *Statutory interpretation: An introduction for students* (1998) 42.

60 I Grobbelaar-Du Plessis & S van Eck 'Protection of disabled employees in South Africa: An analysis of the Constitution and labour legislation' in Grobbelaar-Du Plessis & Van Reenen (n 26) 231 240; *Andrew v Law Society of British Columbia* (n 31 above) para 65 (subtitled 'the concept of equality').

other communities, ethnic groups, place of origin, sex, religious, or political opinion are not made subject; or

- (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, either groups, place of origin, sex, religion, or political opinions.

From the foregoing constitutional provision, there is no doubt that the wording of section 42(1) clearly prohibits 'direct discrimination', 'differential treatment' and 'positive or compensatory action'. Although section 42 (1) does not directly discriminate by expressly excluding groups, its effect indirectly discriminates by requiring the same practice, condition or rule to everyone regardless of difference. This appearance of neutrality is considered deceptive in that it concentrates on differentiation that can be identified based on the mere manifestation or form of a measure, that is, characteristics that are expressly based on protected grounds of discrimination.⁶¹ In this manner, such an approach disregards the effect of adverse discrimination and unfair advantage on vulnerable persons, including disabled persons and legal requirements for legitimate differentiation. The underlying idea is to render consistent treatment to all human law subjects (in other words, formal equality).

It is also obvious that disability is not a prohibited ground of discrimination under section 42 (1), and a fixed category approach is adopted in respect of grounds upon which discrimination is prohibited.⁶² The implication is that grounds can be added only legislatively and not judicially. It could also mean that applications for violations of the right to non-discrimination brought pursuant to non-listed grounds will not be entertained or may not be subjected to a stricter level of scrutiny.⁶³

Section 42, as articulated, does not indicate a commitment towards providing equality of opportunity in order to ensure substantive equality as demanded under international law standards. It also does not reflect a consideration of the difference of humanity. Vulnerable persons such as disabled persons, ought to be regarded in the 'scheme of things' and treated equally as humans and differently in the scheme of distribution.⁶⁴ Equality

61 C Tobler *Indirect discrimination: A case study into the development of the legal concept of indirect discrimination under EC law* (2005) 23.

62 In the Nigerian case of *Uzoukwu v Ezeonu II* (1991) 6 NWLR (Pt.290) 708 CA the Court of Appeal held, among others, that an action for discrimination can only succeed under sec 39 of the Nigerian 1979, now sec 42 of the present Constitution, where the discrimination complained against is listed as a prohibited ground, and where the ground complained of is also not applicable to other Nigerians. The protected characteristics include ethnic group, place of origin, sex, religion, political opinion or circumstances of birth.

63 Drawn from a reading of the ratio in *Uzoukwu v Ezeonu II* (n 62 above); see also NO Ogbu *Human Rights Law and Practice in Nigeria* (2013) 378.

64 I follow Finnis's thoughts here regarding the idea of basic goods of human flourishing. See J Finnis *Natural law and natural rights* (2011).

here should go beyond identical treatment of formal equality to consider substantive equality. This implies that simple differentiation between persons or groups of persons based on factors such as disability, race or sex does not necessarily amount to unfair discrimination once it is aimed at achieving a legitimate purpose.⁶⁵

In principle, simple differentiation endorses the suggestion that bringing about non-discrimination may entail treating people differently and not necessarily in the same way in order to address their different situations and the barriers they face.⁶⁶ Dworkin, in fact, made an interesting point when he said that the cardinal objective regarding the right to non-discrimination lay in discouraging as well as offering positive opportunity for redressing unfair discrimination embedded in the socio-political system.⁶⁷

The insight exemplified in this section suggests the failure of section 42 to give equal protection to disabled persons as vulnerable members of the Nigerian society. In spite of all efforts by the Constitution to reflect the neutral and impartial character of the law in relation to non-discrimination, a presumption of equality as formal equality readily manifests. Thus, the possibility of reading disability within the strict provision of section 42 of the Nigerian Constitution remains fluid. Nevertheless, it is envisaged that all hope is not lost. We must then ask the question: Do other options exist under Nigerian law for the determination of the right to non-discrimination of disabled persons? Or, to what extent can it be argued that the right to non-discrimination of disabled persons is protected and procurable under Nigerian law?

The relevant point that needs to be highlighted is that Nigeria is signatory to major international human rights treaties that extol the fundamentals of non-discrimination.⁶⁸ Nigeria has also signed and ratified

65 Grobbelaar-Du Plessis & Van Eck (n 60 above) 244-246.

66 As highlighted in the South African case of *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 (2) BCLR 99 (CC) para 103 as well as *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (1) BCLR 39 (CC) para 132; See also Ngwena (n 6 above) 157.

67 D Dworkin *Taking rights seriously* (1977) 227.

68 Universal Declaration of Human Rights (UDHR) arts 2 and 7, adopted 10 December 1945 GA Res. 217 A (III); International Covenant on Economic Social and Cultural Rights (ICESCR) art 2, adopted 16 December 1966 by UN General Assembly Resolution 2200A (XXI) and entered into force on 3 January 1976 in accordance with art 27, signed and ratified by Nigeria on 29 July 1993; International Covenant on Civil and Political Rights (ICCPR) arts 3 and 26, adopted 16 December 1966 by United Nations General Assembly Resolution 2200A (XXI) and entered into force on 23 March 1976, in accordance with art 49; see also arts 7 and 10, signed and ratified by Nigeria on 29 July 1993; African Charter on Human and Peoples' Right (African Charter) adopted 27 June 1981, OAU DOC CAB/LEG/67/3 Rev 5, 21 ILM 58 (1982) entered into force 21 October 1986, see arts 2 and 3, adopted and ratified by Nigeria on 31 August 1982 and 22 June 1998 respectively.

the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol.⁶⁹ More pertinent is the fact that Nigeria has incorporated the African Charter by virtue of its Constitution which stipulates that – ‘no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly’.⁷⁰ This was made possible via the African Charter on Human and Peoples’ Rights (Enforcement and Ratification) Act 2 of 1983.⁷¹ Nigeria operates the dualist system of law, and international treaties have the force of law under Nigeria’s legal system only when these have been ratified and domesticated by the Nigerian legislature.

The implication is that the African Charter Act is domestic legislation in Nigeria, and this has been judicially noticed in a number of Nigerian Court of Appeal and Supreme Court decisions.⁷² Specifically, the Nigerian Supreme Court in *General Sani Abacha & Others v Chief Gani Fawehinmi*⁷³ held:

Where a treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into municipal law by the African Charter on Human Peoples’ Right (Ratification and Enforcement) Act Cap 10 Laws of the Federation, it becomes binding and our courts must give effect to it like all other laws falling within the judicial power of the courts. By Cap 10 the ACHPR is now part of the laws of Nigeria and like other laws the Courts must uphold it. The ACHPR gives to citizens of member states of the Organisation of African Unity rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning. It is interesting to note that the rights and obligations contained in the ACHPR are not new to Nigeria as most of these rights and obligations are already enshrined in our Constitution

At this point, it is useful to gain an overview of the normative framework underpinning the African Charter Act and the likelihood of the potential for promoting and protecting the equality rights of disabled persons in Nigeria.

69 On 30 March, 2007 and 24 September, 2010 respectively.

70 See the enactment in sec 12 of the Nigerian Constitution.

71 The Act came into effect on 17 March 1983, but is now contained in Cap A9, Laws of the Federation of Nigeria, 2004.

72 See *Ogugu v The State* (1994) 9 NWLR (Pt. 366)1. Prior to the decision in the Ogugu case, in the High Court in 1990 in *Mohammed Garuba & Others v Lagos State Attorney-General & Others*, (the African Charter, as local legislation, was applied by the Judge to reach its decision. Likewise, in the case of *The Registered Trustees of the Constitutional Rights Project v The President of the Federal Republic of Nigeria & Others* (1994) 9 NWLR (Pt. 366).

73 *General Sani Abacha & Others v Chief Gani Fawehinmi* (2000) SC 45/1997 per Ogundare JSC.

4.2 Legislative disposition: African Charter Act

Apart from the African Charter Act, there is no other identifiable law that specifically addresses disability discrimination in Nigeria. As such, the African Charter Act provides in article 2:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3:

- (1) Every individual shall be equal before the law
- (2) Every individual shall be entitled to equal protection of the law

Article 18(4):

The aged and *the disabled* shall also have the right to special measures of protection in keeping with their physical and moral needs⁷⁴

A central theme emerging from the African Charter Act, and specifically reflected from a joint reading of articles 2, 3 and 18(4), is the reality of possible opening that could be explored in securing the equality aspirations of disabled people in Nigeria. It is true that article 2 does not specifically list disability as a protected ground of discrimination. However, this challenge can be overcome by the existence of the terms 'other status' in section 2 as derived from international jurisprudence on non-discrimination. This has been observed as allowing judges room to extend the list of enumerated grounds of protection.⁷⁵

However, it is considered that the guarantee of formal equality with respect to rights contained in the African Charter Act under article 2 and 3 may not ensure the concrete enjoyment of rights set out in the legislative instrument for vulnerable and marginalised groups. Marginalisation and vulnerability suppose that vulnerable minorities require greater protection and treatment.⁷⁶ Ensuring the empowerment of vulnerable groups such as children, racial minorities and disabled persons, demands negative and positive obligations which require states not only to discourage unlawful

⁷⁴ My emphasis.

⁷⁵ Biegon (n 26 above) 53; This was also stated in the decision of the African Commission in the case of *Purohit & Others v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 4.

⁷⁶ DP Zongwe 'Equality has no mother but sisters: The preference for comparative law over international law in equality jurisprudence in Namibia' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 123 144.

discrimination, but to take positive actions in order to enhance opportunities for the enjoyment of the guaranteed rights.⁷⁷

The African Charter instructively appreciates this reality as it provides for the right to ‘special measures of protection for vulnerable groups, such as women, children, the aged and disabled’ in society.⁷⁸ Additionally, it is expected that the ‘special measures’ shall objectively respond to the ‘physical and moral needs’ of disabled persons.⁷⁹ This, in some manner, signals a deference towards the social model of disability which denounces the conception of disability as the problem of the individual and equality as identical treatment.⁸⁰ This ultimately accentuates the duty of states to accommodate diversity by providing needed individualised support and services.⁸¹

Unarguably, a combined reading of articles 2, 3 and 18 (4) of the African Charter Act provides a legal opening for securing the equality rights of disabled people in Nigeria. To this end, the legislation, through its peculiar provisions, substantively advocates the recognition and protection of the equality rights of disabled persons. It presents an important source of inspiration for human rights activists, disabled people’s organisations as well as civil society, and provides a common domestic avenue that can be invoked not only by disabled people but also by human rights defenders. It is, therefore, imperative that the Nigerian judiciary enhances the enforcement and protection of substantive equality in the enjoyment of rights of disabled persons.

Unlike some jurisdictions, Nigerian courts are yet to develop normative equality jurisprudence for all peoples, including disabled persons. Distinct from the Canadian and South African case law on equality, where the idea of substantive equality is pursued, equality interpretation by Nigerian courts reveals a strict reliance on section 42 of the Constitution which extols the formal equality approach.⁸² Further confirmation of equality for disabled persons as formal equality is to be found in the case of *Simeon Ilemona Akubo v Diamond Bank*.⁸³ This will be evaluated in the next section in order to determine the extent to which Nigerian courts have followed the normative currency embedded in the African Charter Act in the interpretation of equality rights for disabled persons.

77 See General Comment 18 (n 14 above) para 10; Biegion (n 26 above) 62.

78 As set out in art 18(4) of the African Charter.

79 As above.

80 Ngwena (n 6 above) 145.

81 Art 5 CRPD.

82 See the discussion in sections 4.1 and 4.2 above.

83 Suit ID/763M/2010, decided in the High Court of Lagos State of Nigeria.

4.3 Judicial disposition

Decisions of superior courts (Supreme Court and Court of Appeal) with respect to the right to non-discrimination of disabled persons are yet to be seen. A deficit in case law in Nigeria on the right to non-discrimination of disabled persons has also been reported. However, there are two identifiable unreported Nigerian High Court decisions relating to disability and the right to non-discrimination.⁸⁴

In *Simeon Ilemona Akubo v First City Monument Bank PLC*⁸⁵ the judge found that the claimant had been discriminated against on account of disability when he was denied access to the banking hall. The trial judge in his reasoning ‘drew support from foreign jurisprudence’. The Court acknowledged the reasoning in the English case of *David Allen v Royal Bank of Scotland*⁸⁶ which was decided by the Supreme Court of Judicature, Court of Appeal Division based on the English Disability Discrimination Act (DDA) of 1995. In reaching its decision, the High Court judge did not rely on section 42 of the Nigerian Constitution, but instead relied on section 18 of the African Charter Act which he construed as being philosophically comparable to the provisions of the English Disability Discrimination Act. The provisions of the DDA stipulate when an action of a provider of services will be discriminatory and particularly impose an obligation on a service provider to provide accommodations for disabled persons. The Court’s approach demonstrates a salutary convergence with normative values ‘animating’ equality under international law.

By contrast, the trial judge in *Simeon Ilemona Akubo v Diamond Bank*⁸⁷ refused to follow the reasoning of his learned brother when confronted by similar facts. The Court strictly relied on section 42, despite the fact that the claimant brought his application pursuant to article 42 of the Constitution and the African Charter. The Court argued that Nigeria had no corresponding legislation like the DDA and that the DDA ‘is not in anyway, form, purport or intent identical to the Constitution or the African Charter’. With respect, this superficial interpretation of the equality rights of disabled persons under the African Charter is restrictive. The interpretation adopted by the Court in respect of the African Charter Act also failed to give the Act the legitimacy it needs to consistently bring renewed hope to disabled persons in Nigeria. The Court drawing mainly from section 42 of the Constitution, insisted that Diamond Bank was not under any compulsion to provide accommodation to the claimant beyond giving him

84 *Simeon Ilemona Akubo v First City Monument Bank*; Suit ID/824M/09 and *Simeon Ilemona Akubo v Diamond Bank PLC* (n 83 above), decided in the High court of Lagos State of Nigeria.

85 (n 84 above).

86 (2009) EWCA Civ.1213.

87 (n 83 above).

banking services and a reasonable opportunity to use its facilities; it was for the applicant to do all that is reasonably within his own abilities to meet reasonable procedural regulations of the bank which will allow him enjoy the facilities. I shall therefore say for the umpteenth time, that the problem was with the metal devices (crutches). I am not aware that he tried to access the bank using wooden or plastic crutches and could not gain access...Whereas, the action of the respondent's staff could be labelled as lacking initiative, untactful or even insensitive, but I am very doubtful that it can be reasonably be regarded as one offending the applicant's right to human dignity or discrimination.

Accepting the judge's interpretation and reasoning is considered inimical to the normative equality values embedded in the African Charter Act for the attainment of equality rights of disabled persons. Indeed, the facts of the case disclose unfair discrimination as the applicant was denied access to the banking hall on account of his metal crutches. There is evidence that the respondent bank required him to leave his walking crutches outside and could not provide an alternative mobility aid or any other assistive device for the applicant even after the claimant had asked for an alternative.

The Court's view 'that it was for the applicant to do all that is reasonably within his own abilities to meet reasonable procedural regulations of the bank' cannot be conceded. To do so is a denial of the duty to provide accommodation and a good example of absolving the social environment from altering existing social arrangements in order to accommodate disabled people.⁸⁸ It will also entail putting the burden of disability on the claimant, as has been expressed under the medical model of disability.⁸⁹ This must be part of what Ngwena referred to as 'individualising disability' which serves to worsen the status quo.⁹⁰

The trial judge also failed to consider the position of the claimant as a member of a vulnerable group and the effect of the respondent's action which the Court had clearly described as being insensitive and untactful.⁹¹ It will be recalled that the denial of access into the banking hall necessitated

88 As considered by Ngwena in his analysis of the duty to accommodate difference; see Ngwena (n 6 above) 144; see also art 1(b) of the Draft Protocol to the African Charter on Persons with Disabilities in Africa 2014 (n 14 above).

89 Oliver (n 28 above)30; Bickenbach (n 28 above) 65

90 Ngwena (n 6 above) 144.

91 The effect or impact of discrimination on a complainant is usually focused on in determining the extent of discrimination. Drawing from the jurisprudence of other jurisdictions, such as those of Canada and South Africa, courts in these jurisdictions have exemplified that the position of the complainant in society as well as the nature and purpose are usually taken into consideration. In addition, the extent to which the provision had affected the rights or interests of the claimant is also implicated. Apparently, the list does not constitute a closed list, neither is any of the factors determined in isolation, but is usually determined in the context of other existing factors. See *Andrew v Law and Society of British Columbia* (n 31 above); and the decision in *Harkesen v Lane & Others* 1998 (1) SA 300 (CC); Ngwena (n 6 above); Grobbelaar-Du Plessis & Van Eck (n 60 above) 242.

the use by the claimant of third parties to transact business in the bank while he remained outside. Without a doubt, this affected the claimant psychologically, and also amounted to an invasion of his privacy and confidentiality, as argued by his counsel. There was also evidence that the claimant suffered mental torture as a result of the alleged hostile action of the respondent's agents. The Court further erred by stating that the claimant had not been treated differently from others. This reflects a formal equality approach to disability which is not compatible with international law standards on non-discrimination.

Earlier, before the decisions in *Simeon Ilemona Akubo v Diamond bank* and *Simeon Ilemona Akubo v First City Monument Bank PLC*,⁹² Nigerian courts, in determining equality and non-discrimination under section 42 of the Constitution, generally had not deviated from distinctions explicitly based on prohibited grounds of discrimination. Within this framework, the spotlight is often on equal treatment. Persuasive foreign jurisprudence on non-discrimination is usually not taken into account. For instance, in the case of *Uzoukwu v Ezeonu*,⁹³ the Nigerian Court of Appeal held, among other things, that the right to non-discrimination presupposed, first, that the discrimination complained against must have been based on law; second, the discrimination must be seen as an act of government or its agencies; third, that the discrimination complained against does not apply to other Nigerians. Finally, a violation of section 42 can only be invoked where the discrimination falls within the protected grounds; it cannot be invoked if, in addition to protected grounds, there are other reasons why a person is discriminated against.⁹⁴

Arguably, section 42, as construed, failed to appreciate that vulnerable persons like disabled persons are different from other non-vulnerable Nigerians. Using non-vulnerable Nigerians as comparators for vulnerable Nigerians is to condemn, for instance, disabled persons to perpetual marginalisation and discrimination. As a consequence of the emphasis on equal treatment, discrimination not based on law and strict reliance on specifically provided grounds of discrimination cannot influence positive socio-cultural attitudes towards disabled persons. Indeed, negative social and cultural attitudes have been implicated as part of what accentuates discrimination against disabled persons.⁹⁵

However, six years after the decision in *Uzoukwu v Ezeonu*, the Nigerian Court of Appeal in *Mojekwu v Mojekwu*⁹⁶ cited international law

92 See n 83 & 84 above.

93 (n 62 above).

94 *Uzoukwu v Ezeonu* paras 777-780.

95 As articulated under the medical model of disability. See also the World Health Organisation definition of disability in WHO International classification of functioning, disability and health assembly (2001); see also NB Miller *Everybody's different: Understanding and changing our reactions to disabilities* (1999) 34

96 (1997) 7 NWLR (part 512) 283 (CA).

to support its finding of discrimination, and held that the ‘*oli-ekpe*’ custom, which allows the son of the brother of the deceased person to inherit the assets of the dead to the exclusion of the deceased’s female children, cannot be allowed under section 42, as well as the repugnancy doctrine.⁹⁷ This, indeed, indicates a deference towards international law standards relevant to advancing the right to non-discrimination. Unfortunately, the decision in *Mojekwu* was later on appeal criticised by the Supreme Court when presented with similar facts and issues for determination. The Supreme Court disagreed with the Court of Appeal’s condemnation of the ‘*oli-epke*’ custom as well as other customs that discriminate against women, by holding that the Court of Appeal ought to have granted a fair hearing to the people whose customs these may be.

The Supreme Court did not overturn the judgment of the Court of Appeal, as it held that the Court of Appeal was correct to have decided the case based on the ‘*kola tenancy*’, which governed the devolution of the property in dispute. However, the Supreme Court’s averments concerning customs that discriminate against women raise considerable concern as to whether the most superior court in Nigeria would fulfil the non-discriminatory rights guaranteed women under international law and domestic law.

Another problem in *Festus Odafé & Others v Attorney-General of the Federation and Others*⁹⁸ was the failure by the Federal High Court to extend the list of protected grounds. Arguably, a strict application of section 42 of the Nigerian Constitution aligns with ‘the fixed-category approach’. However, this contrasts with international legal standards that usually specify a list of grounds of discrimination, but stipulate that the list is not exhaustive by making reference to terms like ‘other status’, ‘such as’ and ‘in particular’.⁹⁹ The articulation of what amounts to discrimination is often left to the courts to determine. This approach has been adopted in international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (Universal Declaration) as well as in some domestic jurisdictions.¹⁰⁰ In the case of *Festus Odafé*, the Court’s construction of section 42 as not explicitly forbidding discrimination on the grounds of health or disease status failed not only to reflect international standards of protection regarding the right to non-discrimination, but also demonstrates a failure to adopt a purposive interpretation of section 42.

A purposive interpretation should have seen the Court pursue an interpretation of section 42 that would give a wide effect to ethical considerations in the elimination of discrimination. The major purpose

97 The Court considered some provisions of CEDAW.

98 (2004) AHRLR 205 (NgHC 2004).

99 S Fredman *Discrimination law* (2011) ch 3.

100 Like the Canadian and South African examples.

and objective of anti-discriminatory provisions is to offer remedial answers taking into account factual differences. Reasonably, the denial of treatment to an HIV-positive patient jeopardises the right to life and further impacts the individual's human dignity. Thus, a court of justice has a legal and moral duty to fill the vacuum left by the legislative arm.¹⁰¹

In light of these judicial interpretations, one may argue that Nigeria is yet to build a dependable jurisprudence with regard to section 42. There seems to be a common understanding among Nigerian judges that existing legal and other institutional structures are tolerable apart from periodic occurrences which might cause direct discrimination. Obviously, the idea is to settle individual differences using existing structures, regardless of its effect. Consequently, individuals, including disabled persons who are unable to compete within existing social structures experience unfair discrimination. Such an approach encourages formal equality rather than substantive equality.

Restrictive interpretations of equality before the law, in concrete terms are an aspect of formal justice which is further epitomised in the statue of the Greek goddess of justice commonly used as insignia in Nigerian courts and law schools.¹⁰² The Greek goddess assuming equality usually has her eyes covered, while carrying a sword in one hand and scales in the other hand. Philosophically, this constitutes an elusive notion of equality as the scales link to absolute measurement for everyone, and the blindfolded eyes which suggest an intentional denial of vision, prevent the acknowledgment or consideration of different situations and circumstances relative to individuals in society. Such a presumption of equality of status breeds inequality in the distribution of socio-economic goods and services. Adjusting the blindfold will sometimes enable the goddess (courts) to counterbalance the scale of justice when the need arises, in order to remedy historical marginalisation and domination of vulnerable groups such as disabled persons.

5 Concluding remarks

Drawing from the discussion, it is concluded that the existing constitutional framework on the right to non-discrimination in Nigeria can further the right to non-discrimination of disabled persons. Although no explicit reference to disabled persons is made in the Nigerian Constitution, the provisions of the African Charter Act, which has been given effect to by the Constitution, may be used to enforce and protect the substantive

101 Pollicino (n 11 above) 288.

102 USF Nnabue *Understanding jurisprudence and legal theory* (2009) 300; A Oyeboade 'Equality before the law in Nigeria: Myth or reality' <http://www.nigeriavillagesquare.com/articles/equality-before-the-law-in-nigeria-myth-or-reality.html> (accessed 28 March 2016).

equality rights of disabled persons in Nigeria. What remains is the utilisation through litigation of this opportunity by disabled persons and persons acting on their behalf.¹⁰³

Nevertheless, there are indications that Nigerian courts can build on this rather peculiar framework, by rendering non-restrictive equality interpretations that are likely to result in the development of a body of equality jurisprudence relevant to disabled persons and comparable to normative international standards and admirable foreign case law.

103 Especially when the new Rules of Court made by the Chief Justice of Nigeria in 2009, pursuant to sec 46(3) of the Constitution, allow public interest litigation; see Fundamental Rights (Enforcement Procedure) Rules 2009, with effect from 1 December 2009.

LEGISLATIVE MECHANISMS FOR COMBATING VIOLENCE AGAINST CHILDREN WITH DISABILITIES IN SELECTED AFRICAN JURISDICTIONS: A CRITICAL APPRAISAL

*Enoch Macdonnell Chilemba**

Summary

Children with disabilities in many African countries suffer violence and abuse that take various forms. Human rights treaties, such as the Convention on the Rights of Persons with Disabilities (CRPD) require state parties to take appropriate legislative, policy, administrative and other measures that conform to international standards to protect children with disabilities from violence. At the African regional level, the CRPD is complemented by the African Charter on the Rights and Welfare of the Child. A number of African countries that are party to the CRPD have adopted disability and child protection legislation. For example, Malawi, Zambia, Tanzania, Uganda and Kenya have adopted disability specific statutes; while South Africa has enacted child protection legislation. The legislative documents are expected to provide for mechanisms for protecting children with disabilities from violence. The study seeks to analyse the extent to which selected African state parties to the CRPD have put in place legislative mechanisms for protecting children with disabilities from violence as envisaged by international standards, such those under the CRPD. The selected countries are expected to have adopted disability-specific statutes and/or child protection legislation. Accordingly, the study focuses as selected case studies on Malawi, Tanzania, Zambia, South Africa, Kenya, Ghana and Uganda. The study observes that African states need to put in place mechanisms in their child protection and disability-specific legislation that will ensure, amongst others, the identification, investigation and prosecution of all forms of violence and abuse, and the existence of legislative provisions that protect children with disabilities from all forms of violence. Such mechanisms could go a long way towards making the domestic legislative frameworks provide the appropriate mechanisms for combating violence against children with disabilities, as envisaged by the pertinent international standards.

* LLD (RSA), LLM (RSA), LLB (Hons) (Mal); Lecturer in Law and Co-ordinator of the Disability and Human Rights Programme (teaching and research) at the Faculty of Law, University of Malawi; Advocate of the High Court and Supreme Court of Malawi; enochilemba@yahoo.com.

1 Introduction

Children with disabilities in many African countries are often and disproportionately subjected to various forms of violence and abuse.¹ Human rights treaties, such as the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD),² require state parties to take appropriate measures to protect children with disabilities from violence. The international standards under the CRPD and other pertinent treaties expect state parties to put in place legislative mechanisms, amongst others, to ensure such protection. At the international level, the CRPD is complemented by the UN Convention on the Rights of the Child (CRC).³ At the African regional level, the CRPD is complemented by human rights treaties such as the African Charter on the Rights and Welfare of the Child (African Children's Charter)⁴ and, where applicable, the African Youth Charter.⁵ A number of African countries that are party to the CRPD and other applicable treaties have enacted disability-specific and child protection laws, which serve as crucial legislative tools for combating violence against children with disabilities. For example, Malawi, Zambia, Ghana, Tanzania, Uganda and Kenya have adopted disability-specific statutes, while South Africa has enacted child protection legislation. As will be illustrated by the international standards explored below, these legislative documents are expected to provide for mechanisms for protecting children with disabilities from violence.⁶

The study seeks to analyse the extent to which selected African state parties to the CRPD have put in place legislative mechanisms for protecting children with disabilities from violence, as envisaged by the pertinent international standards such as those under the CRPD. For the assessment, the study has selected African state parties to the CRPD that also have in place disability-specific statutes and/or child protection legislation, as some of the legislative measures taken for realising the rights of children with disabilities.⁷

- 1 See generally African Child Policy Forum (ACPF) *Reasons for hope: Good practices relating to children with disabilities from Kenya, Liberia and Mozambique: A synthesis report* (2014) 13; ACPF *The African report on children with disabilities: Promising starts and persisting challenges* (2014) 99. Both reports highlight that '[t]hroughout Africa, children with disabilities are at acute risk of violence and abuse'. See also ACPF *Breaking the silence: Violence against children with disabilities in Africa* (2010). It is worth noting that the study uses the phrase 'children with disabilities' with reference to children who have disabilities in accordance with contemporary practice.
- 2 Adopted on 13 December 2006, entered into force on 3 May 2008.
- 3 Adopted on 20 November 1989, entered into force on 2 September 1990.
- 4 Adopted on 11 July 1990, entered into force on 29 November 1999.
- 5 Adopted on 2 July 2006, entered into force on 8 August 2009. The Youth Charter applies to youth/children with disabilities falling within the 15-18 years age bracket.
- 6 See 3.4 below.
- 7 See eg CRPD, art 4(1)(a) & (b) as read with art 4(3), which require state parties to, amongst others, enact and implement legislation as one of the measures for implementing the CRPD. Of course, constitutions, policies and any other

The study analyses how such legislation incorporates the pertinent international standards. Accordingly, the study focuses on Malawi,⁸ Zambia,⁹ Uganda,¹⁰ Kenya,¹¹ Tanzania,¹² Ghana¹³ and South Africa.¹⁴ The study assumes that efforts to protect children with disabilities in Africa from violence could bear fruits if African countries put in place appropriate legislative mechanisms as envisaged under CRPD standards. In accordance with its scope, the study proceeds on the premise that, as a first step, African states must ensure that the disability-specific and child protection legislation (in addition to other implementation measures) that they adopt must conform to the pertinent international standards in order to provide the appropriate framework for combating violence. The actual implementation of such statutes on the ground forms the second crucial step, a discussion of which does not fall within the scope of the study.

With regard to the disability statutes, it is worth noting that Malawi, Zambia and Tanzania enacted their disability statutes after the three countries had already ratified the CRPD. On their part, Ghana, Kenya and Uganda enacted their disability statutes before the adoption of the CRPD, but during the period when advocacy for the adoption was rife (in the case of Kenya), and in the year that the CRPD was (being) adopted, in the case of Ghana and Uganda. Nonetheless, as explained above, these three jurisdictions subsequently ratified the CRPD. Since the study appraises the conformity of these disability statutes to the CRPD's standards for combating violence against children with disabilities, it is relevant to examine the disability laws in the selected jurisdictions as they are expected to reflect the CRPD's standards.¹⁵ Accordingly, the study looks at disability legislation enacted by the selected African countries before and after the adoption of the CRPD.

In achieving its objectives, the study briefly gives an overview of the forms of violence experienced by children with disabilities in Africa. Thereafter, it analyses the standards under the CRPD and other applicable treaties for eradicating violence against children with disabilities. The study also assesses the extent to which the disability and child protection

implementation measures are also expected to have provisions or mechanisms that could be used to address issues relating to violence. However, in accordance with its scope, the study limits its attention to the identified legislative measures.

8 Malawi signed the CRPD on 27 September 2007 and ratified it on 27 August 2009.

9 Signed the CRPD on 9 May 2008 and ratified it on 1 February 2010.

10 Signed the CRPD on 30 March 2007 and ratified it on 25 September 2008.

11 Signed the CRPD on 30 March 2007 and ratified it on 19 May 2008.

12 Signed the CRPD on 30 March 2007 and ratified it on 10 November 2009.

13 Signed the CRPD on 30 March 2007 and ratified it on 31 July 2012.

14 South Africa signed the CRPD on 30 March 2007 and ratified it on 30 November 2007.

15 The disability laws that had been enacted before the countries concerned ratified the CRPD were expected to be reviewed to be aligned with the CRPD within a reasonable time after the states had ratified the CRPD. Alternatively, or in addition, the drafters of these statutes had to draw inspiration from the advocacy and negotiations surrounding the adoption process of the CRPD by containing provisions that, to an extent, reflected the CRPD's standards.

statutes enacted by the selected African jurisdictions reflect, or adhere to, the pertinent international standards. Lastly, the study suggests concrete recommendations based on the findings.

2 Disability, violence and children with disabilities in Africa

Children with disabilities in Africa face many challenges that impede the enjoyment of their human rights on an equal basis with other children.¹⁶ A number of studies have established that these children often live in conditions of abject poverty, are victims of violence, exploitation, abuse and harmful traditional practices, lack access to health, rehabilitation and welfare services, are neglected by parents, and that little action is taken to meet their needs.¹⁷ For example, in certain African societies, children with disabilities are killed, neglected or not sent to school to attain an education, due to negative stereotypes.¹⁸ Similarly, it has been found that children with disabilities are also at the risk of being locked up by parents or guardians who seek to hide them from society due to, amongst others, the fact that certain communities consider having a child with a disability as a taboo.¹⁹ This illustrates the deplorable situation relating to violence facing a large majority of children with disabilities in Africa.

Indeed, certain studies have found that several children with disabilities in Zimbabwe are killed immediately after birth,²⁰ and are abandoned by their fathers as disability is perceived as a curse on the family.²¹ Likewise, in certain African societies, including Malawi, Tanzania, Kenya and Uganda, persons and children with albinism are often attacked, abducted and killed on the basis that their body parts could be used for certain traditional rituals.²² In addition, studies have found that children with disabilities in South Africa suffer from harmful practices, such as violence, including sexual assault, in addition to abuse and neglect

16 See generally ACPF *The African report on children with disabilities* (n 1 above) 1-6. See also ACPF *Children with disabilities in Africa: Challenges and opportunities* (2011).

17 See ACPF *The African report on children with disabilities* (n 1 above) 1-6; ACPF *The lives of children with disabilities in Africa: A glimpse into a hidden world* (2011); B Ransom *Missing voices: Children with disabilities in Africa* (2008).

18 See eg ACPF *The African report on children with disabilities* (n 1 above) 2; D Filmer 'Disability, poverty, and schooling in developing countries: Results from 14 household surveys' (2008) 22 *World Bank World Economic Review* 141; N Marongwe & R Mate *Children and disability: Their households' livelihoods and experience in accessing key services* (2007) 25; T Choruma *The forgotten tribe: People with disabilities in Zimbabwe* (2006) 7 & 16.

19 See eg R Lang & G Charowa *DFID scoping study: Disability issues in Zimbabwe* (2007) 19.

20 E Mandipa 'A critical analysis of the legal and institutional frameworks for the realisation of the rights of persons with disabilities in Zimbabwe' (2013) *African Disability Rights Yearbook* 74; 'Woman drowns disabled toddler' *Chronicle* 22 August 2013.

21 Marongwe & Mate (n 18 above) 25; Choruma (n 18 above) 7.

22 See eg Human Rights Council, Report of the UN Independent Expert on the enjoyment of human rights by persons with albinism (2016); 'Albinos "hunted like

by the family and the community.²³ In this regard, it has been established that children with disabilities are more likely to be beaten or bullied than children without disabilities,²⁴ and are also at a greater risk of experiencing sexual abuse.²⁵ For example, a study conducted in nine Southern African countries observed that persons or children with disabilities are often sexually abused due to certain misconceptions, such as the belief that having sex with a person with a disability will cure HIV/AIDS. In addition, the study observed that persons or children with disabilities are 'easy targets for rapists, because a mobility-impaired person cannot run away ... and so on'.²⁶

Similarly, in various African societies/countries children with disabilities are hidden or prevented from engaging with the rest of the community as they are perceived as 'a "disgrace" to their families' and are regarded as symbolising a 'punishment from the gods on the family'.²⁷ Above all, harmful practices against children with disabilities, such as hiding them or locking them up, also result in their exclusion from society, further perpetuating the violation of their human rights.²⁸ This confirms the link between disability and violence as regards children with disabilities in Africa. As will be explained below,²⁹ the pertinent international standards expect African state parties to the CRPD, CRC and African Children's Charter to address this situation by taking measures aimed at protecting children with disabilities in their jurisdictions from all forms of violence.

animals" for body parts in Malawi' *News 24* 3 March 2015 <http://www.news24.com/Africa/News/Albinos-hunted-like-animals-for-body-parts-in-Malawi-20150303-4> (accessed 25 March 2016); 'Albinos hunted for body parts in Africa' *The Telegraph* 10 April 2011.

- 23 See generally ACPF *Children with disabilities in South Africa: The hidden reality* (2011) 36-37.
- 24 See generally World Health Organisation (WHO) & World Bank *World report on disability* (2011) 3; ACPF *Breaking the silence* (n 1 above) 1-2.
- 25 See generally ACPF *Breaking the silence* (n 1 above) 2; Handicap International and Save the Children *Out from the shadows: Sexual violence against children with disabilities* (2011).
- 26 H Kotzé *Status of disability rights in Southern Africa* (2012) 30.
- 27 See SAD Kamba 'Forgotten or included? Disabled children's access to primary education in Cameroon' (2013) *African Disability Rights Yearbook* 27-48 46. See also H Combrinck 'The hidden ones: Children with disabilities in Africa and the right to education' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 302; J Biegon 'The promotion and protection of disability rights in the Africa human rights system' in I Grobbelaar-Du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 83.
- 28 See e.g. I Grobbelaar-du Plessis & T Van Reenen 'Introduction to aspects of disability law in Africa' in Grobbelaar-du Plessis & Van Reenen (eds) (n 27 above) xvi.
- 29 The discussion is contained in 3 below.

3 International standards for combating violence against children with disabilities in Africa

3.1 Convention on the Rights of Persons with Disabilities

The CRPD is the global disability-specific human rights treaty. It contains provisions on the rights of children with disabilities and the rights of persons with disabilities broadly,³⁰ including provisions that provide protection from violence. For example, article 16 of the CRPD guarantees the right to freedom from all forms of exploitation, violence and abuse. The provision has five separate sub-articles outlining the obligations of the state to be discharged when implementing the right.³¹ The first sub-article obliges states to take legislative, administrative, social, educational and other measures to protect persons or children with disabilities from all forms of exploitation, violence and abuse.³² The second sub-article requires the provision of appropriate forms of gender- and age-sensitive assistance and support for persons or children with disabilities and their families and caregivers, which should include the provision of information and education on how to avoid, recognise and report instances of exploitation, violence and abuse.³³ The third sub-article mandates states to ensure that all facilities and programmes designed to serve persons or children with disabilities are effectively monitored by independent authorities.³⁴

The fourth sub-article obliges states to take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons or children with disabilities who become victims of any form of exploitation, violence or abuse, which should include the provision of protection services.³⁵ Lastly, the fifth sub-article requires states to have effective legislation and policies, including child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons or children with disabilities are identified, investigated and, where appropriate, prosecuted (and, by implication, punishing perpetrators when convicted).³⁶ This obligation under the CRPD, as clarified by the Committee on the Rights of Persons with Disabilities (CRPD Committee), expressly requires states to identify, investigate and prosecute instances of exploitation, violence and

30 See eg art 7, which sets out the rights of children with disabilities.

31 See art 16. Other provisions of the CRPD such as art 10 on the right to life and art 14 on the right to liberty and security of the person are also applicable and significant since certain forms of violence result in killings of children with disabilities.

32 Art 16(1) CRPD.

33 Art 16(2) CRPD.

34 Art 16(3) CRPD.

35 Art 16(4) CRPD.

36 Art 16(5) CRPD.

abuse through implementing legislation and policies, which must include child-focused laws.³⁷

The CRPD Committee in its Concluding Observations, adopted after having examined various state parties' reports, has further elaborated on the obligations of states and the standards to be adhered to in implementing the right to freedom from violence guaranteed under article 16 of the CRPD. For example, it has urged states to diligently investigate the situations/allegations of violence, exploitation and abuse and to take appropriate measures on the findings, such as prosecuting (and, by implication, punishing upon conviction) the perpetrators, and ensuring that victims can testify.³⁸ It is submitted by the author that states are required to have a legislative framework that provides the enabling environment for discharging these obligations.³⁹

The CRPD Committee further expects states to set up protocols for, and training in, the investigation of cases of violence, and to adopt measures to prevent the exploitation of children with disabilities for the purpose of begging, and to establish programmes to promote their integration in society,⁴⁰ to collect and compile systematic disaggregated data and information on violence and abuse,⁴¹ and establish institutional mechanisms for the early detection of situations in which violence may occur;⁴² to identify incidents of violence and abuse and make available the necessary support;⁴³ to set up a complaints mechanism and to conduct mandatory training for the police force on violence;⁴⁴ and to take the necessary steps for protection, such as alternative housing for those who have been neglected or are making a living by begging, and the creation of reception centres where victims of trafficking in persons can obtain psychosocial care and legal assistance.⁴⁵

The CRPD Committee has also taken a stand against corporal punishment and the exploitation of children with disabilities for the purpose of begging.⁴⁶ It has further appreciated the initiatives taken by states, such as providing specific disability-related provisions in legislation

37 See art 16(5) of the CRPD; CRPD Committee Concluding Observations on Australia (2013) para 38; Concluding Observations on El Salvador (2013) para 36(a).

38 CRPD Committee Concluding Observations on Australia (2013) para 38; Concluding Observations on Argentina (2012) para 30; Concluding Observations on China (2012) para 30; Concluding Observations on Hong Kong, China (2012) para 66; Concluding Observations on Hungary (2012) para 32.

39 See generally art 4 of the CRPD, which requires state parties to adopt or modify legislation to deal with practices and customs that negatively affect the realisation of the rights set out in the CRPD.

40 Concluding Observations on El Salvador (2013) paras 36(a), (b) & (e).

41 Concluding Observations on China (2012) para 30; Concluding Observations on Tunisia (2011) para 17(a).

42 Concluding Observations on Argentina (2012) para 30.

43 Concluding Observations on Sweden (2014) para 42.

44 Concluding Observations on Macao, China (2012) para 91.

45 Concluding Observations on Paraguay (2013) para 42.

46 Concluding Observations on El Salvador (2013) paras 35(d) & (e).

and policies for the prevention of exploitation, violence and abuse.⁴⁷ It is further worth noting that the CRPD, in article 8, imposes the obligation of awareness raising regarding disability, which should be used to 'combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life'.⁴⁸ Thus, awareness-raising measures can also be used as a way of combating violence against children with disabilities in Africa, in particular the violence that is influenced by negatives or harmful beliefs and attitudes towards children with disabilities as is often the case with attacks on children with albinism.

3.2 Convention on the Rights of the Child

The CRC is the global child-specific human rights treaty which guarantees the rights of children, including children with disabilities. The CRC in article 19 sets out the right to freedom from all forms of violence, exploitation and abuse.⁴⁹ The provision also requires states to identify, report and investigate all instances of violence and abuse and to involve the judiciary (through the prosecution of perpetrators of violence), in addition to providing the necessary support to the child and care givers.⁵⁰ It may be observed that the framework under the CRC also singles out the obligations to provide support and to carry out investigations and to prosecute instances of violence.⁵¹

The Committee on the Rights of the Child (CRC Committee), which monitors the implementation of the CRC, has further issued a specific General Comment on the rights of children with disabilities.⁵² In the General Comment, the Committee has highlighted the need for state parties to address the situation by taking all necessary measures for the prevention of abuse and violence against children with disabilities.⁵³ It has also urged states to take measures that should include the following: establishing an accessible, child-sensitive complaints mechanism and a functioning monitoring system;⁵⁴ taking all necessary legislative measures to punish and remove perpetrators of violence and abuse;⁵⁵ and ensuring

47 Concluding Observations on Hungary (2012) para 31.

48 Art 8(1)(b) CRPD.

49 See art 19(1), which requires states to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse'.

50 Art 19(2) CRC.

51 The CRC also dedicates a provision to the rights of children with disabilities in art 23, but the provision does not mention the issue of violence. It also expressly prohibits discrimination against children on the basis of disability in art 2(1).

52 CRC Committee, General Comment 9 'Children with disabilities' (2006).

53 CRC Committee, General Comment 9, para 43.

54 General Comment 9, para 43(a).

55 General Comment 9, para 43(g).

the treatment and re-integration of victims of abuse and violence with a special focus on their overall recovery programmes.⁵⁶

It should be noted that the CRC also recognises the right to survival and development of a child in article 6.⁵⁷ On its part, the CRC Committee has identified the child's survival and development as one of the four cardinal principles for the implementation of the CRC.⁵⁸ The concept of a child's survival and development recognises that the child is entitled to live, survive and develop.⁵⁹ It is related to the right to life and to other rights, such as the right to health, ensuring the survival and development of children to self-sustenance and independent living.⁶⁰ The principle requires states to identify and address all challenges that threaten the life, survival and development of children.⁶¹ The CRC Committee has observed that this principle 'warrants particular attention where children with disabilities are concerned'.⁶² This is the case because, as highlighted above,⁶³ children with disabilities often suffer many forms of violence which also threaten their survival and development.⁶⁴ In this regard, it will be appreciated that protecting children with disabilities from violence will also ensure their survival and development.

3.3 African Children's Charter

The African Children's Charter makes specific provision for the rights of all African children, including children with disabilities, to be protected from violence, abuse, exploitation and torture in two separate articles.⁶⁵ First, article 16 guarantees the right to freedom from torture and abuse. In terms of this provision, states should take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially abuse, neglect or maltreatment.⁶⁶ In addition, states have the obligation to put in place effective procedures for identifying, preventing, reporting and investigating all instances of violence and abuse and to provide the

56 General Comment 9, para 43(i).

57 Art 6(2) of the CRC, which provides that '[s]tates Parties shall ensure ... to the maximum extent possible the survival and development of the child'.

58 The other three cardinal principles are the best interests of the child; child participation; and non-discrimination. See eg CRC Committee General Comment 5 'General measures of implementation of the Convention on the Rights of the Child' (2003) para 12; CRC Committee 'Guidelines for initial reports' (1991) para 13.

59 The principle is derived from CRC, art 6.

60 WHO & World Bank (n 24 above) 10.

61 J Karp 'Concepts underlying the Convention on the Rights of the Child' (1998) 4 *Loyola Poverty Law Journal* 123.

62 General Comment 9, para 31.

63 See section 2 above.

64 See eg General Comment 9, para 31.

65 Arts 16 & 21.

66 Art 16(1).

necessary support to the child and care givers, including through establishing special monitoring units.⁶⁷

On its part, article 21 sets out the right to protection against harmful social and cultural practices. This provision, amongst others, requires states to take all appropriate measures to eliminate harmful social and cultural practices, which include customs, discrimination and prejudices affecting the welfare, dignity, normal growth and development of the child.⁶⁸ Above all, the African Children's Charter outlaws 'any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations' contained in the Charter.⁶⁹ Lastly, the Charter reflects the cardinal principles of the CRC by, amongst others, providing in article 5 for the right of the child to life, survival and development.⁷⁰

3.4 Detecting the pertinent international standards for combating violence

The survey of the applicable human rights law above gives insights into the international standards African states must adhere to in setting out the domestic framework for combating violence against children with disabilities.⁷¹ In particular, the standards require states to ensure that the domestic framework incorporates the following: first, the existence of effective legislation for combating all forms of violence against children with disabilities, including prohibiting exploitation and harmful practices;⁷² second, legislation for identifying, investigating, prosecuting and punishing instances and perpetrators of violence against children with disabilities;⁷³ third, the provision of forms of gender- and age-sensitive assistance and support for children with disabilities and their families and caregivers, including information on identifying, preventing and dealing with all forms of violence and abuse;⁷⁴ fourth, appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of children with disabilities who become victims

67 Art 16(2).

68 Art 21(1)(a) & (b).

69 See African Children's Charter, art 1(3).

70 See art 5(2). See generally D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 129.

71 See sections 3.1, 3.2 and 3.3 above.

72 See eg CRPD art 16(1); African Children's Charter arts 16(1) and 21(a) & (b). It is worth noting that the African Commission on Human and Peoples' Rights has also emphasised such obligation in the context of the protection of the right to life. See General Comment No 3 on the African Charter on Human and Peoples Rights: The Right to Life (Article 4) (2016).

73 See eg CRPD art 16(5); African Children's Charter art 16(2); CRC art 19(2); CRPD Committee Concluding Observations on Australia (2013) para 38; Concluding Observations on El Salvador (2013) para 36(a).

74 See eg CRPD art 16(2); Concluding Observations on Sweden (2014) para 42.

of any form of exploitation, violence or abuse,⁷⁵ fifth, independent monitoring of all facilities and programmes designed to serve persons or children with disabilities.⁷⁶ In addition, states must take additional measures, such as data collection on violence,⁷⁷ and awareness raising,⁷⁸ in addressing violence. Lastly, states must protect the right to survival and development of children with disabilities.⁷⁹

It is thus relevant to examine the extent to which the selected African state parties to the CRPD have put in place a domestic framework for combating violence against children with disabilities that adheres to the standards identified above. These include Malawi, South Africa, Kenya, Uganda, Tanzania, Ghana and Zambia. Although the standards identified above are all crucial, for the purposes of the analysis the study focuses on assessing compliance with three standards, namely, protecting the right to survival and development; legislative provisions that prohibit violence, including harmful practices and exploitation; and putting in place a legal (legislative) mechanism for identifying, investigating and prosecuting instances of violence against children with disabilities. The requirement to protect survival and developmental rights has been identified as it is not only one of the cardinal principles of the CRC and, by extension, the African Children's Charter, but the CRC Committee has also highlighted its significance in so far as the protection of children with disabilities is concerned.⁸⁰ In addition, in a study commissioned by the African Child Policy Forum (ACPF) on best practices relating to children with disabilities in Africa, it was highlighted that a domestic framework is considered to be 'disability friendly' with regard to children with disabilities if, amongst others, it ensures the rights to survival, protection and development of children with disabilities.⁸¹ On their part, the obligations to have legislative provisions that prohibit violence, including harmful practices and exploitation, and putting in place a legislative

75 See eg CRPD art 16(4); Concluding Observations on El Salvador (2013) para 36(e); CRC Committee General Comment 9, para 43(i).

76 See eg CRPD art 16(3).

77 See eg Concluding Observations on China (2012) para 30; Concluding Observations on Tunisia (2011) para 17(a).

78 See eg CRPD art 8(1)(b).

79 See eg CRC art 6; African Children's Charter art 5(2); CRC Committee General Comment 9 para 31; Karp (n 61 above) 123; Olowu (n 70 above) 129. It is worth noting that the report by ACPF on best practices relating to children with disabilities observed that a domestic framework designed to protect children with disabilities must also ensure the 'development of both disability-specific and comprehensive child-rights legislation that explicitly prohibits discrimination and ensures survival and developmental rights, including education, health ...' See ACPF *Reasons for hope* (n 1 above) 16. The report further highlights that 'legislation ... should explicitly ... recognise survival and developmental rights, including education, health and alternative care'. See ACPF *Reasons for hope* (n 1 above) 24.

80 See generally General Comment 9 para 31.

81 ACPF *Reasons for hope* (n 1 above) 5. The report further observes that a domestic framework will be able to provide protection to children with disabilities if it, amongst others, facilitates their survival and development. See ACPF *Reasons for hope* (n 1 above) 6.

mechanism for identifying, investigating, prosecuting and punishing instances of violence against children with disabilities have been specifically isolated, for two particular reasons. First, these obligations will ensure the criminalisation of all acts of violence against children with disabilities, thereby providing higher standards of protection from violence. Second, the regimes under the CRPD, CRC and African Children's Charter have all emphasised these obligations.⁸²

4 Appraising legislative mechanisms in selected African jurisdictions

4.1 Malawi

Malawi enacted the Disability Act in 2012 as the jurisdiction's contemporary principal disability legislation.⁸³ The Disability Act contains a number of survival and developmental rights, such as healthcare.⁸⁴ However, it does not set out the right to protection from violence, abuse or exploitation. Therefore, it does not impose any obligation to identify, investigate and prosecute incidents of violence or abuse against children with disabilities. The Act does not even prohibit harmful practices against persons or children with disabilities.

Malawi also enacted the Child Care, Protection and Justice Act (CCPJA) as its child protection legislation.⁸⁵ The CCPJA sets out a number of obligations that could facilitate the survival and developmental rights of children with disabilities. For example, the Act requires local authorities to provide shelter, within their areas, to children who are lost, abandoned or in need of refuge, and to trace the parents of such children.⁸⁶ In addition, the Act criminalises acts relating to child neglect or desertion.⁸⁷

The Act also imposes duties on the parent or guardian to take care of children.⁸⁸ Amongst others, these responsibilities include 'non-deprivation' or the provision of welfare and primary responsibility for

82 See eg CRPD arts 16(1) & (5); African Children's Charter arts 16(1) & (2); CRC art 19(2); CRPD Committee Concluding Observations on Australia (2013) para 38; Concluding Observations on El Salvador (2013) para 36(a). The African Commission on Human and Peoples' Rights has emphasised the state obligation to exercise due diligence by effectively investigating and prosecuting cases resulting in killings as a significant obligation for protecting the right to life. See General Comment No 3 (n 72 above).

83 Act 8 of 2012.

84 Sec 6.

85 Act 22 of 2012.

86 Secs 73 & 74 CCPJA.

87 See sec 22.

88 See CCPJA sec 3.

raising children.⁸⁹ The parental duties further extend to protection from neglect, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards; the provision of proper guidance, care, assistance and maintenance for the child's survival and development, including adequate diet, clothing, shelter and medical attention; and ensuring that there is always a competent person to care of the child.⁹⁰ Furthermore, the Act makes provision for the protection of children from undesirable practices, which include child abduction; child trafficking; harmful cultural practices; forced marriage or betrothal; and the pledging of a child as security.⁹¹

It can be observed that the protection of these rights would address the glaring gaps in the Disability Act in providing legal protection from violence for against children with disabilities. For example, section 80 expressly prohibits subjecting a child to a social or customary practice that is harmful to the health or general development of the child, while section 83 criminalises such acts. On its part, section 84 requires a social welfare officer, who has reasonable grounds to believe that a child has been trafficked, abducted, subjected to a harmful cultural practice, or used for the purposes of prostitution or immoral practices, to remove and temporarily place the child in a place of safety. The drawback is that the Act does not expressly impose the duty to identify and investigate incidents of violence or abuse. Nonetheless, these duties might be implicit in the responsibility to prosecute such incidents and the duty to remove affected children to a place of safety. Above all, the Act expressly domesticates the CRC and the African Children's Charter.⁹² Consequently, the provisions in the two treaties that protect all children, including children with disabilities, from violence form part of domestic law and can be enforced before local courts.⁹³ The domestication would address most of the gaps in the national framework explained above.

4.2 South Africa

South Africa has not as yet enacted disability-specific legislation, but it has child protection legislation in place, namely, the Children's Act.⁹⁴ The Act contains a number of provisions setting out mechanisms that could protect

89 Secs 3(1)(a) & (b)(iv).

90 Sec 3(1)(b)(i)(ii) & (iii).

91 See Part II Division 6 of the Act (eg secs 78-82).

92 Sec 4(c) of Third Schedule.

93 The express domestication is significant as Malawi essentially has a dualist legal system that requires, on the one hand, the transformation of treaties Malawi ratified in 1995 through an incorporation by an Act of Parliament while, on the other hand, it appears not to require such transformation for treaties ratified before 1995. See the 1995 Malawian Constitution, secs 211(1) & (2); DM Chirwa *Human rights under the Malawian Constitution* (2011) 29-30; EM Chilemba 'Malawi' (2014) 2 *African Disability Rights Yearbook* 211. The express domestication removes any doubt about the domestic applicability of the CRC and the African Children's Charter in Malawi.

94 Act 38 of 2005.

children with disabilities from violence. For example, section 11 of the Act is dedicated to children with disabilities and children with chronic illnesses. Amongst others, the provision guarantees every child with a disability 'the right not to be subjected to medical, social, cultural or religious practices that are detrimental to his or her health, well-being or dignity'.⁹⁵ Furthermore, the Children's Act sets out a number of developmental and survival rights in addition to the general rights of children. These include the right to freedom from harmful practices, such as those based on culture, society or religion.⁹⁶ Thus, the Act expressly provides protection from harmful practices against children, including children with disabilities.

The Act further makes provision for 'particular measures' that could strengthen the protection of children from violence, abuse and exploitation. For example, section 104 provides for a national child protection system that should be properly resourced, co-ordinated and managed. Section 105 provides for designated child protection services for each of the nine provinces of South Africa. In terms of section 105, designated child protection services include the carrying out of investigations and the making of assessments, in cases of suspected abuse, neglect or abandonment of children.⁹⁷ On its part, section 107 provides for the designation of child protection organisation(s) that will be responsible for performing all or any specific designated child protection services in the relevant province. Furthermore, section 110 sets out a mechanism for the reporting of abused or neglected children and those in need of care and protection. In terms of this mechanism, any designated person or officer who, on reasonable grounds, concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, is required to report the conclusion to a designated child protection organisation, the provincial department of social development or a police official⁹⁸ who should, upon receiving the report, ensure the safety and well-being of the child concerned if the child's safety or well-being is at risk.⁹⁹ The designated child protection organisation or the provincial department of social development should further cause an investigation to be carried out and, depending on the findings, initiate proceedings in terms of the Act for the protection of the child without delay. The two institutions are also required to report the commission of an offence to a police officer after having carried out the investigation.

The Act further makes provision for a national child protection register.¹⁰⁰ The purposes of the register (in Part A) include having a record

95 Sec 11(3).

96 See generally sec 12.

97 Sec 105(5)(c).

98 Sec 110(1).

99 Secs 110(4)(a) & (5)(a).

100 Secs 111-128.

of abuse or deliberate neglect inflicted on specific children; having a record of the circumstances surrounding the abuse or deliberate neglect; and using the information in the register in order to protect these children from further abuse or neglect.¹⁰¹ The reports of the neglect of a child contained in the register are also required to indicate whether the child has a disability and, if so, the nature of the disability.¹⁰² The register (in Part B) is further required to have a record of persons who are unsuitable to work with children and to use the information in the register in order to protect children in general against abuse from these persons.¹⁰³ In terms of the mechanism, a person whose name is recorded in Part B of the register will not be allowed to do any work, duties or functions that involve dealing with or having access to children.¹⁰⁴

It can be observed that the national child protection register sets out a mechanism for protecting children, including children with disabilities, from neglect, abuse and other forms of violence or the continuation thereof at the hands of persons with a record of perpetrating such abuses. The Children's Act further contains provisions that prohibit certain acts of violence, exploitation and abuse against children. For example, section 141 prohibits child labour and exploitation. In view of this, South Africa's legislative framework may be regarded as demonstrating many aspects of compliance with the international standards for combating violence against children with disabilities.

4.3 Zambia

In 2012 the Persons with Disabilities Act was enacted as Zambia's contemporary disability legislation.¹⁰⁵ It sets out mechanisms that could address violence against children with disabilities. For example, Part IX of the Act provides for offences and penalties comprising fines and a term of imprisonment.¹⁰⁶ The offences include the concealment of a person with a disability by a parent, guardian or any next of kin.¹⁰⁷ The Act prohibits any such concealment if it will have the effect of denying the concealed person or child with a disability the opportunities and services guaranteed under the Act.¹⁰⁸ It further prohibits exploiting or subjecting any person with a disability to abusive, violent or degrading treatment,¹⁰⁹ and also prohibits

101 Secs 113(a), (b) & (c).

102 Secs 114(1)(a) & (2)(a)(iii).

103 Sec 118.

104 Sec 123.

105 Act 6 of 2012. Zambia is yet to enact generic child protection legislation. Currently it has a number of child-related statutes.

106 Secs 61, 62 & 63.

107 Sec 61.

108 As above.

109 Sec 6(2).

the use of derogatory terms against persons or children with disabilities because of the disability of the person concerned.¹¹⁰

The Act makes provision for the continuation of the Zambia Agency for Persons with Disabilities,¹¹¹ originally established under the repealed *Zambian Persons with Disabilities Act of 1996*.¹¹² The Act mandates the Agency to carry out programmes and conduct campaigns to inform the public and raise public awareness on issues relating to disability, and in particular to achieve the following:¹¹³ combating stereotypes, prejudices and harmful practices relating to persons with disabilities in all areas of life;¹¹⁴ promoting positive perceptions and greater social awareness towards persons with disabilities;¹¹⁵ and promoting and encouraging the media to portray persons with disabilities in a manner consistent with the purpose of the Act and the CRPD.¹¹⁶

The Act also requires the government to develop and implement national strategies and plans which incorporate measures aimed at ensuring, amongst others,¹¹⁷ the protection of persons with disabilities from all forms of exploitation, violence and abuse, and that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.¹¹⁸ Lastly, the Act recognises survival and developmental rights, such as healthcare.¹¹⁹ However, it does not specifically recognise survival and development as a substantive right.¹²⁰ In conclusion, it can be stated that the Act incorporates most of the standards for combating violence against children with disabilities, as it almost duplicates the provisions in article 16 of the CRPD, discussed above.¹²¹

4.4 Tanzania

The *Persons with Disabilities Act* was passed in 2010 as the modern principal disability legislation of Tanzania.¹²² It contains a number of provisions that could play a role in curbing violence against children with disabilities. For example, section 20(1) imposes a duty on a local government to safeguard and promote the rights and welfare of a person

110 Sec 6(3).

111 See sec 11(1).

112 The old Act was repealed under sec 67 of the 2012 Act.

113 Sec 17(4).

114 Sec 17(4)(a).

115 Sec 17(4)(d).

116 Sec 17(4)(e).

117 Sec 21.

118 Secs 21(1) & (2)(d).

119 Secs 27 & 28.

120 Perhaps this right could have been included in child protection legislation (which Zambia does not have).

121 See section 3.1 above.

122 Act 9 of 2010.

with a disability within its area of jurisdiction. Section 20(3) requires the local government authority, through a social welfare officer, to provide counselling to parents, guardians, relatives and persons with disabilities for the purpose of reducing or removing the degree of stigma among them.

Section 21(1) places the duty on any member of the community who has evidence or information that the rights of a child with disabilities are being infringed or that a parent, guardian or relative having custody of a person or child with a disability who is able to, but refuses or neglects to, provide the right to play, medical care, leisure and education, to report the matter to the local government authority as well as to any other relevant authority in the area. On its part, section 21(2) requires the social welfare officer, upon receiving the report, to summon the person against whom the report was made to discuss the matter and to make a decision in the best interests of the person or child with a disability. In terms of section 23(3), where the person against whom the report was made refuses to comply with the decision made under sub-section (2), the social welfare officer should refer the matter to the court, which should hear the matter and in that respect order the parent, guardian or relative to execute a bond to exercise proper care and guardianship by signing and undertaking to provide a person or child with a disability with any or all of the requirements.

The Act also takes the approach of making provision for offences and penalties comprising a term of imprisonment or a fine. The list of offences includes hiding, concealing or causing a person with a disability not to be accessible to or admitted to schools or training institutions for whatever reason;¹²³ abandoning or rejecting or denying a person with a disability the right to social support;¹²⁴ and denying participation of a person with a disability in social, economic and political activities.¹²⁵ It is worth noting that the Act also recognises survival and developmental rights, such as healthcare.¹²⁶

The analysis reveals that the Act does not expressly impose the obligation to protect persons or children with disabilities from violence, exploitation or abuse, nor does it contain a provision prohibiting harmful practices. Therefore, it does not impose a duty to identify, investigate and prosecute incidents of violence. Nevertheless, it prohibits and criminalises acts constituting violence and abuse, such as neglecting, abandoning or concealing a person or child with a disability. It may be submitted that the duty to identify, investigate and prosecute should be covered by the criminalisation of acts that constitute violence and abuse.

123 Sec 62(c).

124 Sec 62(d).

125 Sec 62(i).

126 Sec 26.

Furthermore, Tanzania adopted the Law of the Child Act in 2009,¹²⁷ which is applicable in Tanzania Mainland. The Law of the Child Act in section 9(3) places duties and responsibilities on every parent towards his or her child, which include the duty to protect the child from neglect, violence, abuse, exposure to physical and moral hazards and oppression,¹²⁸ and to provide guidance, care, assistance and maintenance for the child and the assurance of the child's survival and development.¹²⁹ Section 13(1) prohibits any person from subjecting a child to torture or other cruel, inhuman punishment or degrading treatment, including any cultural practice which dehumanises or is injurious to the physical and mental well-being of a child. Section 95 places the duty on any member of the community to report incidents of abuse against a child to the local government authority in the area. Section 96 requires a social welfare officer, who has reasonable grounds to suspect child abuse or that a child is in need of care and protection, to enter and search the premises where the child is being kept, in order to investigate in the company of a police officer.¹³⁰ The mechanisms provided for in the child protection statute should complement and strengthen the rather inadequate legal protection under the disability legislation.

4.5 Uganda

The Persons with Disabilities Act was enacted in 2006 as the principal disability legislation in Uganda.¹³¹ It sets out a number of mechanisms to address violence against children with disabilities. For example, the Act recognises survival and developmental rights, such as healthcare.¹³² In addition, the Act prohibits subjecting a person with a disability to cruel, inhuman or degrading treatment, or medical or scientific experimentation without his or her free and informed consent.¹³³ However, the Act does not expressly impose the obligation to protect persons or children with disabilities from violence, exploitation or abuse, nor does it contain a provision prohibiting harmful practices. It, therefore, does not impose the duty to identify, investigate and prosecute incidents of violence. Nevertheless, the Act prohibits and criminalises acts that constitute violence and abuse, such as cruel and inhuman treatment against a person or child with a disability. This mechanism may be regarded as inherently implying the duty to identify, investigate and prosecute incidents of cruel and inhuman treatment against a child with a disability.

127 21 of 2009.

128 Sec 9(3)(a).

129 Sec 9(3)(b).

130 Sec 96(1).

131 Act 20 of 2006.

132 Secs 7 & 8.

133 Secs 34(1) & (2).

Furthermore, Uganda enacted child-specific legislation in the Children Act,¹³⁴ which contains various provisions that could protect children with disabilities from violence, abuse and exploitation. For example, section 5(2) requires any person having custody of a child to protect the child from violence, abuse and neglect. In addition, section 7 outlaws subjecting a child to social or customary practices that are harmful to the child's health. Similarly, section 8 prohibits employing or engaging a child in any activity that may be harmful to his or her health, education or mental, physical or moral development. These provisions may be regarded as a prohibition of harmful practices.

In addition, the Act imposes a duty on each local government council to provide assistance and accommodation to any child in need (of protection) within its area of jurisdiction, or any child who appears to require assistance and accommodation as a result of his or her having been lost or abandoned or seeking refuge.¹³⁵ The Act further requires each local government council to make every effort, including publication through the mass media, to trace the parents or guardians of any lost or abandoned child or to return the child to the place where he or she ordinarily resides and, where this is not possible, to refer the matter to a probation or social welfare officer or to the police.¹³⁶ Lastly, the Act imposes a duty on any member of the community who has evidence that a child's rights are being infringed or that a parent, guardian or any person having custody of a child is able to but refuses or neglects to provide the child with adequate food, shelter, clothing, medical care or education, to report the matter to the local government council in the area.¹³⁷ These provisions should play a crucial role in protecting children with disabilities from various forms of violence and abuse.

Above all, the Children Act explicitly domesticates the CRC and the African Children's Charter.¹³⁸ Consequently, the provisions in these two treaties which protect all children, including children with disabilities, from violence form part of domestic law and can be enforced before local courts. The domestication could address most of the gaps in the national framework identified above.

4.6 Kenya

Kenya enacted the current Persons with Disabilities Act in 2003.¹³⁹ The Act contains a few provisions that could be utilised to protect children with

134 Ch 59 of the Laws of Uganda.

135 Sec 10(6).

136 Sec 10(7).

137 Sec 11(1).

138 Sec 4(3) of the First Schedule.

139 Act 14 of 2003. The Act is in the process of being reviewed, probably to take into account the post-CRPD disability rights standards.

disabilities from violence. For example, the Act sets out survival and developmental rights, such as health.¹⁴⁰ In addition, the Act prohibits and criminalises the concealment of any person with a disability in such a manner as to deny such a person the opportunities and services available under the Act.¹⁴¹ However, the Act does not expressly impose the obligation to protect persons or children with disabilities from violence, exploitation or abuse, nor does it contain a provision prohibiting harmful practices. It thus does not impose the duty to identify, investigate and prosecute incidents of violence. Nevertheless, it prohibits and criminalises certain acts that constitute violence and abuse, such as neglecting, abandoning or concealing a person or child with a disability. The duty to identify, investigate and prosecute should be understood as being implicit in the prohibition and criminalisation of acts which constitute violence and abuse.

Furthermore, Kenya adopted child protection legislation, namely, the Children's Act of 2007 (revised in 2010).¹⁴² The Act contains provisions that could address violence against children with disabilities. For example, the Act protects the inherent right to life of a child, and places a duty on government and the family to ensure the survival and development of the child.¹⁴³ Section 10 provides protection to a child from economic exploitation and any work likely to be hazardous to or interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.¹⁴⁴ Section 13 provides protection to any child from physical and psychological abuse, neglect and any other form of exploitation, including the sale, trafficking or abduction by any person.¹⁴⁵ Section 14 prohibits subjecting a child to female circumcision, early marriage or other cultural rites, customs or traditional practices likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development. Section 15 protects a child from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials. Section 18(1) prohibits subjecting a child to torture or cruel treatment or punishment.

In addition, The Act establishes a Directorate of Children's Services and Children's Officers, comprising a director and senior children's officers.¹⁴⁶ The functions of the director include providing assistance and procuring accommodation for any child not in proper custody, any child who is abandoned or any child who is in need of refuge or safety,¹⁴⁷ and

140 Sec 20.

141 Sec 45.

142 Ch 141.

143 Sec 4(1).

144 Sec 10(1).

145 Sec 13(1).

146 See sec 37(1).

147 Sec 38(2)(j).

tracing the parents or guardians of any lost or abandoned child, or returning a lost or abandoned child to his or her lawful place of residence.¹⁴⁸ These functions should protect children with disabilities from exploitation, abuse and violence. Thus, the Act contains mechanisms that could protect children, including children with disabilities, from various forms of violence and abuse. However, the Act still is not clear on the duty to identify, investigate and prosecute incidents of violence.¹⁴⁹

4.7 Ghana

The Persons with Disabilities Act of Ghana was enacted in 2006.¹⁵⁰ The Act sets out certain mechanisms that could protect children with disabilities from violence. For example, it provides for survival and developmental rights, such as healthcare.¹⁵¹ Furthermore, the Act contains two different sections that make provision for offences and their penalties in the form of fines or terms of imprisonment.¹⁵² Amongst others, it makes it an offence for any person to contravene the provisions setting out rights relating to family life and social activities,¹⁵³ and to exploit a person with a disability.¹⁵⁴ Further, section 4(1) prohibits exploiting or subjecting a person with a disability to abusive or degrading treatment; while section 8 criminalises such acts.

The Act further prohibits and criminalises calling a person with a disability by any derogatory names because of the disability of the person.¹⁵⁵ However, the Act does not expressly impose the obligation to protect persons or children with disabilities from violence or prohibit any harmful practices. It, therefore, does not impose the duty to identify, investigate and prosecute incidents of violence. Nonetheless, it prohibits and criminalises several acts that constitute violence, and it expressly prohibits and criminalises exploitation and abusive treatment. Ghana also enacted child protection legislation, namely, the Children's Act.¹⁵⁶ Section 6 sets out parental duties that include protecting a child from neglect, violence, abuse, exposure to physical and moral hazards and oppression.¹⁵⁷ Section 10(1) prohibits any person from treating a child with a disability in an undignified manner. Furthermore, section 17 sets out a mechanism requiring any person to report child abuse and protection

148 Sec 38(2)(k).

149 Sec 38(2)(g) merely requires the Director of Children's Services to 'make such enquiries and investigations and provide such reports and assessments as may be required by any court or for the enforcement of any order made by a court' under the Act.

150 Act 715 of 2006.

151 Secs 31-35.

152 Secs 8 & 30.

153 Sec 1.

154 Sec 4.

155 Sec 37.

156 Act 560 of 1998.

157 Sec 6(3)(a).

cases to the Social Welfare and Community Development Department of a district assembly. The Department is required to carry out an investigation where there are reasonable grounds to suspect child abuse or a need for care and protection.¹⁵⁸ These provisions should complement the disability legislation by addressing the gaps in the latter.

5 Conclusion

The study has revealed that children with disabilities in Africa face various forms of violence despite a number of African state parties to the CRPD having enacted disability-specific and/or child protection legislation. Such legislation is expected to provide legislative mechanisms that adhere to international standards for the protection of children with disabilities from violence. The study has explored international standards, and it has, furthermore, examined the extent to which the disability and child protection laws of selected African state parties to the CRPD incorporate, or adhere to, these standards. Four conclusions may be drawn in relation to the analysis. First, most disability-specific or child protection statutes either protect the right to survival and development, or they recognise rights and/or obligations that could protect the survival and development of children, including children with disabilities. The child protection statutes of South Africa, Malawi and Tanzania and the disability legislation of Malawi, Zambia, Uganda, Kenya, Ghana and Tanzania are cases in point, as discussed above.

Second, certain disability laws still fall short of conforming to the standard of having legal provisions that protect children with disabilities from all forms of violence, abuse and exploitation, including by prohibiting harmful practices. The disability legislation of Malawi, Uganda, Kenya, Ghana and Tanzania falls within this category. Third, most of the disability laws do not conform to the standard that requires states to have a legislative framework expressly imposing the duty to identify, investigate, prosecute and punish incidents of violence and abuse against children with disabilities. The disability statutes that fall within this bracket include those of Kenya, Uganda, Ghana and Malawi. Lastly, a number of jurisdictions have set out elaborate provisions dealing with violence against all children, which includes children with disabilities, in their child protection laws, as opposed to disability-specific legislation. Such jurisdictions include Malawi, Uganda, Kenya, Ghana and Tanzania.

Therefore, it may be concluded from the analysis that African countries need to modify their disability and child protection laws, which are part and parcel of the required legislative implementation measures, in conformity with the CRPD and other international standards. In addition,

¹⁵⁸ Sec 19(1).

the jurisdictions that have not yet domesticated the relevant treaties by means of their statutes can revise the relevant legislation to expressly incorporate the treaties. Such an exercise would enable these legislative measures to provide mechanisms that comply with international standards for combating violence against children with disabilities in their jurisdictions. Indeed, most of the jurisdictions the study has assessed would benefit from this type of exercise. This modification is necessary especially regarding aspects of ensuring the identification, investigation, prosecution and punishment of all forms of violence and abuse, and the existence of legal provisions that protect children with disabilities from all forms of violence. Such modification would go a long way towards making disability and child protection laws provide the appropriate legislative mechanisms for combating violence against children with disabilities in Africa, as envisaged by the relevant international standards. Of course, a jurisdiction could set out anti-violence provisions in penal statutes, such as criminal or penal codes. However, these statutes or codes may not specifically address violence against children with disabilities. Therefore, utilising disability-specific and/or child protection legislation to combat violence against children with disabilities is undoubtedly one of the most appropriate and necessary means of incorporating the requisite international standards.

CHAPTER 5

MY RIGHT TO KNOW: DEVELOPING SEXUALITY EDUCATION RESOURCES FOR LEARNERS WITH INTELLECTUAL DISABILITIES IN THE WESTERN CAPE, SOUTH AFRICA

Rebecca Johns*
Colleen Adnams**

Summary

In South Africa, the continuing HIV pandemic and high prevalence of sexual abuse focus attention on the vulnerability of persons with intellectual disabilities and highlight the need to provide them with comprehensive sexuality education. Access to sexuality education is intrinsic to supporting sexual health as well as any possibility of informed consent (or self protection) in relation to sexual behaviour with others or sexual health treatment, such as contraception. The right to access information relating to sexual health programmes is enshrined by the UN Convention on the Rights of Persons with Disabilities and South African law, such as the Constitution.

Learners and adults with intellectual disabilities are frequently denied this information due to negative beliefs toward their sexuality and learning capabilities compounded in Southern Africa by a paucity of programmes, training and resources to accommodate their learning needs. Over the past 10 years, the Western Cape Forum for Intellectual Disability (WCFID) has developed materials to enable educators and health care workers to provide sexuality education to this neglected population group. This article broadly describes the content and methodology of one such programme for learners with intellectual disabilities alongside contextual and other factors that impact on sexuality education for people with intellectual disabilities in South Africa.

* BA Hons (Exeter, UK), MEd (UWC); Life Skills Trainer and Resource Developer, Western Cape Forum for Intellectual Disability (WCFID).

** BSc (UKZN), BSc Med Hons MBChB (UCT), FCPaed (SA) (College of Paediatrics of South Africa); Vera Grover Professor of Intellectual Disability, Dept of Psychiatry and Mental Health, University of Cape Town.

1 Introduction

The UN Convention on the Rights of Persons with Disabilities (CRPD)¹ provides a framework for the elimination of discrimination, and champions equality in all aspects of life. Sexuality cannot be detached from human experience and demands its presence in any document that promotes the rights of people with disabilities, especially in view of the ‘interdependence, and interrelatedness’ of human rights, as stated by the CRPD.² The provision of comprehensive³ and accessible sexuality education is integral to a rights-based framework. This mandate is supported by international research⁴ and a growing body of African research into the need for sexuality education for people with intellectual disabilities,⁵ as well as South African law relevant to this area.⁶ However, the provision of comprehensive sexuality education for the youth in Southern Africa, especially those with disabilities, is inadequate despite the high rate of HIV and unacceptable levels of sexual violence toward women and girls.⁷

The implementation of comprehensive sexuality education is hindered by an ambivalence toward acknowledging the sexuality of adolescents, leaving them more vulnerable and unprepared for their sexual lives.⁸ This resistance is amplified as far as the sexuality of people with disabilities is concerned,⁹ and even more so in relation to people with intellectual

1 UN General Assembly, Convention on the Rights of Persons with Disabilities (CRPD): Resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106.

2 CRPD Preamble, para (c).

3 UNESCO *Young people today, time to act now: Why adolescents and young people need comprehensive sexuality education and reproductive health services in Eastern and Southern Africa* (2013) 21.

4 NA Gougeon ‘Sexuality education for students with intellectual disabilities: A critical pedagogical approach; outing the ignored curriculum’ (2009) 9 *Sex Education* 277; G Katz & E Lazcano-Ponce ‘Sexuality in subjects with intellectual disability: An educational intervention proposal for parents and counsellors in developing countries’ (2008) 50 *Salud publica de mexico* 239; T Gardiner & E Braddon ‘A right to know. Facilitating a relationship and sexuality programme for adults with intellectual disabilities in Donegal’ (2009) 37 *British Journal of Learning Disabilities* 327; A Craft *Practice issues in sexuality and learning disabilities* (1994); JK Carter ‘Sexuality education for students with specific learning disabilities’ (1999) 34 *Intervention in School and Clinic* 220; L Lofgren-Martenson ‘I want to do it right! A pilot study of Swedish sex education and young people with intellectual disability’ (2012) 30 *Sex and Disability* 209.

5 T Aderemi ‘Teachers’ perspectives on sexuality and sexuality education of learners with intellectual disabilities in Nigeria’ (2014) 32 *Sexuality and Disability* 247; J Hanass-Hancock et al ‘The cross-cultural validation to measure the needs and practices of educators who teach sexuality education to learners with a disability in South Africa’ (2014) 32 *Sex and Disability* 279; P Rohelder & L Swartz ‘Providing sex education to persons with learning disabilities in the era of HIV/AIDS. Tensions between discourses of human rights and restriction’ (2009) 14 *Journal of Health Psychology* 601.

6 Constitution of the Republic of South Africa, 1996; National Health Act 61 of 2003; Children’s Act 38 of 2005.

7 UNESCO (n 3 above).

8 UNESCO *International Technical Guidance on Sexuality Education. An evidence-informed approach for schools, teachers and health educators* (2009) 2.

9 M Schaaf ‘Negotiating sexuality in the UN Convention on the Rights of Persons with Disabilities’ (2011) (14) *International Journal on Human Rights* 114.

disabilities.¹⁰ Ambivalence may lead to the denial of a person's sexuality, or the reframing of their sexual needs solely within an abuse prevention focus.

The article aims to describe a sexuality education programme and resources for learners and adults with mild, moderate and high severe intellectual disabilities who attend LSEN (Learners with Special Educational Needs) schools in the Western Cape, South Africa.¹¹ In addressing these aims, the article examines the contextual and other factors that impact on sexuality education for people with intellectual disabilities in South Africa.

2 Defining sexuality, sexual health and comprehensive sexuality education

Any discussion of sexuality education will be framed by the meaning attached to the construct of sexuality. The World Health Organisation (WHO) defines sexuality as 'a central aspect of being human throughout life'.¹² Sexuality includes private sexual behaviour, sexual orientation, identity and feelings, alongside the social expression of sexual identity in gender roles, values and relationships. Social, cultural and historical contexts will shape personal experiences and the social construction of sexuality at any point in time. Within this view, it is not possible to limit our discussion of sexual health as simply the absence of disease or as excluding any sector of any population. The WHO defines of sexual health as

a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. For sexual health to be attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled.¹³

10 M Perlin & A Lynch 'Love is a four-letter word: Sexuality, international human rights and therapeutic jurisprudence' (2014) *SSRN Electronic Journal* 10 doi 10.2139/ssrn.2380714 (accessed 18 March 2016).

11 The Western Cape Forum for Intellectual Disability (WCFID) has published resources to support sexual health in children and adults with intellectual disabilities: R Johns 'All about me: A life skills, sexuality and HIV/AIDS education programme for learners with intellectual disability' (2007) WCFID; <http://www.wcfid.co.za> (accessed 18 March 2016).

12 World Health Organisation (WHO) *Defining sexual health: Report of a technical consultation on sexual health 28-31 January 2002 Geneva* (2006) 5.

13 WHO (n 12 above) 5.

Comprehensive sexuality education is underpinned by this view of sexual health and supports the youth to develop a positive view of their sexuality.¹⁴ The United Nations (UN) Population Fund (UNFPA) describes comprehensive sexuality education as ‘a rights-based and gender-focused approach to sexuality education’.¹⁵ The United Nations Educational, Scientific and Cultural Organisation (UNESCO) International Technical Guidance on Sexuality Education states that alongside scientifically accurate information, sexuality education provides ‘opportunities for young people to explore their values and practise decision making and other life skills they will need to be able to make informed choices about their sexual lives’.¹⁶ Just as sexual health does not only focus on the absence of disease, comprehensive sexuality education goes beyond a narrow focus of preventing pregnancy and sexual disease and is underpinned by universal human rights relating to health and education for all.¹⁷

3 How do we understand intellectual disability?

3.1 Models of disability

In the past, the medical model dominated our understanding of intellectual disability, resulting in a paternalistic approach to care that prioritised protection and separate, specialised services. The social ecological model, as the theoretical framework of the CRPD, challenges the medical model through conceptualising disability as the result of a discriminatory social system.¹⁸ The CRPD recognises the need to protect the human rights of all, including those who ‘require more intensive support’,¹⁹ which is relevant to the different support needs of people with different levels of intellectual disability.

Different levels of cognitive ability within intellectual impairment, described as mild, moderate, severe or profound,²⁰ present a diverse

14 UN Population Fund (UNFPA) Operational Guidance for Comprehensive Sexuality Education (2014) 6.

15 UNFPA (n 14 above).

16 UNESCO (n 8 above) 2.

17 UNFPA (n 14 above).

18 Schaaf (n 9 above) 116.

19 CRPD, Preamble (j).

20 Mild intellectual disability is indicated by an IQ of between 50 and 69 and accounts for about 80 percent of people with intellectual disability. Moderate intellectual disability is indicated by an IQ of between 35 and 49 and accounts for about 10 percent of people with intellectual disability. Severe intellectual disability is indicated by an IQ of between 20 and 34 and accounts for 4 percent of all people with intellectual disability. Profound intellectual disability is indicated by an IQ score usually below 20 and accounts for 2 percent of all people with intellectual disability. See C Adnams ‘Assessment of levels of intellectual disability and adaptive behaviour’ in R Johns & C Adnams (eds) *Understanding intellectual disability: A handbook for families, staff, students and professionals* (2016) 14.

population group and, thus, diverse support needs. An acknowledgment of these different levels is inevitably framed within a medical discourse. However, the more recent bio-pyscho social model²¹ provides a more integrated view by acknowledging social barriers and discrimination alongside diverse impairments that may require individual treatment and accommodation. Current debates reflect the difficulty of ethically and equitably addressing the different abilities of people with intellectual disabilities in relation to their rights.²²

Discerning the appropriate focus of sexuality education for children and adults with more severe levels of cognitive impairment, namely the high support needs of those with severe to profound intellectual disability, is difficult due to their significantly-reduced understanding and autonomy: 'A person with profound intellectual disability cannot understand verbal requests, has very limited communication, no self-care skills and is usually incontinent.'²³ One approach is to engage caregivers to acknowledge and understand the rights and needs of this group in relation to their sexual health.²⁴ The issues related to 'recognising the dignity' and sexual health rights of these individuals are complex and, although outside of the scope of the article, need urgent engagement in relation to policy and practice²⁵ in special care facilities, residential facilities and community settings.

3.2 Problem of terminology

People with intellectual disabilities have always been 'marginalised and stigmatised'.²⁶ The terminology used to describe intellectual disability has continually changed, reflecting the attempt to 'define difference differently' and 'remove the stigma associated with a particular term'.²⁷ The article uses the current, internationally-accepted term 'intellectual

21 WHO 'International classification of functioning, disability and health' (ICF) Geneva (2001).

22 Submission to the Committee on the Rights of Persons with Disabilities from the Cambridge Intellectual and Developmental Disabilities Research Group' (2011) <http://www.cidrgrg.org.uk> (accessed 18 March 2016); A Dimopoulos 'The legal capacity of persons with disabilities in light of the United Nations Convention on the Rights of Persons with Disabilities' Brunel University <http://www.era-comm.eu/UNCRPD/kiosk/speakers-contributions/111OV69/Dimopoulos-pres-pdf> (accessed 14 March 2016).

23 D Clarke 'What is intellectual disability?' in A Roy, M Roy & D Clarke *The psychiatry of intellectual disability* (2006) in NJ Wilson et al 'Conditionally sexual: Men and teenage boys with moderate to profound intellectual disability' (2011) 29 *Sex and Disability* 275.

24 R Johns *Thinking ahead: The sexual development and sexual health of children and young adults with severe or profound intellectual disability: A guide for parents and caregivers* (2011).

25 See D Kulick & J Rydstrom *Loneliness and its opposite: Sex disability, and the ethics of engagement* (2015).

26 Perlin & Lynch (n 10 above) p 2.

27 L Lomofsky & M Skuy 'Educational needs related to intellectual and cognitive difference' in P Englebrecht & L Green (eds) *Promoting learner development. Preventing and working with barriers to learning* (2001) 192.

disability',²⁸ although previously-used terms, such as 'mental handicap', 'mental retardation' or 'learning disabilities' often remain more familiar to the general public as well as professionals working outside the sector. The CRPD uses the umbrella term 'persons with disabilities', additionally defining intellectual disability as 'long-term' 'mental or intellectual impairment'.²⁹

South African law relevant to the sexual health of those with intellectual disabilities, such as the Sterilisation Act³⁰ and the Sexual Offences Amendment Act,³¹ use the term 'mental disability'. Within the South African educational system, the terminology varies. The move toward creating an inclusive education system, as outlined by White Paper 6,³² reflects a social model of education³³ in the need to redress a segregated, inequitable school system under apartheid. LSEN schools provide for 'children with barriers to learning'.³⁴ Some LSEN schools refer to catering for learners with intellectual impairments, while the new LSEN curriculum (in draft process) caters for 'learners with severe intellectual disability who are enrolled in special as well as ordinary schools'.³⁵ LSEN schools for learners with intellectual disabilities generally provide for a broad mix of cognitive abilities, and include learners with mild, moderate and high severe intellectual disabilities.

3.3 Mental age

The way in which intellectual disability is perceived remains shaped by a medical discourse dominated by intelligence (IQ) testing³⁶ and the concept of 'mental age' estimated a child's intellectual performance in relation to typical age-related results.³⁷ Although the concept of mental age is no longer used in intelligence tests,³⁸ it remains current and misunderstood in relation to people with intellectual disabilities and results in caregivers feeling justified in treating an adult as a five year-old. The concept of mental age perpetuates negative beliefs about the sexuality of adults with

28 American Psychiatric Association (APA) 'Intellectual disability fact sheet' DSM V (2013) APA Publishing <http://www.dsm5.org> (accessed 17 March 2016).

29 Art 1 CRPD.

30 Sterilisation Amendment Act 3 of 2005.

31 Sexual Offences (and Related Matters) Amendment Act 5 of 2015.

32 Department of Education White Paper 6 *Special needs education. Building an inclusive education and training system* (2001).

33 M Maher 'Information and advocacy: Forgotten components in the strategies for achieving inclusive education in South Africa' (2009) 6 *Africa Education Review* 19.

34 <https://www.westerncape.gov.za/directories/facilities/788> (accessed 14 March 2016).

35 Department of Education *The new curriculum for learners with severe intellectual disability currently in process* <http://www.gov.za/basic-education-development-vocational-learning-programme> (accessed 14 March 2016).

36 Intelligence quotient (IQ) describes a score on a test that rates a person's intellectual functioning as compared to the general population. See Adnams (n 20 above) 14.

37 N Holt et al *Psychology: The science of mind and behaviour* (2012).

38 Holt (n 37 above) p 367.

intellectual disabilities where they are infantilised³⁹ and, thus, denied age-appropriate information.

Currently, a diagnosis of intellectual disability takes into account a person's IQ score alongside an assessment of their adaptive skills across three domains of the conceptual, practical and social. A person's lower intellectual functioning leads to reduced adaptive functioning.⁴⁰ A life span perspective⁴¹ sees development and learning as lifelong and is extremely relevant to challenging negative perceptions that adults with intellectual disabilities are incapable of continued learning.

4 Need for sexuality education for children and adults with intellectual disabilities

Bornman states that 'a silent victim is the best victim', highlighting the particular vulnerability to abuse of people with communication difficulties.⁴² Yet, even with functional communication, children and adults with intellectual disabilities are effectively silenced by withholding information about appropriate and inappropriate sexual behaviour and training them to be compliant. Children with intellectual disabilities are estimated three to eight times more likely to be abused than non-disabled children⁴³ and adults, particularly women⁴⁴ with intellectual disabilities, remain at increased risk of sexual violence and abuse.⁴⁵ A lack of sexuality education results in low levels of knowledge about sexual behaviour and is a factor that increases vulnerability to sexual violence,⁴⁶ increasing the risk of sexually-transmitted infections (STIs), including HIV,⁴⁷ as well as mental health problems more common in people with intellectual

39 Perlin & Lynch (n 10 above); C Capri & C Buckle 'We have to be satisfied with the scraps: South African nurses' experiences of care on adult psychiatric intellectual disability in patient wards' (2015) 28 *Journal of Applied Research in Intellectual Disabilities* 167.

40 Adnams (n 20 above).

41 D Papalia & R Feldman R *Experience human development* (2012).

42 J Bornman 'Join the fight as we pave a new way forward: A view from South Africa' in DN Bryen & J Bornman (eds) *Stop violence against people with disabilities. An international resource* (2014).

43 Save the Children *Out from the shadows: Sexual violence against children with disabilities* (2011).

44 E Barger et al 'Sexual assault prevention for women with intellectual disabilities: A critical review of the evidence' (2009) 47 *Intellectual and Developmental Disabilities* 249.

45 D Sobsey 'Sexual abuse of individuals with intellectual disabilities' in A Craft *Practice issues in sexuality and learning disabilities* (1994) 94.

46 'UN Thematic study on the issue of violence against women and girls and disability' *Report of the Office of the United Nations High Commissioner for Human Rights* (2012) 7; Barger (n 44 above) 251.

47 P Chirawu et al 'Protect or enable? Teachers' beliefs and practices regarding provision of sexuality education to learners with disability in KwaZulu-Natal, South Africa' (2014) 32 *Sex and Disability* 259.

disabilities.⁴⁸ Furthermore, people with intellectual disabilities have a poor understanding of their rights and the law, further increasing their vulnerability.

For many young people, friends are a source of sexual information, especially if parents are resistant to providing information, but young people with intellectual disabilities will struggle to 'share information and knowledge with one another'.⁴⁹ Additionally, people with intellectual disabilities are more likely to have low self-efficacy in relation to sexual decision making and negotiating skills in relation to condoms,⁵⁰ as they often lack social and educational opportunities to build skills related to setting boundaries or understanding their basic rights to consent.

South Africa continues to be one of the most highly HIV-affected countries in the world.⁵¹ Yet, people with disabilities are less informed about HIV, and have less access to testing and treatment despite their increased risk.⁵² Learners with intellectual disabilities show low levels of HIV knowledge,⁵³ reflecting a lack of accessible HIV education, the inability to access written information about HIV and the likelihood that television or radio information aimed at the general population is too complex for them to comprehend.

5 A rights-based framework

A rights-based framework, underpinned by international conventions and their respective monitoring bodies, offers a powerful tool to engage professionals, community leaders, parents and wider communities, as well as people with intellectual disabilities themselves, with the right to comprehensive sexuality education. These instruments provide an opportunity to legitimise and, thus, to challenge attitudinal barriers toward providing sexuality education for children and adults with intellectual disabilities, to shape policy, as well as examine the predominant discourse within any sexuality education programme. African-based human rights 'instruments' offer an additional tool to support the right to comprehensive sexuality education in an African context.

48 D Shaafsma et al 'Identifying effective methods for teaching sex education to individuals with intellectual disabilities: A systematic review' (2014) *Journal of Sex Research* doi 10.1080/00224499.2014.919373.

49 Lofgren-Martenson (n 4 above).

50 Aderemi (n 5 above).

51 P Rohleder et al 'HIV/AIDS and disability in Southern Africa: A review of relevant literature' (2009) 31 *Disability and Rehabilitation* 51.

52 J Hanass-Hancock 'Interweaving conceptualisations of gender and disability in the context of vulnerability to HIV/AIDS in KwaZulu-Natal, South Africa' (2009) 2 *Sex and Disability* 35.

53 T Aderemi et al 'Differences in HIV knowledge and sexual practices of learners with intellectual disabilities and non-disabled learners in Nigeria' (2013) 16 *Journal of the International AIDS Society* 1.

5.1 An international human rights framework on sexuality

5.1.1 Right to equality and non-discrimination

Perlin and Lynch⁵⁴ argue that the CRPD has the potential to challenge longstanding discrimination in the area of sexuality and people with intellectual disabilities. Rights concerning sexuality cannot be separated from other 'equal inalienable rights'⁵⁵ and the need for these to be enjoyed 'without discrimination'.⁵⁶ The UN Committee on Economic, Social and Cultural Rights (ESCR Committee)⁵⁷ acknowledges that people with disabilities may experience legal, practical and social barriers in accessing sexual health, and affirms that all individuals or groups have the right to enjoy the same range and standard of sexual health services and information as others. Article 23(1) of the CRPD, 'Respect for Home and Family', calls for the elimination of discrimination 'relating to marriage, family, parenthood and relationships'.⁵⁸ Rule 9 of The Standard Rules on the Equalisation of Opportunities for Persons with Disabilities,⁵⁹ which predated the CRPD, took a more overt tone by stating that persons with disabilities 'must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood'.⁶⁰ Schaaf⁶¹ documents the difficult process of negotiating sexuality within the CRPD, illustrating the tension between a conservative versus a sexual rights-based discourse and the resulting dominance of heteronormative values through the positioning of sexuality within the conservative framework of marriage, the family and health.⁶² The Convention on the Rights of The Child (CRC)⁶³ prioritises non-discrimination and emphasises the fact that these rights apply to all children, no matter their abilities or circumstances. Article 23 addresses the rights of children with disabilities to special support to live full and independent lives. The equality of children with disabilities with other children is also supported by article 7(1) of the CRPD.

54 Perlin & Lynch (n 10 above).

55 CRPD, Preamble, para (a).

56 CRPD, Preamble, para (c).

57 UN Committee on Economic, Social and Cultural Rights (ESCR Committee) 'The right to sexual and reproductive health' General Comment 22, DOC E/C/12/2016/ 2 para 2.

58 Art 23(1) CRPD.

59 UN Standard Rules on the Equalisation of Opportunities for Person's with Disabilities Rule 9; Family Life and Personal Integrity (1993) <http://www.un.org/esa/socdev/enable/dissre00.htm> (accessed 18 June 2016).

60 UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (n 59 above).

61 Schaaf (n 9 above).

62 As above.

63 UN Convention on the Rights of the Child (CRC) (1990) <http://www.ohchr.org/esa/socdev/enable/dissre00.htm> (accessed 18 June 2016).

5.1.2 Right to education

The right to education is fundamental to conventions such as the CRC,⁶⁴ CRPD,⁶⁵ and deserving of the ongoing scrutiny by treaty-monitoring bodies, such as the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) and ESCR Committee. Article 17 of the CRC states that all children have the right to information important to their wellbeing, and article 28 enshrines the right of all children to free primary education. Article 24 of the CRPD affirms the rights of children and adults with disabilities to equal education, including reasonable accommodation to facilitate their learning needs. The recognition of life-long learning without discrimination⁶⁶ is relevant to adults with intellectual disabilities who remain capable of continued learning and development once they have left school.⁶⁷ The right to inclusive education⁶⁸ is seen as integral to ending the discrimination experienced by people with disabilities.⁶⁹

Comprehensive sexuality education forms part of the right to education⁷⁰ and underpins other human rights, such as the right to health, information, non-discrimination, freedom from violence, and sexual reproductive autonomy for all.⁷¹ The UN CRC Committee argues that adolescents have the right to adequate information regarding their health, which includes information on sexual behaviour.⁷² Article 10 of CEDAW urges states to provide women with equal educational opportunities, including information on family planning. The CEDAW Committee further identifies the rights of girls and boys to age-appropriate and comprehensive sexuality education as part of the primary and secondary school curriculum.⁷³ The ESCR Committee cites the right to sexual and reproductive health combined with the right to education, and affirm a right to sexuality education that is 'comprehensive, non-discriminatory, evidence-based and age-appropriate'.⁷⁴ The ESCR Committee states that

64 Art 28 CRC.

65 Art 24 CRPD.

66 Art 24(5) CRPD.

67 O Coetzee & R Johns 'Development and the child with intellectual disability' in Johns & Adnams (n 20 above) 21.

68 Art 24(1) CRPD.

69 International Disability Alliance (IDA) and Centre for Reproductive Rights Comments to the Committee on the Rights of Persons with Disabilities on Draft General Comment 4, on the Right to Inclusive Education (art 24) 22 December 2015 <http://www.ohchr.org/documents/HRBodies/CRPD/GC./CentreReproductiveRights.doc> (accessed 18 June 2016).

70 IDA (n 69 above).

71 As above.

72 UN Committee on the Rights of the Child, General Comment 4: Adolescent health and development in the context of the Convention of the Rights of the Child (2004) in UNESCO (n 8 above) 30.

73 Committee on the Elimination of Discrimination against Women (CEDAW Committee) Concluding Observations: Ghana para 33 UN Doc CEDAW/C/GHA/CO/6-7 (2014).

74 ESCR Committee (n 57 above) 3.

information must be accessible to the needs of the individual and includes disability as a factor that must be taken into consideration.⁷⁵ The Centre for Reproductive Rights argues that comprehensive sexuality education forms part of inclusive education for people with disabilities, and argues that this position is supported by the Special Rapporteur on the Right to Education and enshrined by article 24(1) of the CRPD. This indicates that comprehensive sexuality education for persons with disabilities should occur from a young age, alongside reasonable accommodation and appropriate teacher training.⁷⁶

With regard to the increased risk of abuse experienced by people with disabilities, and especially women and children with disabilities, article 16 of the CRPD, 'Freedom from Exploitation, Violence and Abuse', recognises the need for information and education on how to avoid and report instances of exploitation and abuse.

5.1.3 Right to health

The right to health is indispensable to other human rights and, according to article 12(b) of the ESCR Committee⁷⁷ which asserts that health services may not discriminate against people with disabilities. The ESCR Committee in General Comment 22 argues that sexual health is intrinsic to the right to health.⁷⁸ Article 25 of the CRPD states that people with disabilities should have equal access to health services and programmes, including on sexual and reproductive health. This is further supported by the CEDAW Committee in that states may not 'cancel or withhold sexual and reproductive health information', and that everyone has the right to 'comprehensive, unbiased and scientifically accurate sexuality education'.⁷⁹

The ESCR Committee distinguishes between sexual health as defined by WHO (described above) and reproductive health which 'concerns the capability to reproduce and the freedom to make informed, free and responsible decisions'.⁸⁰ Article 23 of the CRPD recognises 'the rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education'. This is of crucial relevance to sexual decision making and sexual health

75 ESCR Committee 5.

76 IDA (n 69 above) 5.

77 ESCR Committee (n 57 above). Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights, art 12, General Comment 14 (2000).

78 ESCR Committee (n 57 above) 1.

79 Centre for Reproductive Rights *Breaking ground 2015: Treaty-monitoring bodies on reproductive rights* (2015) 6.

80 ESCR Committee (n 57 above) 2.

interventions. Women and girls (as well as men and boys)⁸¹ with intellectual disabilities are frequently the recipients of medicalised sexual health interventions, often with little explanation or process of informed consent.⁸² The higher rates of forced sterilisations and abortions experienced by women with disabilities remain in violation of their human rights.⁸³ Article 25 of the CRPD requires health professionals to provide equal treatment on 'the basis of free and informed consent',⁸⁴ and this is further emphasised by the CEDAW Committee in the need to train health workers to improve support for women with disabilities concerning their reproductive health decisions.⁸⁵ Again, accessible and comprehensive sexuality education is integral to any possibility of autonomy in this area. Additionally, article 12 of the CRPD addresses equal recognition under the law and equal capacity. People with intellectual disabilities are often poorly informed of their rights regarding all aspects of their lives.

5.1.4 African instruments supportive of the right to sexuality education

The right to sexual and reproductive health is addressed by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).⁸⁶ The Women's Protocol articulates the rights of African women and girls, such as the right to dignity (article 3); the right to life, integrity and security of the person (article 4); and the right to equality before the law (article 8). Article 14 addresses 'the right to self-protection and to be protected'⁸⁷ regarding STIs, including HIV, and recognises the need for states to provide accessible health services and information. Article 23 recognises the need to ensure the protection of women with disabilities, and ensure their freedom from violence, discrimination and sexual abuse.⁸⁸ However, Murungi and Durojaye observe that the Protocol fails to support a more positive

81 In the author's experience of training educators and health professionals, anecdotal reports indicate that boys and men with intellectual disabilities in the Western Cape, South Africa are given the female contraceptive injection, Depo Provera, as anti-libidinal medication to manage what is perceived as 'difficult' sexual behaviour, such as public masturbation or inappropriate sexual behaviour towards others. This is despite the lack of standard guidelines or evidence-based research to support this approach.

82 W Holness 'Informed consent for sterilisation for women and girls in the light of the Convention of the Rights of Persons with Disabilities' (2013) 27 *Agenda* 35.

83 Centre for Reproductive Rights (n 79 above) 22; Human Rights Watch 'Sterilisation of women and girls with disabilities: A briefing paper' (2011) <https://www.hrw.org/news/2011/11/10/sterilization-women-and-girls-disabilities>, (accessed 18 June 2016).

84 Art 25(d) CRPD.

85 Centre for Reproductive Rights (n 79 above).

86 Adopted in Maputo, Mozambique on 11 July 2003; entered into force on 25 November 2005; reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 65.

87 Arts 14(1)(d) & 2(a) African Women's Protocol (n 86 above).

88 Art 23(b) African Women's Protocol.

discourse of sexuality, particularly for women with disabilities.⁸⁹ This is addressed in part by General Comments on article 14 of the African Women's Protocol,⁹⁰ where the African Commission emphasises that states must

guarantee information and education on sex, sexuality, HIV, sexual and reproductive rights. The content must be evidence based, facts based, rights based, non-judgmental and understandable in content and language.⁹¹

This expands the focus of the Women's Protocol's from the prevention of HIV and sexual disease toward a more a rights-based framework toward sexual health.

The African Charter on the Rights and Welfare of the Child (African Children's Charter)⁹² specifies the right of children with physical or mental disabilities to protection and measures to ensure dignity, self-reliance and active participation in the community.⁹³ Additional support is provided by the Ministerial Commitment on Comprehensive Sexuality Education and Sexual and Reproductive Health Services for Adolescents and Young People in Eastern and Southern Africa 2013.⁹⁴ These instruments are important in challenging views that comprehensive sexuality education is contrary to African cultural values.

5.2 Legal framework on sexuality education and persons with disabilities in South Africa

5.2.1 Right to information

The South African Constitution⁹⁵ is the overarching legal instrument that infers support for the right to inclusive and comprehensive sexuality education for persons with disabilities, including those with intellectual disabilities, through the following rights: The state may not unfairly discriminate against anyone on the grounds of disability (article 9(3)); every child has the right to be protected against abuse (article 28(d)); everyone has the right to a basic education including adult education (article 29(a)); and everyone has the right to bodily and psychological integrity, which includes the right to make decisions about reproduction and to have control over their body (articles 12(2)(a) and (b)).

89 LN Murungi & E Durojaye 'The sexual and reproductive health rights of women with disabilities in Africa: Linkages between the CRPD and the African Women's Protocol' (2015) 3 *African Disability Rights Yearbook* 1.

90 General Comments on art 14(1)(d) and (e) of the African Women's Protocol.

91 Art 26 Africa Women's Protocol.

92 OAU Doc CAB/LEG/24.9/49 (1990); reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 80.

93 Art 13 African Children's Charter (n 92 above).

94 UNFPA (n 14 above) 8.

95 Secs 9(1) & 10 South African Constitution.

The National Health Care Act⁹⁶ states that all health users have the right to accessible information and to participate in health decisions even without the capacity to consent.⁹⁷ Additionally, the Children's Act⁹⁸ states that all children have the right to access information on health promotion and prevention and treatment of ill-health and disease, sexuality and reproduction, and to be given information in an accessible way that considers their age, literacy and any special needs.⁹⁹

The White Paper on the Rights of Persons with Disabilities (WPRPD), approved in 2015, further strengthens South Africa's commitment to the CRPD. Of particular relevance is the importance of life-long education and training;¹⁰⁰ the vulnerability of women and girls to sexual violence;¹⁰¹ and the need for persons with disabilities to access all HIV education programmes, and that these must include 'family planning, sexuality/sex education programmes' through services that are accessible and disability specific.¹⁰² However, the influence of the WPRPD is somewhat undermined by the opening disclaimer that it does 'not introduce a policy shift, nor does it replace any sector specific policies on disability'.¹⁰³

5.2.2 Right to protection

The high rate of sexual abuse in South Africa leads to heightened awareness of the need to protect children and adults with intellectual disabilities in recognition of their increased vulnerability.¹⁰⁴ The Sexual Offences Amendment Act¹⁰⁵ acknowledges CEDAW, CRC and the Constitution as underpinning its objective to protect vulnerable people.¹⁰⁶ However, sections 15 and 16, which define the statutory rape and statutory sexual assault of children, were challenged as unconstitutional in criminalising normative developmental and consensual sexual acts between children, and seen to 'infringe on children's constitutional rights to dignity, privacy and bodily and psychological integrity'.¹⁰⁷

Adults with intellectual disabilities are protected from unconsensual sexual acts, such as sexual exploitation, sexual grooming and exposure to

96 National Health Act 61 of 2003.

97 Secs 6, 7 & 8 Act 61 (n 96 above).

98 Children's Act 38 of 2005

99 Secs 13(1) & (2) Children's Act.

100 White Paper on the Rights of Persons with Disabilities (WPRPD) (2015) sec 6.4.1.2.

101 WPRPD (n 100 above) sec 6.2.1.4.

102 WPRPD (n 100 above).

103 WPRPD (n 100 above) Overview.

104 TN Phasha & LD Myaka 'Sexuality and sexual abuse involving teenagers with intellectual disability: Community conceptions in a rural village of KwaZulu-Natal South Africa' (2014) 32 *Sexuality and Disability* 153.

105 Act 32 of 2007 (n 31 above)

106 Act 32 of 2007 Preamble.

107 *Teddy Bear Clinic for Abused Children & RAPCAN v The Minister of Justice and Constitutional Development & The National Director of Prosecutions* 2013 12/13 35 (CC)

pornography.¹⁰⁸ The mandate for protection is further emphasised by stating that someone with a ‘mental disability’ is incapable of consenting to a sexual act.¹⁰⁹ In this context, the term ‘mental disability’ is not defined as a diagnosis, or a particular level of intellectual disability, but as the person’s inability to consent to sexual behaviour at the time when the offence is committed.¹¹⁰ This dynamic is easily overlooked and encourages caregivers or parents to react to all sexual acts as abusive without examination. It could be argued that the misinterpretation of ‘mental disability’ in relation to the capacity to consent infringes the constitutional rights of adults with intellectual disabilities. The possibility of misinterpreting all consensual sexual acts as abusive is heightened in the context of the duty to report¹¹¹ sexual offences against people with ‘mental disability’ and the fear of committing an imprisonable offence if any suspicion of abuse goes unreported. The misperception that people with intellectual disabilities are unable to consent to sexual behaviour may compound the fear that sexuality education that addresses sexual behaviour is unnecessary or even against the law. Current thinking around the capacity to consent as a dynamic construct¹¹² that varies from individual to individual in each circumstance needs to be addressed in the training of legal, health and education professionals, alongside the provision of comprehensive sexuality education for people with intellectual disabilities to address the topics needed to facilitate any possibility of capacity.¹¹³

6 Barriers to providing sexuality education for persons with intellectual disabilities

In Southern Africa, the need for comprehensive sexuality education is unequivocal in the face of the continuing high rates of HIV, endemic sexual abuse,¹¹⁴ teenage pregnancy and sexual violence.¹¹⁵ This need is no different for people with intellectual disabilities, who remain disadvantaged by negative attitudes toward their sexuality and a lack of accessible information. Educators commonly feel inhibited by ‘social norms’ that prevent them from providing information about sexual

108 Ch 4 Act 32 of 2007 (n 31 above).

109 Sec 57(2) Act 32 of 2007.

110 Ch 1 Act 32 of 2007 (n 31 above).

111 Ch 7 & 54 Act 32 of 2007.

112 J Rose & M Rennie ‘Managing the risks associated with sexual activity’ in L Walker-Hirsch *The facts of life and more: Sexuality and intimacy for people with intellectual disabilities* (2007) 202.

113 M Lyden ‘Capacity issues related to the health care proxy’ in M Lyden ‘Assessment of sexual consent capacity’ (2007) 25 *Sex and Disability* 8.

114 BJ Dickman & AJ Roux ‘Complainants with learning disabilities in sexual abuse cases: A 10-year review of a psycho-legal project in Cape Town, South Africa’ (2005) 33 *British Journal of Learning Disabilities* 138.

115 UNESCO (n 3 above).

behaviour.¹¹⁶ Yet, these barriers are significantly increased in relation to children and adults with intellectual disabilities due to negative beliefs about their sexuality

6.1 Ambivalence and negative attitudes

Negative beliefs concerning the sexuality of people with intellectual disabilities are pervasive worldwide.¹¹⁷ The myth of asexuality 'strengthens the belief that people with intellectual disability should not be exposed to sexuality education'.¹¹⁸ The myth of hypersexuality strengthens the fear that teaching about sexuality will increase indiscriminate sexual behaviour.¹¹⁹ This, combined with the belief that young persons with intellectual disabilities are incapable of reciprocal relationships,¹²⁰ alongside low expectations about their ability to understand the topic, means that educators, parents and caregivers feel uncertain about providing sexuality education to children or adults with intellectual disabilities,¹²¹ and are concerned about how much information is appropriate. Some parents may also avoid the topic for fear of giving their child expectations in the area of relationships that they assume are not possible.¹²²

Although the need for protection is unequivocal, this may take the form of limiting opportunities for socialising and relationships, further reducing normative opportunities for social learning and decreasing the person's self-protection skills. Misconceptions concerning the ability to consent, as discussed above, may strengthen resistance to providing information about sexual behaviour.

People with intellectual disabilities may internalise these negative attitudes about their sexuality.¹²³ The denial of sexuality as an acceptable part of the self may result in low sexual self-esteem, and exacerbate challenging behaviour, depression, inappropriate sexual attraction,

116 As above.

117 A Swango-Wilson 'Caregiver perceptions and implications for sex education for individuals with intellectual and developmental disabilities' (2008) 26 *Sexuality and Disability* 167.

118 Aderemi (n 5 above) 248.

119 As above.

120 As above

121 P Rohelder & L Swartz 'Challenges to providing HIV prevention education to youth with disabilities in South Africa' (2012) 34 *Disability and Rehabilitation* 619.

122 C Kahonde 'A grounded theory study of family caregivers responses to sexuality issues of young adults with intellectual disabilities' unpublished PhD thesis, University of Cape Town Disability Studies Programme, Department of Health and Rehabilitation Sciences (2015).

123 E Healy et al 'Sexuality and personal relationships for people with an intellectual disability. Part 1: Service user perspectives (1998) 53 *Journal of Intellectual Disability Research* 905; A Swango-Wilson 'Caregiver perceptions and implications for sex education for individuals with intellectual and developmental disabilities' (2008) 26 *Sexuality and Disability* 167.

inappropriate sexual behaviour or secretive sexual experiences.¹²⁴ There is no evidence to support fears that teaching about sexuality increases sexual behaviour in mainstream youth¹²⁵ or in youth with intellectual disabilities; rather, evidence points to sexuality education improving positive decision-making skills in people with intellectual disabilities related to sexual behaviour.¹²⁶

Another common area of resistance is in acknowledging and, thus, including respectful information about same-sex relationships in sexuality education. The Constitution states that no one should be discriminated against on the basis of their sexual orientation.¹²⁷ However, for many educators this issue remains uncomfortable and, therefore, is most likely avoided. A study on identifying effective sexuality education methods,¹²⁸ based in developed countries, suggested low levels of knowledge and negative attitudes about same-sex relationships contributes to the isolation experienced by homosexual individuals.¹²⁹ In the South African context, negative attitudes may contribute to the low visibility of homosexual individuals with intellectual disabilities.

6.2 Lack of curriculum and leadership

School-based programmes are an important platform to deliver sexuality and HIV education to learners,¹³⁰ yet messages associated with sexuality education tend to be 'negative and based in fear'.¹³¹ The new draft Department of Education policy on HIV, sexually-transmitted infections and tuberculosis presents a disease-focused intervention.¹³² This draft policy commits access to male and female condoms as well as information on their use to all learners in the basic education sector.¹³³ The draft policy also commits to increased educator training and support in the teaching of sexual and reproductive health education.¹³⁴ In the authors' experience of training educators, it is disturbing how many educators lack basic information about the sexual reproductive system and sexual development. Lack of information and mistaken beliefs prevent them from

124 L Walker-Hirsch *The facts of life ... and more. Sexuality and intimacy for people with intellectual disabilities* (2007) 58.

125 D Kirby et al 'School-based programmes to reduce sexual risk behaviours: A review of effectiveness' (1994) 109 *Public Health Reports* 339.

126 Healy et al (n 123 above).

127 Sec 9(3) Constitution (n 95 above).

128 Shaafsma et al (n 48 above).

129 As above.

130 Kirby et al (n 125 above); L de Reus et al 'Challenges in providing HIV education to learners with disabilities in South Africa: The voice of educators' in *Sex education: Sexuality, society and learning* (2015) doi: 10.1080/14681811.2015.1023283.

131 UNESCO (n 3 above) 22.

132 Department of Basic Education National Policy on HIV, STI's and TB (2015) 6.2.6.1.

133 Department of Basic Education National Policy (n 132 above) 6.2.2.4.

134 Department of Basic Education National Policy 6.2.7.

imparting accurate information or having the confidence to even begin a discussion with learners.

A recent South African study based in special schools found that educators were supportive about the need to provide sexuality education, but tended to focus on information related to personal hygiene, body development, self-respect, abstinence and the need to use condoms, but avoided topics such as sexual behaviour, contraception, sexual orientation and how to use condoms.¹³⁵ Information about sexual behaviour is most likely to be provided reactively in response to problems rather than as a tool to prevent problems.¹³⁶ Educators who are supportive of sexuality education may lack the confidence, skills or resources to present the information in an accessible format,¹³⁷ especially because the concepts are so abstract.¹³⁸ In identifying reasons to provide sexuality education, educators¹³⁹ first prioritise protection against sexual abuse and sexually-transmitted infections and, second, sexually-appropriate behaviour, such as what is public and private. These priorities reflect real concerns about the sexual risk in South Africa, as well as the real stigma associated with sexually-inappropriate behaviour. However, a supportive framework¹⁴⁰ that acknowledges pleasurable sexual experiences, alone and with others, is much less likely to be communicated, if at all.¹⁴¹ Additionally, there may be disagreement among staff about providing sexuality education to learners¹⁴² or beliefs that parents will disapprove, especially considering the taboo in many South African cultures associated with talking about sexuality.¹⁴³

Sexuality and HIV education is a compulsory part of the national curriculum¹⁴⁴ for all learners, regardless of their ability. Yet, an adapted curriculum for learners with intellectual disabilities attending LSEN schools or ordinary schools to date is lacking.¹⁴⁵ A draft skills and vocational curriculum statement for Grade R to Grade 9, to include learners with intellectual disabilities, is currently in process and is expected to be released to schools in 2017/2018.¹⁴⁶ In residential and work settings

135 De Reus et al (n 130 above).

136 Schaafsma (n 48 above); Rohelder & Swartz (n 5 above).

137 Aderemi (n 5 above); Rohelda & Swartz (n 121 above).

138 Rohelder & Swartz (n 121 above).

139 In the authors' experience of training educators.

140 L Haroian 'Child sexual development' (2000) 3 *Electronic Journal of Human Sexuality*.

141 Swango-Wilson (n 123 above).

142 Rohelder & Swartz (n 121 above).

143 De Reus et al (n 130 above).

144 The Life Orientation curriculum covers the foundation, intermediate and senior phase and can be downloaded as Curriculum Assessment Policy Statements (CAPS). <http://www.kzneducation.gov.za> (accessed 17 June 2016).

145 The new curriculum for learners with severe intellectual disability currently in process (n 35 above).

146 Basic education on development of vocational learning programme' South African government <http://www.gov.za/basic-education-development-vocational-learning-programme> (accessed 17 June 2016).

for adults, participation in sexuality education is dependent on the individual outlook and policy of each centre, leading to different approaches to or the total absence of programmes.

A more positive attitude toward sexuality education by educators is difficult, if not impossible, to maintain without a whole school approach. There is an urgent need for increased leadership from principals and the education department to prioritise and formalise sexuality education for learners with intellectual disabilities with regard to their rights expressed in the CRPD, South African law and not least due to the unacceptable levels of sexual abuse and HIV risk in South Africa.

7 Developing a sexuality education programme

Although sexuality education programmes for people with intellectual disabilities have been available in Europe and America since the 1990s,¹⁴⁷ in South Africa there are few available resources or programmes. Those available, and in use, reflect the commitment of individuals within small-scale organisations, often non-governmental organisations (NGOs), who have identified the need for this work in a 'bottom-up' approach rather than directed from above by national policy.¹⁴⁸

In advocating for the rights of people with intellectual disabilities, the Western Cape Forum for Intellectual Disability (WCFID) has developed sexuality and education programmes and resources. 'All About Me' is a group-based programme facilitated by educators and aimed at learners with intellectual disabilities from the foundation to senior phase.¹⁴⁹ This programme will be discussed in the context of a rights-based framework, identifying core components of effective sexuality education and accommodations for people with intellectual disabilities.

7.1 A rights-based curriculum

7.1.1 From foundation to senior phase and beyond

Treaty-monitoring bodies urge that sexuality education be introduced as

147 L Walker-Hirsch & MP Champagne *'Circles, level 2: Intimacy and relationships'* (2005); A Craft *Living your life* (1991); L Scott & L Kerr-Edwards *Talking together about growing up: A workbook for parents of children with learning disabilities* (1999); M McCarthy & D Thompson *Sex and the 3R's* (2007).

148 See Cape Mental Health Sexuality Awareness Training Programme, <http://www.capementalhealth.co.za/sexuality.html> (accessed 18 June 2016). See R Johns et al *Breaking the silence and closing the gap: Accommodating young people with disabilities in sexuality education* (2014).

149 Johns (n 11 above).

part of the primary phase, to continue throughout secondary education.¹⁵⁰ The need for sexuality education to reach children before puberty and before sexual debut¹⁵¹ is recommended to improve their sexual health outcomes.¹⁵² Children with intellectual disabilities have an equal right to accurate and age-appropriate information in preparation for puberty and the social and emotional changes of adolescence.¹⁵³ Additionally, their increased difficulty to learn through observation and to generalise and internalise information means that comprehensive sexuality education is conditional to achieving their basic rights. The All About Me programme is organised into nine modules, designed to be repeated, and extended in response to the age and learning needs of participants: modules 1-5 foundation phase; modules 1-6 intermediate phase; modules 1-8 senior phase; and modules 1-9 upper senior phase and beyond.

7.1.2 Balancing a rights and risk discourse

The tension between a rights and risk discourse in relation to the sexuality education of people with intellectual disabilities is well recognised.¹⁵⁴ The increased risk of sexual abuse, combined with conceptualising the sexuality of people with intellectual disabilities as problematic, skews content toward fear based and restrictive messages. This may have unintended consequences, as discussed above, such as reinforcing secretive sexual behaviour or maintaining low sexual self-esteem.

The need to balance messages is achieved in the All About Me programme through using social stories, pictures and activities that balance and, thus, integrates a rights and risk perspective.¹⁵⁵ Positive relationship experiences in relation to family and friends or sexual relationships can be interrogated in the context of equality, consent, autonomy and respect, alongside related feelings of joy and wellbeing. The possibility of harmful relationship experiences engendering hurt, anxiety, fear, anger and sadness can more easily be understood in relation to that which is positive.

The programme provides matter-of-fact and age-appropriate information about sexual development, sexual body functions and reproduction that normalise sexual development. Learners need to discriminate between public and private places, body parts and behaviour. Ignorance about these matters increases the likelihood of making sexual

150 CEDAW Committee Concluding Observations: Ghana para 33, UN Doc CEDAW/C/GHA/CO/6-7 (2014).

151 UNESCO (n 3 above) 24.

152 UNESCO 25.

153 Centre for Reproductive Rights (n 79 above) 5.

154 Rohelder & Swartz (n 5 above). R Johns 'Rights versus risk: Balancing perspectives in a sexuality programme for learners with moderate intellectual disabilities' unpublished MEd thesis, University of the Western Cape, 2004.

155 Johns (n 11 above)

mistakes, such as masturbation in public, and so perpetuates stigma and discrimination against people with intellectual disabilities. The tendency to treat adults with intellectual disabilities like children is a form of discrimination that impacts self-concept, behaviour and wellbeing. The 'right to grow up and be treated with the respect and dignity accorded to adults'¹⁵⁶ means that sexual development, sexual feelings and safer sexual behaviour must be acknowledged and taught in a way that is accessible and affirming.

The values in the All About Me programme reflect the 'core universal values of human rights' identified by the UNFPA as an essential component of comprehensive sexuality education.¹⁵⁷ The UNFPA argues that 'even younger learners can grasp concepts of fairness, respect, equal treatment, protection of bodily integrity and freedom from stigma and violence'.¹⁵⁸ This assertion is equally relevant to learners and adults with intellectual disabilities if their learning needs can be accommodated.

7.2 Methodology; accommodation of learning needs

7.2.1 Visual resources

There is limited research identifying evidence-based practice and efficacy of methods for this population group.¹⁵⁹ Studies are limited by small sample sizes, a lack of detail concerning goals and methods as well as the difficulty of evaluating behavioural outcomes due to the private nature of sexuality.¹⁶⁰ Schaafsma et al begin to address the knowledge gap concerning sexuality education and people with intellectual disabilities, and identify three components of an effective programme: information and instruction; modelling and rehearsing; and testing and generalising skills.¹⁶¹

The All About Me programme uses participatory group-based activities and specially-developed visual resources. These support the more concrete learning needs of people with intellectual disabilities¹⁶² and methods that do not rely on reading, writing skills or verbal skills.¹⁶³

156 A Craft & H 'Brown Personal relationships and sexuality: The staff role' in A Craft *Practice issues in sexuality and learning disabilities* (1994) 3.

157 UNFPA (n 14 as above) 10.

158 As above.

159 Schaafsma et al (n 48 above) 6.

160 As above.

161 As above.

162 L Lomofsky & M Skuy 'Educational needs related to intellectual and cognitive difference' in P Engelbrecht & L Green *Promoting learner development: Preventing and working with barriers to learning* (2001) 188.

163 De Reus et al (n 130 above).

Placing pictures into categories, that is, showing consensual and non-consensual touch,¹⁶⁴ or different kinds of relationships,¹⁶⁵ allows learners to indicate their understanding even without expressive verbal communication.

Large body outlines allow learners to draw the private body parts¹⁶⁶ or, for those who struggle with fine motor control, to stick on cut-out body parts. Fake bodily fluids made from tea, water, tomato sauce, water-based lubricant and shampoo provide concrete information about sexual bodily functions and how bodily fluids transmit STIs.¹⁶⁷ A penis made from clay illustrates ejaculation and demonstrates how condoms act as a barrier to prevent the transmission of bodily fluids.¹⁶⁸ Visual resources and interactive methods enable information and instruction to be accessible and memorable and are particularly relevant, as children and adults with intellectual disabilities often have difficulties with short-term memory.¹⁶⁹

7.2.2 Participatory methods

The UNFPA identifies participatory methods as a core component of effective sexuality education in developing 'communication, negotiation and decision-making skills'.¹⁷⁰ The UNESCO report on sexuality education in Southern Africa asserts that participatory teaching methods are a significant skills gap for teachers that need to be addressed in the delivery of comprehensive sexuality education.¹⁷¹ Participatory methods in the All About Me programme provide an opportunity for modelling and rehearsing social skills, engendering a new and shared understanding of appropriate sexual behaviour and sexual rights. Games, social stories and role play can be repeated to assess and improve learners' understanding and to offer significant opportunities for social learning, especially considering the reduced opportunities for social learning experienced by many people with intellectual disabilities. Methodology developed for learners with intellectual disabilities is relevant to an inclusive setting and the need for participatory methods that meet different learning needs.¹⁷²

The ability to generalise behaviour relies on social reasoning or the ability to learn rules and apply them repeatedly in different contexts.¹⁷³ The skill of generalising is difficult for people with intellectual disabilities. Topics taught in sexuality education need to be reinforced in other

164 Johns (n 11 above).

165 Johns (n 11 above) 62.

166 Johns (n 11 above) 71.

167 Johns (n 11 above) 89.

168 Johns (n 11 above) 127.

169 Walker-Hirsch (n 124 above) 58.

170 UNFPA (n 14 above) 13.

171 UNESCO (n 3 above) 23.

172 UNESCO (n 3 above).

173 Walker-Hirsch (n 169 above) 64.

contexts, such as the home, emphasising the importance of parental involvement. This aspect, namely, what happens outside of the programme, is the most difficult to evaluate. Interviewing participants may not reveal accurate information because of the participant wanting to provide socially-desirable answers,¹⁷⁴ or having difficulties with understanding questions or expressing themselves.

7.2.3 Involving the youth

One component of effective comprehensive sexuality education is strengthening youth advocacy, and some research shows the benefit of peer-led education programmes.¹⁷⁵ The involvement of youth in programmes facilitates personal agency, empowerment and leadership. Negative perceptions about the learning capabilities of learners with intellectual disabilities, especially in relation to sexuality education, forecloses their ability to disseminate this information. However, this perception is currently being challenged by a peer educator-led sexuality education programme in an LSEN school for learners with intellectual disabilities using the All About Me curriculum and programme.¹⁷⁶

8 Conclusion

The silence surrounding the sexuality of persons with intellectual disabilities has the result that most educators, caregivers, parents and health professionals struggle to engage with the topic,¹⁷⁷ whilst having few, if any, opportunities to re-examine their beliefs. A rights-based framework used in policy development, training and awareness campaigns can support engagement with the need for comprehensive sexuality education and an opportunity to re-examine the way in which negative beliefs impact the life experiences of persons with intellectual disabilities.

The importance of equal access to information and the right to informed consent is integral to international human rights conventions and South African law. These principles present an argument in favour of sexuality education as a human right. The denial of this right could be viewed as simultaneously negligent and directly harmful, especially in the context of South Africa, where the rate of sexual abuse and HIV infection is soaring. The denial of sexuality education is well researched as a factor increasing sexual risk and the vulnerability of people with intellectual disabilities. The lack of comprehensive sexuality education denies persons with intellectual disabilities their constitutional and legal rights, as the

174 Shaafsma et al (n 48 above).

175 UNFPA (n 14 above) 14; UNESCO (n 8 above) 24.

176 Afrikka Tikkun 'Peer educator delivery of a comprehensive health and wellness course' 4th Afrikka Tikkun Child Protection Dialogue 2016.

177 Perlin & Lynch (n 10 above).

denial of accessible information prevents any possibility of informed consent or self-protection.¹⁷⁸

For many learners and adults with intellectual disabilities, relationships are forbidden and information about sexuality and sexual behaviour remains taboo. Perceptions that people with intellectual disabilities cannot consent and, therefore, do not need sexuality education may be further entrenched by the Sexual Offences Amendment Act.¹⁷⁹ There is an urgent need to understand how the definition of mental disability in this Act impacts the sexual experiences of people with intellectual disabilities.

There is also a need for more evidence-based research into which kind of sexuality education is effective for people with intellectual disabilities to guide the development of curriculum, methods and resources.¹⁸⁰ The growing research in this area worldwide and in Southern Africa reflects an increasing engagement with the sexual rights of people with intellectual disabilities. Advocates of sexuality education programmes believe that it is possible to teach the abstract and sensitive concepts needed in sexuality education through participatory-based methods. Concurrent to this belief is the fact that learners and adults with intellectual disabilities are capable of life-long learning and development if their learning needs are appropriately accommodated.

Presently, sexuality education for people with intellectual disabilities in South Africa is driven by a small number of NGOs, individual educators and health professionals who remain passionate about the rights of persons with intellectual disabilities. The Department of Education is required to address, with increased urgency, educator training, an appropriate curriculum, the methodology and visual resources appropriate to the learning needs of learners with intellectual disabilities. Methodology suitable for learners with intellectual disabilities is conducive to an inclusive approach and may benefit learners with a wide range of learning needs.

Attitudes that sexuality education causes indiscriminate sexual behaviour leads to denying support and information about sexuality. Avoidance increases the risk of secretive, ignorant or abusive sexual experiences alongside mental health problems so common in people with intellectual disabilities. In South Africa, the long journey to acknowledge the autonomy of people with intellectual disabilities and their rights to be sexual beings, whether in a relationship or not, remains in its early stages. The provision of comprehensive sexuality education is a step in the right direction.

178 Art 14 African Women's Protocol (n 86 above).

179 Act 32 2007 (n 31 above).

180 Schaafsma et al (n 48 above) 8.

*Paul Chappell**

Summary

The subject of sexual rights and disability is a largely underdeveloped sphere in relation to African rights discourse. This subject becomes even more contested and unacceptable when discussing access in relation to sexual expression or relationships amongst adolescents with disabilities. Most commonly, adolescents with disabilities are often denied their sexual autonomy and are generally depicted as being non-sexual and incapable of sexual agency. In view of this, while adolescents with disabilities continue to gain recognition as citizens with the same equal opportunities as their non-disabled peers, they have not as yet truly emerged as sexual citizens within the African context.

This article aims to (re)position discourses of sexual access in relation to adolescents with disabilities in South Africa. In particular, the article outlines the importance of supporting and nurturing the sexual autonomy of adolescents with disabilities. The article also outlines the way in which international rights conventions and national legislation may impact sexual encounters amongst adolescents with disabilities and what this means for significant adults working with adolescents with disabilities.

1 Introduction

Since the country's first democratic elections in 1994 and the ending of apartheid, South Africa has introduced several advancements in terms of

* BSc (UCN), MSc (UCL), PhD (UKZN); Postdoctoral Research Fellow, Centre for Social Development in Africa (CSDA), University of Johannesburg.

its socio-political context, Constitution and legislation. One of the most significant advancements has been the promotion of basic human rights, which has had a particular bearing on young people with disabilities who, for the first time, were recognised as having a substantive role in the country's new Constitution.¹ In this context, South Africa is recognised as having some of the most comprehensive legislation and policies in the world that protect and promote the rights of all people with disabilities.²

At the basis of this rights legislation is the discourse of accessibility. For instance, in accordance with the basic principles of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD), accessibility is recognised as a crucial component in the realisation of disability rights, and enabling people with disabilities to 'participate fully in all aspects of life ... on an equal basis with others'.³ Moreover, the discourse of accessibility is often used by the disability movement as a gauge in which to measure the lived experiences of people with disabilities within an ableist world.

In terms of children and adolescents with disabilities, much attention has been given to their rights of access in relation to inclusive education⁴ and to ending their discrimination and oppression in South Africa.⁵ Likewise, increasing attention has been given to children and adolescents with disabilities in relation to accessing HIV and AIDS services⁶ and the judicial system following sexual abuse.⁷ Despite this, very little attention has been given to access in relation to sexual expression and relationships. This becomes evident from the apparent invisibility in the CRPD of adolescents with disabilities, and the growing number of youth sexuality studies in South Africa.⁸ In view of this, while adolescents with disabilities continue to gain recognition as citizens with the same equal rights and opportunities as their non-disabled peers, they have not as yet truly emerged as autonomous sexual citizens.

1 CS Howell et al 'A history of the disability rights movement in South Africa' in B Watermeyer et al (eds) *Disability and social change: A South African agenda* (2006) 46-84.

2 AK Dube 'The role and effectiveness of disability legislation in South Africa: Disability and Knowledge Research Programme' http://www.dfid.gov.uk/r4d/PDF/Outputs/Disability/PolicyProject_legislation_sa_ex.pdf (accessed 6 December 2012).

3 UN General Assembly, Convention on the Rights of Persons with Disabilities: Resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106.

4 Human Rights Watch 'Complicit exclusion: South Africa's failure to guarantee an inclusive education for children with disabilities' (2015).

5 Howell et al (n 1 above) 46.

6 J Hanass-Hancock 'A systematic review of literature on disability and HIV and AIDS in Africa' (2009) 12 *Journal of the International AIDS Society* 34.

7 B Dickman et al 'How could she possibly manage in court? An intervention programme assisting complainants with intellectual disabilities in sexual assault cases in the Western Cape' in Watermeyer et al (n 1 above) 116.

8 P Chappell 'Troubling the socialisation of the sexual identities of youth with disabilities: Lessons for sexuality and HIV pedagogy' in D Francis (ed) *Sexuality, society and pedagogy* (2013) 111.

In accordance with the World Health Organisation (WHO) and United Nations Population Fund (UNFPA), adolescence is defined as being between the ages of 10 and 19 years.⁹ This critical period is marked as a time of great physical and psycho-social change as individuals transition from childhood to adulthood. Regardless of this age range, the article will focus on adolescents between the ages of 12 and 19 years. The reason for focusing on adolescents over 12 years of age is guided by national legislation, mainly the Children's Act 38 of 2005. Although the Act does not directly discuss sexuality, it does allude to sexual access and the ability of adolescents over the age of 12 years to consent to HIV testing¹⁰ and to access condoms and other contraceptives¹¹ without the consent of parents or caregivers. Notwithstanding legislation, another reason for concentrating on this age group is because of the high levels of reported sexual risk-taking amongst this age group.¹² In addition, recent data on sexuality and HIV prevalence demonstrates that AIDS-related deaths have tripled since 2000 and that AIDS is now the leading cause of death among adolescents in Africa.¹³ The United Nations Children's Fund (UNICEF) also reports that over 70 per cent of adolescents aged 12 to 19 years in sub-Saharan Africa lack comprehensive knowledge about HIV or their sexual and reproductive rights.¹⁴

Against this background, the article aims at critically exploring constructions of disabled sexualities and rights discourse in relation to sexual access and adolescents with disabilities in the South African context. In particular, the article outlines the importance of supporting and nurturing the sexual expression of adolescents with disabilities. The article also outlines how international rights conventions and national legislation may impact sexual expression and encounters among adolescents with disabilities, and what this means for parents and other adults working with adolescents with disabilities. By addressing the issue of sexual access for adolescents with disabilities, the article ultimately aims to politicise what has, until now, remained an invisible and, at times, controversial topic.

After defining the concepts of disability, sexuality and sexual access, the article proceeds to explore commonly-held constructs of disabled sexualities and the invisibility of sexuality within the rhetoric of the disability rights movement in South Africa. The article then critically explores how sexuality and disability have been addressed in international rights conventions and declarations, including the CRPD, and their links

9 K Mitchell *Adolescent sexual and reproductive health toolkit for humanitarian settings* (2009) 5.

10 Sec 130(2)(a).

11 Sec 134(1)(a)-(b).

12 A Pettifor et al 'Early coital debut and associated HIV risk factors among young women and men in South Africa' (2015) 35 *International Perspectives on Sexual and Reproductive Health* 2.

13 UNICEF 'Children and AIDS 2015 Statistical Update' <http://www.childrenand aids.org/situation> (accessed 29 January 2016).

14 As above.

to national sexuality legislation. Following this, the article discusses the way in which these social and legislative constructs impact sexual access for adolescents with disabilities. Drawing from national legislation and international rights conventions and treaties that include issues of sexuality, the article then attempts to (re)position sexual access for adolescents with disabilities in South Africa, and concludes with recommendations for future practice and research.

1.1 Defining disability, sexuality and sexual access

The construct of disability in South Africa has been the subject of much historical debate, ranging from a biomedical discourse to that of a social and human rights perspective.¹⁵ For purposes of the article, disability is situated as a social construct and draws upon the CRPD, which defines disability as

an evolving concept that results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full participation in society on an equal basis with others.¹⁶

For purposes of the article, the focus will be on adolescents with sensory, physical, communication, and mild to moderate intellectual or psychosocial disabilities.¹⁷

In terms of sexuality, it is also recognised as being more than just a biological or psychological construct, and includes other significant factors such as gender, identity, desirability, love and forming meaningful relationships. In view of this, the article adopts the World Health Organisation (WHO) definition, which describes sexuality as

a central aspect of human life and encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors.¹⁸

In acknowledgment of the WHO definition of sexuality, it is clear that when defining sexual access, it goes beyond merely sexual intercourse, and includes 'access to the psychological, social and cultural contexts and

15 Howell (n 1 above) 46.

16 CRPD Preamble (e).

17 Young persons with severe intellectual or psychosocial impairments have been excluded at this time due to ongoing debates surrounding their ability to consent to sexual practices.

18 WHO 'Defining sexual health: Report of a technical consultation on sexual health' 28-31 January 2002 http://www.who.int/reproductivehealth/publications/sexual_health/defining_sexual_health.pdf (accessed 23 May 2014).

supports that acknowledge, nurture and promote sexuality in general'.¹⁹ Therefore, the article draws upon the work of Kanguade, who categorises sexual access within two principle domains. According to Kanguade,²⁰ the first domain of sexual access acknowledges the importance of supporting and nurturing sexual expression, and covers issues such as comprehensive sexuality education and sexual autonomy. The second domain focuses upon opportunities for sexual encounters. In relation to disability, opportunities for sexual encounters stir up controversies and emotive discussions around such issues as facilitated sex, sexual surrogacy, and the use of sex workers.²¹ Although discussions surrounding access to sexual surrogates and sex workers are an important issue, they go beyond the scope of this article. Likewise, in discussing sexual encounters, the article does not promote sexual activity amongst adolescents with disabilities who lack sexual maturity.

2 Social constructions of disabled sexualities

Before discussing rights legislation in terms of adolescents with disabilities and sexuality, it is important to provide a critical overview of how disabled sexualities have emerged in social discourse. As put forward by Shildrick,²² social constructs of disabled sexuality and rights policies are 'mutually constitutive' in shaping each other and an individual's perception of their own sexual identity and practice.

The discourse on disabled sexualities has been subjected to similar a historical and apolitical disregard as that on African sexualities. For instance, popular notions about disabled sexuality have usually focused around biomedical discourses that construct people with disabilities in terms of 'deviance, lack and tragedy', and as victims of impairment.²³ As a result, ableist communities have made stereotypically incorrect assumptions about the sexualities of people with disabilities, their desirability, and their abilities to exercise agency in negotiating intimate relationships. When these assumptions intersect with other oppressions, such as the severity of the impairment, gender, age, sexual orientation,

19 R Shuttleworth & L Mona 'Disability and sexual access: Toward a focus on sexual access' (2002) 22 *Disability Studies Quarterly* 4.

20 G Kanguade 'Advancing sexual health for persons with disabilities through sexual rights' in R Shuttleworth & T Sanders (eds) *Sex and disability: Politics, identity and access* (2011) 206.

21 Kanguade (n 20 above) 207.

22 M Shildrick 'Silencing sexuality: The regulation of the disabled body' in J Carabine (ed) *Sexualities, personal lives and social policy* (2004) 143.

23 M Corker & T Shakespeare 'Mapping the terrain' in M Corker & T Shakespeare (eds) *Disability/Postmodernity: Embodying disability theory* (2002) 2.

race and socio-economic status, it further complicates the discourse on disabled sexualities and how it is captured within rights legislation.²⁴

In most societies, prominent socio-medical discourses construct people with physical or sensory impairments as incapable of experiencing sex or intimate relationships. As portrayed by Morris, those with physical impairments are deemed 'non-sexual, or at best sexually inadequate; that they cannot ovulate, menstruate, conceive or give birth, have orgasms, erections, ejaculations or impregnate'.²⁵ This notion of being non-sexual is clearly emphasised in a study conducted amongst boys with physical impairments in Lesotho.²⁶ The boys reported that their non-disabled peers would often tease them, believing them to be incapable of having the same sexual fantasies or feelings. In essence, the boys were rejected because of their perceived incapability of performing normative constructs of sexuality and masculinity due to their physical impairments.

Besides being deemed non-sexual, those with psycho-social or intellectual impairments are often 'infantilised'²⁷ and depicted as lacking the capacity to engage in responsible sexual relationships. On the other hand, commonly-held public perceptions view those with psycho-social and intellectual impairments as over-sexed with limited social judgment to control their sexual desires.²⁸

Notwithstanding these differences in sexual abilities, the article contends that these hegemonic discourses of disabled sexuality are largely formulated through the discourse of heteronormativity. Understood in this context, it is widely accepted that heteronormativity is responsible for governing and regulating our gender roles, our sexual behaviour and, to a large extent, sexuality rights legislation.²⁹ In doing so, heteronormativity privileges narrow constructs of phallogentric (mainly that of penile-vaginal) sexuality and notions of compulsory able-bodiedness that uphold beliefs of health and fertility as normal sexuality.³⁰ As a result, those who do not embody these dominant socio-sexual norms are often marginalised and relegated as non-normative or even perverse. Quintessentially,

24 R Shuttleworth 'Disability and sexuality: Toward a constructionist focus on access and the inclusion of disabled people in the sexual rights movement' in N Teunis & G Herdt (eds) *Sexual inequalities and social justice* (2007) 174.

25 J Morris *Pride against prejudice* (1991) 20.

26 KM Motalingoane-Khau "'I never thought they do it too ...!'" Sexuality and the disabled body' (2006) Understanding Human Sexuality Seminar Series, Durban: Africa Regional Sexuality Resource Centre.

27 A Craft 'Mental handicap and sexuality: Issues for individuals with a mental handicap, their parents and professionals' in A Craft (ed) *Mental handicap and sexuality: Issues and perspectives* (1987) 14.

28 M Milligan & A Neufeldt 'The myth of asexuality: A survey of social and empirical evidence' (2001) 19 *Sexuality and Disability* 2.

29 RP Cheng 'Sociological theories of disability, gender, and sexuality: A review of the literature' (2009) 19 *Journal of Human Behaviour in the Social Environment* 1.

30 R McRuer *Crip theory: Cultural signs of queerness and disability* (2006).

heteronormative constructs of sexuality and desirability ultimately question the suitability of all people with disabilities as sexual partners.³¹

2.1 South African disability rights movement and sexuality

The medicalised and apolitical focus on disabled sexuality has drawn attention away from the rights of sexual access of people with disabilities, and fails to recognise the experiences of multiple barriers to sexual expression and relationships.³² What is more, this apolitical approach to sexuality has been inadvertently reinforced by the disability rights movement, both in South Africa and globally. For instance, although the disability rights movement in South Africa has played an influential role in terms of addressing the exclusion of people with disabilities from public issues, such as education, employment and poverty reduction strategies, the private lives of people with disabilities, that is, sexuality and identity, are not seen as equally worthy of concern.³³ This is evident in the South African country progress report to the UN General Assembly on the implementation of the CRPD.³⁴ For instance, the report highlights varying changes in terms of physical and social disability indicators, but does not include anything about sexual access. By failing to engage with sexual access as a rights-based issue, the disability rights movement in South Africa perpetuates the marginalisation of disabled sexualities. Finger, a disabled feminist activist, poignantly sums this up by suggesting:

The disability rights movement has certainly not put sexual rights at the forefront of its agenda. Sexuality is often the source of our deepest oppression; it is also often the source of our deepest pain. It's easier for us to talk about – and formulate strategies for changing – discrimination in employment, education, and housing than to talk about our exclusion from sexuality and reproduction.³⁵

The continual absence of sexuality on the disability rights agenda impelled disabled feminists and disability scholars to call for the politicisation of sexuality within the disability rights movement, particularly in the Western world.³⁶ In so doing, they aimed to draw attention to the notion that the sexual socialisation of people with disabilities did not exclusively revolve around pathologised bodies, but also the structures within social communities. As portrayed by Shakespeare:

31 T Shakespeare 'Disabled sexuality: Toward rights and recognition' (2000) 18 *Sexuality and disability* 3.

32 Shuttleworth & Mona (n 9 above) 4.

33 Shakespeare (n 31 above) 159.

34 Department of Women, Children and People with Disabilities 'Baseline country report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities in South Africa' (2013).

35 A Finger 'Forbidden fruit: Why shouldn't disabled people have sex or become parents?' (1992) *New Internationalist* 233 <http://www.newint.org/issue233/fruit.htm> (accessed 28 June 2009).

36 Shakespeare (n 31 above) 159.

The solution is not more prosthetics, or more Viagra, or any other physical or clinical intervention ... The barriers to the sexual expression of disabled people are primarily to do with the society in which we live, not the bodies with which we are endowed with.³⁷

The politicisation of disabled sexualities as a rights-based issue is still in its infancy in the context of Africa and the global south. Moreover, much of African disability scholarship on sexuality is primarily focused upon the rights to protection from sexual exploitation and abuse. This protection discourse may be largely influenced by the reported high incidence of sexual abuse among people with disabilities,³⁸ but also international rights treaties.

3 Disability and sexual rights in international conventions and national legislation

Before discussing the way in which international rights conventions³⁹ address disabled sexualities, it is important to give some background on how the discourse of sexuality has emerged within international conventions and treaties. According to Petchesky,⁴⁰ the terms 'sexual' and 'sexuality' did not appear in international conventions until after 1993. Prior to this, sexuality was only discussed in relation to reproductive health rights. The only exception was the UN Convention on the Rights of the Child (CRC) in 1989, which addressed protection from sexual exploitation. Sexuality-related rights only started to emerge following efforts by transnational women's advocacy groups at the International Conference on Population and Development in Cairo in 1994, and the International Conference on Women in Beijing in 1995.⁴¹ Their efforts resulted in the UN incorporating reproductive health with freedom from sexual violence and equality between men and women in relationships.

Reflecting critically on sexuality rights in UN conventions and treaties, although discussions surrounding sexuality rights have been extended to include sexual orientation and the sexual rights of minors, sexuality rights still predominantly relate to health, protection and public morals. To date, UN conventions have not included regulation on sexual behaviour or access.⁴² As far as South Africa is concerned, the notion of international regulation on sexual access could be a bitter pill to swallow, especially

37 Shakespeare (n 31 above) 161.

38 Hanass-Hancock (n 6 above) 5.

39 For the purpose of this article, this mainly focuses on the CRPD.

40 R Petchesky 'Sexual rights: Inventing a concept, mapping an international practice' in R Parker (ed) *Framing the sexual subject: The politics of gender, sexuality and power* (2000) 81.

41 M Schaff 'Negotiating sexuality in the Convention on the Rights of Persons with Disabilities' (2011) 8 *International Journal of Human Rights* 14.

42 A Miller 'Sexuality and human rights: discussion paper' (2009) Geneva: International Council on Human Rights Policy http://www.ichrp.org/files/reports/47/137_web.pdf (accessed 5 February 2016).

given previous colonial and apartheid racial legislation regarding sexual behaviour in the country.⁴³

3.1 Sexuality and disability in the Convention on the Rights of Persons with Disabilities

In terms of disability, the CRPD clearly recognises the full and equal participation of all people with disabilities in all aspects of life. Included in this are several rights pertaining to sexuality. These include the rights to freedom from exploitation, violence and abuse;⁴⁴ respect for the home and family;⁴⁵ and the right to health.⁴⁶ Besides protection from abuse and sexual violence, these specific articles highlight the right to reproductive health information and the right to marry and have children. Reflecting critically on these sexuality-related rights, although they do acknowledge people with disabilities as sexual agents, and also issues of gender, reproduction, and protection from abuse, the CRPD, like other UN conventions and treaties, fails to explicitly mention sexual access, and ultimately continues to promote a heteronormative gaze. As a result, issues surrounding sexual diversity, promoting positive sexual identity development, sexual expression, and sexuality education remain invisible within the international disability rights discourse.⁴⁷

However, this has not always been the case. For instance, the United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, which informed the backdrop of the CRPD and national disability legislation, clearly call for the politicisation of disabled sexualities in Rule 9(2), which unequivocally states:

Persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood. Persons with disabilities must also have the same access as others to family planning methods, as well as to information in accessible form on the sexual functioning of their bodies.⁴⁸

In addition to this, Rule 9(3) states:

43 For further reading on previous sexual legislation in South Africa, refer to P Delius & C Glaser 'Sexual socialisation in South Africa: A historical perspective' (2002) 61 *African Studies* 1.

44 Art 16(2) of the CRPD.

45 Art 23(b) of the CRPD.

46 Art 25(a) of the CRPD.

47 D Higgins 'Sexuality, human rights and safety for people with disabilities: The challenge of intersecting identities' (2010) 25 *Sexual and Relationship Therapy* 3.

48 UN General Assembly, Standard Rules on the Equalisation of Opportunities for Persons with Disabilities: Resolution adopted by the General Assembly, 20 December 1993, A/RES/48/96.

States should promote measures to change negative attitudes towards marriage, sexuality and parenthood of persons with disabilities, especially of girls and women with disabilities, which still prevail in society.⁴⁹

According to Schaaf, the failure to explicitly include sexual access in the CRPD was not only due to pressure from the Vatican and other religious states to limit sexual rights, but also because of widespread concerns about eugenic practices and the 'centrality of the body in conceptions of disability'.⁵⁰ Moreover, reflecting on both the CRPD and Standard Rules, both fail to address the needs of adolescents with disabilities. Given the invisibility of sexual access and disabled adolescents in the CRPD and other UN conventions and treaties, it may provide a reason as to why national states and the disability rights movement in South Africa have not readily politicised the issue of disabled sexualities within their own legislation. In this regard, concepts of disabled sexual rights remain inadequate, with what Miller describes as 'troublesome but predictable disjunctures [that] constrain the evolution of coherent and progressive policy positions in this area [of disabled sexual rights]'.⁵¹

3.2 Sexuality and disability in national legislation

As outlined earlier in this article, South Africa is recognised for its comprehensive legislation and policy development in relation to disability rights. However, similar to the CRPD and other UN conventions, rights in relation to sexual access and disability are minimal; however, rights in terms of protection from abuse appear strongly in national sexuality-related legislation. An example is the Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015, which includes two parts related to 'sexual offences against children, and persons who are mentally disabled'.⁵² In summary, the Act states that youths and adults who are 'mentally disabled' (either intellectually or psycho-socially) are unable to consent to sex and, therefore, any attempt at a sexual act is deemed an offence.

In a first reading of the Act, it is often misunderstood that the Act is applicable to everyone with an intellectual or psychosocial disability, and is often used as a means of preventing sexual encounters amongst adolescents with varying intellectual disabilities. However, on closer reflection, in particular the definitions in Chapter 1, the Act defines 'persons who are mentally disabled' as any person who, as a result of a disorder or disability of the mind, is:

49 Standard Rules (n 48 above) Rule 9 relates to family life and personal integrity.

50 Schaaf (n 41 above) 119.

51 Miller (n 42 above) 1.

52 Ch 7, Part 1 & 2 of Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2015.

- (a) not able to understand the nature and outcomes of the sexual act;
- (b) able to understand the sexual act but unable to make a proper decision based on this understanding;
- (c) unable to resist the sexual act; or
- (d) unable to show that she does not want to take part in the sexual act.⁵³

Given this context, it is evident that the Act does not prevent sexual encounters amongst adolescents with disabilities (including those with intellectual or psycho-social impairments) who can understand the nature and outcome of a sexual act, and who are able to consent to sexual acts.

4 Sexual silence of adolescents with disabilities

The continual subjugation of disabled sexualities and the silence surrounding adolescents with disabilities within the CRPD has played a significant role in the understanding of sexual access in relation to adolescents with disabilities in South Africa. This is made evident by the fact that adolescents with disabilities are generally discouraged by their parents or caregivers and other significant adults from discussions around sexuality, and are often inhibited from expressing their sexuality. For instance, in a study in the Northern Cape, Sait et al⁵⁴ found that the mothers of girls with intellectual disabilities ignored their daughters' attempts to talk about issues of a sexual nature. What is more, the majority of the mothers perceived sexuality education as consisting only of discussing the sex act, which they believed was inappropriate for their disabled daughters. Similar findings were reported among parents of adolescents with physical disabilities in the Western Cape, who limited sexual discussions with their disabled offspring, believing them to be non-sexual and not in need of sexuality education.⁵⁵ Similarly, it was found that Xhosa-speaking parents of disabled youth in the Eastern Cape were reluctant to talk about issues of sexuality because of doubts about the sexual and reproductive capacities of youths with disabilities.⁵⁶ As a result, the youths with disabilities who took part in the same study indicated that their non-disabled siblings were reportedly more valued as reproductive family members, leaving the disabled siblings feeling rejected. Contrary to these studies, a study amongst Zulu-speaking adolescents with disabilities in KwaZulu-Natal revealed that their lack of sexual communication with their parents or caregivers was no different from that of their non-disabled

53 Centre for Applied Legal Studies & Tshwaranang Legal Advocacy Centre *A summary of the Criminal Law Sexual Offences Amendment Act 32 of 2007* (2008) 13.

54 W Sait et al 'Sexuality, gender and disability in South Africa' in S Tamale (ed) *African sexualities: A reader* (2011) 50.

55 M Wazakili et al 'Experiences and perceptions of sexuality and HIV/AIDS among young people with physical disabilities in a South African township: A case study' (2006) *Sexuality and Disability* 24.

56 J McKenzie 'Disabled people in rural South Africa talk about sexuality' (2013) 15 *Culture, Health and Sexuality* 3.

siblings. Instead, the young participants attributed this lack of sexual communication to cultural practices and the inability of parents or caregivers to talk about sexuality.⁵⁷

4.1 Sexuality education in schools

With the reported inability of parents and caregivers to discuss sexuality, and their apparent lack of awareness surrounding sexuality rights, more emphasis has been placed on educators to provide moral (sexual) guidance. However, given the fact that nearly half a million children and adolescents with disabilities in South Africa do not attend school,⁵⁸ it is clear that they are exempt from these efforts to provide sexuality education. Nevertheless, those adolescents with disabilities who do attend school are often exempt from efforts at sexuality education.⁵⁹ It is reported that some educators in South Africa believe that discussing sexuality would only encourage adolescents with disabilities to go ahead and practise sexual activities.⁶⁰ Contrary to this, however, some educators working in special education did recognise the importance of providing sexuality education to learners with disabilities, but the way in which it was delivered differed between schools and educators.⁶¹ Furthermore, as indicated by De Reus, educators of learners with intellectual disabilities were less inclined to discuss sexuality in detail, as they assumed that the learners would not understand.⁶²

These differences in terms of the provision of sexuality education are exacerbated by a reported lack of skills and resources on the part of educators in terms of conveying sexuality messages in accessible and understandable format to learners with disabilities.⁶³ Moreover, with the invisibility of disabled sexuality in initial teacher education and national guidelines in teaching sexuality education, educators also reported tensions between the discourses on human rights and the restriction of sexual behaviour of adolescents with disabilities.⁶⁴ This conflict between rights and sexual access will be discussed below.

57 P Chappell 'Secret languages of sex: Disabled youth's experiences of sexual and HIV communication with their parents/caregivers in KwaZulu-Natal, South Africa' (2015) 16 *Sex Education* 405.

58 Human Rights Watch (n 4 above) 1.

59 N Groce 'Adolescents and youth with disability: Issues and challenges' (2004) 15 *Asia Pacific Disability and Rehabilitation Journal* 2.

60 P Rohleder & L Swartz 'Providing sex education to persons with learning disabilities in the era of HIV/AIDS: Tensions between discourses of human rights and restriction' (2009) 14 *Journal of Health Psychology* 4.

61 L De Reus et al 'Challenges in providing HIV and sexuality education to learners with disabilities in South Africa: The voice of educators' (2015) 15 *Sex Education* 333.

62 As above.

63 P Rohleder et al 'Challenges to providing HIV prevention education to youth with disabilities in South Africa' (2012) 34 *Disability and Rehabilitation* 8.

64 Rohleder & Swartz (n 60 above) 605.

Apart from a reluctance on the part of adults to discuss sexuality issues, attempts at sexual expression or sexual encounters are often also chastised or prevented. This is particularly evident amongst adolescents with intellectual disabilities living in institutional care or educational settings. For example, studies in New Zealand⁶⁵ and Canada⁶⁶ demonstrate how a lack of privacy, combined with negative attitudes of caregivers and support staff, reduced opportunities for the development of intimate relationships in institutional care settings. Moreover, attempts at sexual acts by young residents with intellectual disabilities were generally classified as problematic behaviour rather than as expressions of love and intimacy.⁶⁷ In addition to attitudes towards sexuality and disability, issues of morality and religion also play an integral role in preventing sexual encounters. This was revealed in a study conducted amongst educators and support staff in a Christian residential organisation for adolescents and young adults with intellectual disabilities in the Western Cape. Some educators identified a conflict between their Christian beliefs and the promotion of sexual rights, as identified in the following extract:

If an organisation were to recognise the sexual rights of persons with learning disabilities, and provide condoms to residents, there will be a perceived condoning of sexual relationships occurring outside of marriage.⁶⁸

To overcome this moral dilemma and to manage sexual behaviour, educators would make it difficult for the residences to access condoms, and did not provide private spaces in which couples could meet.⁶⁹ Critically analysing this situation, the lack of privacy and access to condoms not only goes against the Children's Act, but would undoubtedly not deter curious adolescents with disabilities from having sexual encounters. If anything, this situation may perpetuate risky sexual behaviour and heighten risks of unplanned pregnancies, rape and HIV infection.

Separate from the doubts concerning the sexual capacities of adolescents with disabilities, Milligan and Neufeldt⁷⁰ contend that the reluctance of both parents, caregivers and educators to engage with the discourse of sexual access may be further attributed to their efforts to protect adolescents with disabilities from future rejection and vulnerability to sexual abuse. These concerns about abuse also intersect in the control of reproduction and use of forced or coerced sterilisation to protect young disabled women from pregnancy following sexual abuse.⁷¹ This is of

65 CA Hamilton "Now I'd like to sleep with Rachael" – Researching sexuality support in a service agency group home' (2009) 24 *Disability and Society* 3.

66 A Saxe & T Flanagan 'Factors that impact support workers' perceptions of the sexuality of adults with developmental disabilities: A quantitative analysis' (2014) 32 *Journal of Sexuality and Disability* 45.

67 Hamilton (n 65 above) 304.

68 Rohleder & Swartz (n 60 above) 606.

69 As above.

70 Milligan & Neufeldt (n 28 above) 93.

71 Schaff (n 41 above) 14.

particular relevance in the South African context, where sexual and gender-based violence is rife and where children and youths with disabilities are two to five times more likely to experience sexual abuse than their non-disabled peers.⁷²

A closer reflection on the various attitudes of parents/caregivers and educators towards the sexuality of adolescents with disabilities clearly reveals that sexuality is presented as a dangerous and risky discourse. These notions of sexuality as 'dangerous' or 'risky' are not unique to the disability discourse, but also feature prominently in South African sexuality discourse and national legislation.⁷³ Given this perspective, instead of recognising the sexual agency of adolescents with disabilities, parents/caregivers and educators have tended to focus on the construct of adolescents with disabilities as innocent and, therefore, in need of protection. Although not denying the importance of protection from harm, it is argued that the discourse of innocence 'constructs young [disabled] people as un-knowledgeable about sexuality, sexual practice and their own bodies, and inherently creates young [disabled] people as pure'.⁷⁴

Although the discourses of innocence and purity are also related to non-disabled adolescents,⁷⁵ it is more pronounced amongst adolescents with disabilities as it is believed that sex will never form a part of their lives. This continual silence surrounding sexuality and adolescents with disabilities demonstrates not only adultist constructs of adolescence, but ableist constructs of disabled sexuality. Quintessentially, it also demonstrates a general disregard for recognising the sexual agency and rights of adolescents with disabilities. As argued by Coppock, the discourses of silence and protectionism does nothing more than 'skilfully disguise a fundamental distrust in young [disabled] peoples' competence'.⁷⁶ Moreover, the silence surrounding sexual access and adolescents with disabilities reflects a powerful discourse that ultimately culminates in the regulation of young disabled sexual identities.

4.2 Sexual self-esteem and adolescents with disabilities

As a result of the silence and invisibility of adolescents with disabilities in terms of sexual access, many disabled adolescents may lack the confidence to find out how to discuss matters of sex, love and relationships.⁷⁷ This, for example, was identified in a qualitative study in the United Kingdom,

72 Hanass-Hancock (n 6 above) 5.

73 Posel (n 43 above) 1.

74 C Mitchell et al 'Visualising the politics of innocence in the age of AIDS' (2004) 4 *Sex education: Sexuality, society and learning* 36.

75 V Coppock 'Children as peer researchers: Reflections on a journey of mutual discovery' (2010) 25 *Children and Society* 6.

76 Coppock (n 75 above) 439.

77 Shakespeare (n 31 above) 3.

which sought to understand disabled sexuality amongst 44 disabled persons in the UK.⁷⁸ The study found that, although respondents were able to talk in general about their lives and issues of identity and barriers, they had difficulty talking about relationships and sexuality. As a consequence of not being able to speak openly about sexuality, it could in turn increase the vulnerability of adolescents with disabilities to abusive relationships and continue to privilege hegemonic notions of non-sexuality.

Similarly, in the South African context, as children and youths with disabilities are often 'hidden' away, either in their own homes or distant schools or institutions, it is argued that adolescents with disabilities may experience a different sexual identity development process than their non-disabled peers, as the knowledge that they are 'different' is always present.⁷⁹ Consequently, in the absence of positive role models and because of their need to 'fit in' with their peers, some adolescents with disabilities may try to overcompensate for their physical and psycho-social differences.⁸⁰ This became evident in a study amongst Zulu-speaking older adolescents with visual and physical disabilities in KwaZulu-Natal, where it was reported that, in an effort to overcompensate for their differences and fit in with their non-disabled peers, some disabled adolescents displayed behaviour that put them at high risk of sexual exploitation, abuse and HIV infection, all in an attempt to prove their self-worth.⁸¹

5 Sexual rights versus the need for protection: (Re)positioning adolescents with disabilities

Reflecting on the various studies, the CRPD and other legislation discussed in the article, it is clear that the sexuality of adolescents with disabilities in South Africa is constructed as a danger both to themselves and others and, at times, is perceived as socially unacceptable. As a result, any attempt at sexual communication or sexual expression is deemed undesirable and in need of adult and state intervention. Understood in this way, the notion of sexual access for adolescents with disabilities is manipulated and contrived in social and legislative contexts by important adults who are generally perceived as having more power. In the context of adolescents with disabilities, these important adults are the parents or caregivers, educators and government departments, who through their given positionality are able to enforce certain vocabularies and values and

78 T Shakespeare et al *The sexual politics of disability* (1994).

79 Sait et al (n 54 above) 50.

80 C Johnstone 'Disability and identity: Personalised constructions and formalised supports' (2004) 24 *Disability Studies Quarterly* 4.

81 P Chappell 'The social construction of the sexual identities of Zulu-speaking youth with disabilities in KwaZulu-Natal, South Africa, in the context of the HIV pandemic' unpublished PhD thesis, University of KwaZulu-Natal, 2013 180.

in effect control and protect the discourse of sexuality amongst adolescents with disabilities.

As far as South Africa is concerned, the need for control over and protection of adolescents with disabilities has been justified because of the current climate where issues such as HIV and AIDS, gender-based violence and sexual exploitation of children and youths with disabilities are rife. However, in critically analysing this protectionist approach, it not only constructs sexuality as a dangerous and risky discourse, but also renders adolescents with disabilities as void of sexual agency. This undoubtedly has a two-fold effect on disabled adolescents. First, it marginalises the (sexual) voices of adolescents with disabilities and, second, it may also impact on the individual and their perceptions of their own sexual identity, desirability and, possibly, their perceptions regarding the risk of HIV. In this regard, it is argued that by taking a solely protectionist approach to sexual access, it can be a potentially 'disempowering act', which fails to recognise the sexual rights of adolescents with disabilities.⁸²

Although not denying the significance of protection, the article calls for a more balanced, holistic approach between the need for protection and recognition of the rights of adolescents with disabilities to access their sexualities. However, in order to achieve this balance, it is necessary to recognise the fluidity of power and that adolescents with disabilities also have the potential to exercise agency and trouble constructions of their sexual identities and notions of sexual access. In adopting this approach, we need to (re)position adolescents with disabilities as sexual beings who, in line with Marr and Malone's concept of the 'agentic child', are 'capable and competent agent(s) who replicate and appropriate aspects of their culture through their talk and interaction with others, thereby actively participating in the construction of their own social situations'.⁸³ Given this perspective, adolescents with disabilities are positioned as 'knowers' or experts in their own lives.⁸⁴ The notion of adolescents with disabilities as 'knowers' troubles constructs of innocence and encourages adults to take cognisance of the knowledge and experiences disabled adolescents already have regarding sexuality.

To some extent, this approach has been acknowledged within the recent Department of Social Development's national adolescent sexual and reproductive health and rights framework strategy, 2014-2019.⁸⁵ In

82 D Francis et al 'Deconstructing participatory research in an HIV/AIDS context' (2006) 38 *Journal of Education* 141.

83 P Marr & K Malone 'What about me? Children as co-researchers' <http://www.aare.edu.au/data/publications/2007/mar07118.pdf> (accessed 5 February 2016).

84 D Francis 'Sexuality education in South Africa: Three essential questions' (2010) 30 *International Journal of Educational Development* 3.

85 Department of Social Development *National adolescent sexual and reproductive health and rights strategy framework, 2014-2019* (2015).

the milieu of South Africa's growing youth population, the aim of the strategy is to address some of the gaps in the provision of sexual and reproductive health care for adolescents (defined between the ages of 10 to 19 years) and to call for

the development of an inclusive agenda that intends to promote the quality of life and the right to choose whether and when to have children; the right to exercise sexuality free of violence and coercion; the right to seek pleasure with respect for other people's rights; the right to protect fertility; and the right to access modern techniques for the prevention, diagnosis and treatment of sexually transmitted infections.⁸⁶

As part of its commitment to developing an 'inclusive agenda', the strategy framework acknowledges adolescents with disabilities. Furthermore, reflecting on the five key priorities in the strategy framework, it attempts to ensure that the (sexual) voices of adolescents are heard, and that parents/caregivers and other significant adults are trained in the sexual and reproductive health rights of adolescents with disabilities. In taking a rights-based approach, although the strategy does not include any indicators, it does, however, start to positively acknowledge both the sexual agency of adolescents with disabilities, and their rights to sexual access.

6 Recommendations

To conclude the article, the following recommendations are put forward:

- There is a need to develop a draft sexuality rights policy within the disability sector, which aims at creating optimal and safe conditions for adolescents with disabilities to experience positive relationships, sexuality and sexual health.
- Further research is required amongst adolescents with disabilities in South Africa to gain a better understanding of their experiences of sexual access and sexuality rights. In line with the concept of adolescents with disabilities as experts in their own lives, research efforts should engage adolescents with disabilities as co-researchers. The findings from this research may contribute to developing comprehensive indicators in relation to disabled adolescents and the national adolescent sexual and reproductive health and rights framework strategy.
- Comprehensive sexuality educational programmes that use a rights-based approach are needed for parents/caregivers and educators of adolescents with disabilities. From the outset, these educational programmes must recognise adolescents with disabilities as 'capable social agents' and not merely innocent vessels when it comes to sexuality and HIV.

86 Department of Social Development (n 85 above) 6.

THE DEVELOPMENT AND USE OF
SIGN LANGUAGE IN SOUTH AFRICAN
SCHOOLS: THE DENIAL OF
INCLUSIVE EDUCATION*Willene Holness****Summary**

The lobbying and advocacy predating, and litigation in Springate v Minister of Basic Education Case no 4846/2009 (PMB HC) culminated in a victory for South African deaf learners, namely, to study sign language as a language subject for matriculation in schools. This article discusses the litigation in Springate, focusing on South African sign language as a school subject, and the silence of the Pan-South African Language Board in the litigation, curriculum development and monitoring, enforcement and advocacy by relevant institutions (the South African Human Rights Commission and the Commission on the Rights of Cultural, Religious and Linguistic Communities), the media and civil society. The rationale for legislative and policy choices distinguishing between sign language as a disability right or linguistic minority right is considered, as well as litigation and law reform for the recognition and use of sign language in education and the provision of sign language interpreters in select jurisdictions. It is concluded that the protection of sign language in domestic law and policy, though fragmented, should be read within the growing acceptance globally that sign language is both a right accruing due to disability accommodations, and due to the linguistic and cultural minority status of deaf users of sign language. The current offering of sign language as a language subject in mainstream or full service schools in South Africa is considered to be constrained by the 'reasonable practicable' standard, contrary to the notion of full inclusive education. The continual monitoring of the linguistic and cultural rights of sign language users will hopefully address the shortcomings in the education system, but this will need dedicated funding and political will.

* BA LLB (Rhodes), LLM (UKZN); Lecturer, School of Law, University of KwaZulu-Natal. This article was presented at the Conference on Disability Rights in Africa in November 2015 at the Centre for Human Rights, University of Pretoria. The author wishes to thank the Legal Resources Centre, Durban, for access to their files in the *Springate* matter and the Centre for Human Rights for funding attendance of the conference.

That we are here launching New Zealand sign language into the New Zealand curriculum offers a greater hope of that ordinary life – not only for the deaf community, but for all disabled New Zealanders. And I'm proud to be part of a government that is working to ensure New Zealanders have the tools and support to realise their potential ... having these guidelines boosts the recognition of New Zealand sign language as a native language... But, critically, it removes sign language from the realms of special education. It firmly places New Zealand sign language within the mainstream, where hearing students will have the access to the language and culture of the deaf; where someday its use will become unremarkable – just another facet of ordinary life.¹

I am very pleased that learners across the country will now have the opportunity to receive an education in their home language of choice – sign language. And I am proud of the role the Western Cape government, the WCED and our schools, particularly De La Bat, have played in making this dream a reality for our deaf learners. I am hopeful that, in future, we will be able [to provide this] option in hearing schools, particularly in our full-service schools where this is reasonably practicable. However, a lot more work lies ahead of us, and the rest of the country, before this can be implemented.²

1 Introduction

Despite the recognition by the South African Schools Act (SASA) that sign language has been utilised in the teaching and learning of deaf learners in public schools since 1996, there was no approved sign language curriculum for learners until 2014.³ Whilst in New Zealand, for example, sign language is a recognised official language and provided in mainstream schools to allow language acquisition and cultural acceptance of sign language and deaf culture, in South Africa sign language is not an official language and currently is taught only in special schools for the deaf. South African sign language (SASL) is a unique language and is not linguistically related to spoken languages in South Africa (English or isiZulu, for example). Rather, it is a distinct, 'rule-governed, grammatical, systematic, and non-arbitrary communication system which is similar in nature to other natural sign languages'.⁴ The lack of recognition of SASL and curriculum development in practice has for generations denied learners

1 Ruth Dyson, New Zealand's Minister of Disability Issues, Address to the launch of New Zealand sign language in the New Zealand curriculum (15 March 2007) <http://www.beehive.govt.nz/speech/address-launch-new-zealand-signlanguage-new-zealand-curriculum>, cited in JH Cripps & SJ Supalla 'The power of spoken language in schools and deaf students who sign' (2012) 16 *International Journal of Humanities and Social Science* 86-94.

2 Donald Grant, Minister of Education, Western Cape Province, statement 'Promoting the use of sign language in schools' 11 September 2013 <https://www.westerncape.gov.za/news/promoting-use-sign-language-schools> (accessed 1 December 2015).

3 Sec 6(4) of the South African Schools Act 84 of 1996.

4 C Penn 'Signs of the times: Deaf language and culture in South Africa' (1993) 40 *South African Journal of Communication Disorders* 11-23; C Penn 'The sociolinguistics of South African sign language' in R Herbert (ed) *Language and society in South Africa* (1992) 277.

educational and employment opportunities. This lack of recognition may also be traced to the preference for special schools rather than mainstream schools for children with hearing impairments, which means that SASL and its development has not been prioritised by the relevant state bodies. The move towards inclusive education has not been uncontroversial and, at times, has been jeopardised by exclusionary state policy and skewed funding priorities.⁵

In 2009, Kyle Springate, a matric pupil at a prestigious 'mainstream' school, Westville Boys High School, challenged the Department of Education in the High Court of Pietermaritzburg for being refused to be examined in sign language, a subject he had taken throughout high school. Kyle attended a mainstream high school, despite his hearing impairment, primarily because his communication skills were aided by his ability to lip read and the use of a hearing aid.⁶ Because Kyle's hearing loss was progressive, he required to be proficient in sign language to mitigate his hearing loss in the future:

I simply feel that proper knowledge of SASL is a vital skill that will be of great use for the rest of my life. Over the last few years, I have experienced a reduction in my ability to hear. My mother has arranged for me to have the most powerful hearing aid on the market, but it cannot prevent the degeneration in hearing that I am experiencing. In due course, my ability to lip read will be diminished and I will need to use SASL as my way of communicating.⁷

The threat of litigation brought by Kyle and two disabled persons' organisations (DPOs), DeafSA and the KwaZulu-Natal Blind and Deaf Society (KZNBDS), against the Department of Education resulted in the curriculum development of South African sign language (SASL) after 14 years of advocacy by the deaf community. The constitutionally-mandated body responsible for language development, the Pan-South African Language Board (Language Board) was not a key party in the litigation, despite being cited as a respondent, nor was it an active participant in the preceding advocacy by DPOs and lobbying of government departments to have sign language recognised.

The article considers the advocacy and litigation in *K Springate v Minister of Education & Others*,⁸ which culminated in a victory for deaf learners to study sign language as a language subject for matriculation in

5 *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC). Cf C Ngwenya 'Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education' (2013) 1 *African Disability Rights Yearbook* 139; P Kruger 'A critical appraisal of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 97 (CC)' (2015) 18 *Potchefstroom Electronic Law Journal* 756-773.

6 Kyle's hearing loss was established at that time at 91%.

7 K Springate, confirmatory affidavit filed on 8 June 2009 para 3 (copy with the author).

8 Case 4846/2009 (PMB HC).

schools. Section 2 provides a brief overview of the recognition of South African sign language and inclusive education in South Africa. Section 3 discusses the litigation in *Springate*, focusing on SASL as a school subject, the silence of the Language Board in the litigation, the curriculum development following the litigation, and the monitoring, enforcement and advocacy by relevant institutions, such as the South African Human Rights Commission (SAHRC) and the Commission on the Rights of Cultural, Religious and Linguistic Communities (CRL Commission), the media and civil society. Section 4 briefly outlines the rationale for legislative and policy choices distinguishing between sign language as a disability right or a linguistic minority right. Section 5 is an overview of selected jurisdictions: litigation and law reform for the recognition and use of sign language in education and the provision of sign language interpreters. Such examples provide scope for further advocacy and litigation to promote the recognition of sign language as an official language and its development and utilisation in the private and public spheres. It will also inform the choice for states' legislative and policy frameworks between viewing the recognition of sign language as a disability right or a linguistic minority right. Such a deliberate choice is important, because

[e]ven in industrialised countries, the majority of current deaf education programmes do not respect the linguistic human rights of deaf children. Indeed, most deaf education programmes fall in to the language deprivation category described in theoretical models of education of linguistic minorities. 'Language deprivation' for deaf people means ignoring the use of sign language as a basic communication means, as a language of instruction and as a school subject. Following this, the linguistic human rights of deaf children are grossly violated in educational programmes all over the world.⁹

Grobbelaar-Du Plessis has bemoaned the lack of disability-specific legislation in South Africa, commenting that its absence means that the current fragmented legislation may promote some rights at the expense of others, and also affects the accessibility of the law, and the rights flowing therefrom.¹⁰ The legislature should, therefore, be cognisant of the implications of legislative choices regarding the recognition of SASL, for example, if SASL is to be recognised as a twelfth official language, just as the Department of Education should be aware of its policy implications when developing curricula to teach SASL in schools for the deaf and not in *all* schools. Section 6 is the conclusion.

9 World Federation of the Deaf *Policy on Education Rights for Deaf Children* (2007) ii.

10 I Grobbelaar-Du Plessis 'Gestremdeheidsreg: 'n Internasionaal regtelike en regsvergelikende analise' unpublished LL.D thesis, University of Pretoria, 2010 565-566 <http://repository.up.ac.za/bitstream/handle/2263/28549/Complete.pdf?sequence=10> (accessed 1 December 2015).

2 Brief overview of South African sign language recognition and inclusive education in South Africa

During the apartheid era, disability rights issues were not prioritised by lawyers, policy and lawmakers, particularly as civil and political rights were most under threat. Because of the unequal education system, segregated according to race, persons with disabilities were marginalised, and by and large were functionally illiterate.¹¹ Dube explains that '[t]he lived experiences of black and white disabled people under apartheid were very different, and reflected the general inequalities between white and black people in South Africa'.¹² Inclusive education has been the preference following the constitutional dispensation at a policy level but, in reality, particularly the hearing impaired are still segregated into special schools without the equal recognition of their language of communication and learning.

2.1 Apartheid context and mobilisation by the disability community

During the apartheid era, language planning and policy, not only the use of spoken languages, but also sign language, supported Afrikaner nationalist objectives and as a 'pillar of ethnolinguistically separate education', and has remained divisive since the dawn of democracy.¹³ Deep-seated inequality of resources on the basis of race followed.¹⁴ Manual codes (a form of English) were used in schools for the black deaf, with oral and written manuals, whilst schools for the white deaf followed oral education methods, offering hearing aids and intensive speech and language therapy.¹⁵ 'Oralism' was the overarching approach in an attempt to 'cure' the deaf child, requiring children to lip-read and speak.¹⁶ Towards the end of the apartheid era, the total communication approach was used, involving the simultaneous use of spoken language and signs, in a single

11 DeafSA *Deaf education position paper* (2006) 11 (copy with the author).

12 AK Dube 'The role and effectiveness of disability legislation in South Africa' (2005) *Disability Knowledge and Research* 14.

13 T Reagan 'South African sign language and language-in-education policy in South Africa' (2008) 38 *Stellenbosch Papers in Linguistics* 165. For a historical account of education of the deaf in South Africa, see C Storbeck et al 'Education of the deaf in South Africa' in DF Moores & M Miller (eds) *Educational and social perspectives of deaf people around the world* (2009) 133.

14 *Hoërskool Ermelo v Head of the Mpumalanga Department of Education* 2010 (2) SA 415 (CC) para 2.

15 Storbeck et al (n 13 above) 133; RMT Simmons 'The role of educational systems and deaf culture in sign language in South Africa' in C Erting et al (eds) *The deaf way: Perspectives from the international conference on deaf culture* (1994) 80-83.

16 EL Peel 'Inclusive practice in South Africa: A deaf education perspective' unpublished Master of Education thesis, University of Witwatersrand (2004) 14.

education system for all students.¹⁷ Thereafter, a more bilingual-bicultural approach to deaf education was followed in line with the prevailing educational language policy.¹⁸

Within the disability sector, mobilisation by the disability community on rights issues were primarily coloured by the welfare or charity model,¹⁹ as well as the medicalised understanding of disability, with the result that the focus was on rehabilitation, namely, curing the defect, such as cochlear implants for deaf children. As in the rest of the world, DPOs were mainly constituted of able-bodied persons, managing the organisations *for* persons with disabilities.²⁰ The agency of persons with disabilities was, thus, not evident in community organisations, nor in policy and law making.

During the 1980s to 1990s, DPOs moved towards a human rights approach, greatly influenced by the political environment, and organisations became more and more representative *of* persons with disabilities.²¹ As a result, the movements' efforts at macro-level were in line with the social model of disability, based on the claim 'that disability is caused wholly or substantially by social and environmental barriers that prevent disabled people from living independently and from participating in their communities'.²² This signals a socio-cultural perspective that advances a two-fold role of sign language for the deaf community: acting as the community's vernacular language, and as an indicator of cultural group membership.²³ Competence in a particular sign language is required for deaf cultural identity.²⁴ In South Africa, research on the nature and characteristics of SASL points to the recognition of SASL as a 'distinct language in its own right, not a derivational, pidgin or contact language. It is a rule-governed, grammatical, systematic and non-arbitrary

17 E Smuts 'Schools: Deciding on a school for the deaf' in R Hugo & T Blumberg (eds) *Challenges and choices: An aid for parents of children with hearing loss* (2010) 51, cited in Peel (n 16 above) 18.

18 PAO Akach 'Teachers attitudes towards the medium of instruction: An empirical study (a case study of two schools) in South Africa' in DO Orwenjo et al (eds) *Multilingualism and education in Africa: The state of the state of art* (2014) 286 298.

19 S Philpott & W Sait 'Disabled children: An emergency submerged' in M Priestly (ed) *Disability and life course: Global perspectives* (2001) 151 165.

20 K Jagoe 'The disability rights movement: Its development in South Africa' (undated) Living Institute <http://www.independentliving.org/toolsforpower/tools6.html> (accessed 1 December 2015).

21 C Howell et al 'A history of disability rights movement in South Africa' in B Watermeyer et al (eds) *Disability and social change: A South African agenda* (2006) 58.

22 M du Plessis 'The social model of disability, rights discourse and the impact of South Africa's Education' White Paper 6 on access to the basic education system for persons with severe or profound intellectual impairments (2013) 17 *Law, Democracy and Development* 202 208.

23 Reagan (n 13 above) 169.

24 Reagan (n 13 above) 170.

communication system similar in nature to other natural sign languages'.²⁵

2.2 Democratic imperatives

Not only had the global paradigm shifted from the medical model (or clinical-pathological model) to the social-cultural model (or bilingual-bicultural approach to sign language), but the democratic transition in South Africa brought recognition of the status of children with disabilities as equal to their non-disabled peers. This is considered from the perspective of constitutional changes, international law imperatives and legislative and policy changes.

2.2.1 Constitutional provisions

The rights to equality, language, culture and education comprise the matrix of sign language protection in the South African Constitution. In the democratic era, the anti-discrimination clause²⁶ in the Constitution was the most significant gain made by the disability community and would prove to provide impetus for policy and legislation to address the unequal treatment of persons with disabilities, to the extent that persons with disabilities are a designated group for the purposes of employment equity and affirmative action.²⁷ The clause prohibits unfair discrimination, *inter alia* on the basis of disability, culture and language.

The Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000 (Equality Act) was enacted to comply with the constitutional requirement for national legislation to prevent or prohibit unfair discrimination.²⁸ The Equality Act lists unfair discrimination on the basis of disability as including the denial of or removal from any person who has a disability, any supporting or enabling facility necessary for their

25 Reagan (n 13 above) 173, citing D Aarons & P Akach 'South African sign language: One language or many? A socio-linguistic question' (1998) 31 *Stellenbosch Papers in Linguistics* 1. Cf D Aarons & L Reynolds 'South African sign language: Changing policies and practice' in L Monaghan et al (eds) *Many ways to be deaf: International variation in deaf communities* (2003) 194; C Penn & T Reagan 'Implications of the study of South African sign language for the education of the deaf in South Africa' (1995) 15 *South African Journal of Education* 92; C Penn 'Signs of the times: Deaf language and culture in South Africa' (1993) 40 *South African Journal of Communication Disorders* 11; C Penn & T Reagan 'Toward a national policy for deaf education in the "new" South Africa' (1991) 38 *South African Journal of Communication Disorders* 19; C Penn & T Reagan 'How do you sign "apartheid"? The politics of South African sign language' (1990) 14 *Language Problems and Language Planning* 91.

26 Sec 9 of the Constitution, particularly sec 9(3): 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth' (my emphasis).

27 Sec 9(2) of the Constitution and Employment Equity Act 55 of 1998.

28 Sec 9(4) of the Constitution.

functioning in society;²⁹ and the failure to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.³⁰ Failing to provide reasonable accommodation constitutes unfair discrimination. Examples of illustrative practices in education amounting to unfair discrimination were not left to the imagination of lawyers but listed in Schedule 1 of the Equality Act, including the unfair exclusion of learners, including learners with special needs, from educational institutions; and the failure to reasonably and practically accommodate diversity in education.³¹ The Equality Act explicitly lists as a factor in determining the fairness of the discrimination the question as to whether the applicant has taken reasonable steps to accommodate diversity.³² The state is further enjoined to take positive steps to eliminate discrimination on the basis of disability through, for example, auditing laws, policies and practices with a view to eliminating all discriminatory aspects and to enact appropriate laws; to develop progressive policies and initiate codes of practice in order to eliminate unfair discrimination on the basis of disability; to adopt viable action plans to promote and achieve equality in respect of disability; and to give priority to the elimination of unfair discrimination and promotion of equality in respect of disability.³³ The Equality Act is, therefore, a vehicle for obtaining reasonable accommodation and support measures and for removing barriers to equal opportunities for deaf learners for education in schools.

Whilst not recognised as an official language, sign languages are explicitly protected by the Constitution as it recognised the need for the establishment of a Language Board to, *inter alia*, promote and create conditions for the development of all official languages and sign language.³⁴ With regard to the protection of linguistic rights, sections 30 and 31 are significant.³⁵ the former referring to the rights of individuals to

29 Sec 9(a) of the Equality Act.

30 Sec 9(c) of the Equality Act.

31 Items 2(a) and (c) of Schedule 1: Illustrative list of unfair practices in certain sectors.

32 Sec 14(3)(i)(ii) of the Equality Act.

33 Secs 28(3)(b)(i) to (iv) of the Equality Act. Similarly, the suspect grounds of race and gender are elevated to needing special measures to promote equality. Unfortunately, the date of commencement of this proactive provision is still to be proclaimed.

34 Sec 6(5) of the Constitution provides that a Pan-South African Language Board is to be established by national legislation to *inter alia* promote and create conditions for the development of all official languages and sign language. The Pan-South African Language Board Act 59 of 1995, amended by Act 1999, established the Board.

35 Sec 30 of the Constitution provides: 'Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.' According to sec 31: '(1) Persons belonging to a cultural or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture and use their language; and (b) to form, join and maintain cultural and linguistic associations and other organs of civil society. '(2)The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.'

participate within their cultural and linguistic communities; the latter protecting the interests of the community.³⁶

The right to basic education is an unqualified right.³⁷ For educational purposes, section 29(2) guarantees that '[e]veryone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable'. The limitation for linguistic protection, however, is the standard of 'reasonably practicable'. Reasonable alternatives, which include single-medium schools, should be considered by the state in implementing this right.³⁸ Factors that should be considered include equity, practicability and the pressing need to redress the results of the racially discriminatory laws and practices of the past.³⁹ Following a number of court decisions⁴⁰ that have delineated the scope of this right, the Department of Education has described their obligation as follows:

In recognising the right of a learner to receive education in an official language or in a language of one's choice, the state is duty-bound to ensure effective access to the right to be taught in the language of one's choice. This duty is coupled with the obligation on the state to ensure that there are sufficient school places for every child living in a province, as well as with the duty to ensure that a public school admits learners without unfair discrimination against them in any way.⁴¹

The right of language choice is, therefore, not absolute but tempered by considerations of equality – particularly equal access to education for all children.⁴² The best interests of the child is the standard against which all decisions regarding children are measured.⁴³ Underpinning the right to education, as most rights, is non-discrimination and equal treatment, but also equality of access, resources and opportunities.⁴⁴ The use of an inappropriate language of learning and teaching, such as reliance on a

36 S Woolman 'Community rights: Language, culture and religion' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (original service 2007) 58-49.

37 Sec 29(1) of the Constitution.

38 Sec 29(2) of the Constitution.

39 Secs 29(2)(a) to (c) of the Constitution.

40 Including *Matukane & Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T) and *Hoërskool Ermelo v Head of the Mpumalanga Department of Education* 2010 (2) SA 415 (CC).

41 Department of Basic Education 'The status of the language of learning and teaching in South African schools: A quantitative overview' (2010) 9 <http://www.education.gov.za/LinkClick.aspx?fileticket=wuoS4v3cIkg%3D&tabid=358&mid=2597> (accessed 23 September 2015). This statement is taken virtually *verbatim* from the decision in *Hoërskool Ermelo* (n 40 above) para 76.

42 Cf S Woolman 'Defending discrimination: On the constitutionality of independent schools that promote a particular, if not comprehensive, vision of good life' (2007) *Stellenbosch Law Review* 31; B Fleisch & S Woolman 'On the constitutionality of single-medium public schools' (2007) *South African Journal on Human Rights* 34 38; S Woolman & M Bishop 'Education' in S Woolman & M Bishop *Constitutional law of South Africa* (original service 11-07) 57-42 to 57-78.

43 Sec 28(2) of the Constitution.

44 T Boezaart 'A constitutional perspective on the rights of children with disabilities in an educational context' (2012) 7 *South African Public Law* 460.

spoken language at the detriment of SASL, for example, violates the right to equal access to education.⁴⁵

2.2.2 International law

International law arguably perceives users of sign language as a linguistic and cultural minority, but more forcefully protects the rights to language, culture and education of children with hearing impairments as individual, not group rights,⁴⁶ in a number of instruments. The Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (Standard Rules) stress the need for states to consider the use of sign language in educating deaf children.⁴⁷ Whilst acknowledging that the communication needs of the deaf may require the provision of schooling in 'special classes and units in mainstream schools', the Rules emphasise attention to be paid to 'culturally sensitive instruction that will result in effective communication skills and maximum independence for people who are deaf or deaf/blind'.⁴⁸

Users of sign language, arguably, comprise a minority as they are numerically inferior, possessing linguistic characteristics different from the rest of the population, and showing a sense of solidarity in preserving their culture and language.⁴⁹ Article 27 of the International Covenant on Civil Political Rights (ICCPR) informs section 31 of the Constitution and protects the rights of linguistic minorities to enjoy their own culture or to use their own language.⁵⁰ The Convention on the Rights of the Child (CRC), similarly, protects this minority cultural and linguistic right.⁵¹ This recognition would require positive steps to be taken by the state to develop

45 S Pendlebury 'Meaningful access to basic education' in S Pendlebury et al (eds) *South African child gauge* (2009) 24 26.

46 A Kusters et al *On diversity and inclusion: Exploring paradigms for achieving sign language people's rights* (2015) MMG Working Paper 15-02 Max Planck Institute for the Study of Religious and Ethnic Diversity, Göttingen, 1 8; S Batterbury et al 'Sign language peoples as indigenous minorities: Implications for research and policy' (2007) 39 *Environment and Planning* 2899.

47 Rule 5(7) on accessibility, Standard Rules on the Equalisation of Opportunities for Persons with Disabilities A/RES/48/96 (4 March 1994).

48 Rule 6 on education of the Standard Rules (n 47 above).

49 This complies with the definition of minority proffered by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CN.4/Sub.2/384/Rev.1 para 568.

50 See also arts 1(1), 2(1), 2(5), 3(1), 3(2) and 4(1) of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, General Assembly Resolution 47/135 (18 December 1992). The multiple discrimination faced by linguistic minorities, eg on the basis of disability as well as language, is recognised in United Nations Minority rights: International standards and guidance for implementation (2010) HR/PUB/10/3 3 http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf (accessed 1 December 2015).

51 Art 30 of the CRC.

their linguistic identity.⁵² Some commentators have argued that linguistic genocide has occurred where spoken languages are preferred over sign languages, and where one sign language dominates, attaining official status, to the detriment (or 'death') of other sign languages practised in a given country.⁵³ The genocide of sign language in this context also meets the understanding of linguistic genocide interpreted from the definition of 'genocide'⁵⁴ in the UN Convention on the Prevention and Punishment of the Crime of Genocide.⁵⁵ Three treaties that have explicit provisions dealing with the education of children with disabilities, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the CRC and the CRPD are now discussed.

South Africa only recently ratified the ICESCR, in January 2015, 20 years after signature, but subject to a reservation that some commentators argue may be unconstitutional.⁵⁶ The reservation provides:

The government of the Republic of South Africa will give progressive effect to the right to education, as provided for in article 13(2)(a) and article 14, within the framework of its national education policy and available resources.

Even though the right to education is unqualified in the Constitution,⁵⁷ the government attempts to make this right subject to progressive realisation and available resources and, most disquieting, subjects this constitutional right to policy. The implications of resource allocation and much-needed political support for the provision of sign language education in *all* schools are distressing. The right to culture, however, is not subjected to a reservation. The ICESCR recognises the right of everyone to practise their culture.⁵⁸ The UN Committee on Economic, Social and Cultural Rights

52 General Comment 23, art 27 of the International Covenant on Civil Political Rights (1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 (1994) 38. Paras 6.1 and 6.2 oblige states to take positive measures to protect the identity of the minority and to enable them to enjoy and develop their culture and language, in community with the other members of their group.

53 T Skutnabb-Kangas *Linguistic genocide in education- Or worldwide diversity and human rights?* (2000) 227 348 376.

54 T Skutnabb-Kangas 'Linguistic genocide and the deaf' (undated) http://www.deafzone.ch/file/file_pool/action/download/file_id/1379. Cf J Lubbe et al (eds) *South African language rights monitor 2003* (2011) 20.

55 Convention on the Prevention and Punishment of the Crime of Genocide Assembly Resolution 260 A (III) of 9 December 1948. Art II(e) considers it genocide when there is an instance of forcibly transferring children of the group to another group; and art II(b), when it causes serious bodily or mental harm to members of the group.

56 Joint statement by Section 27, Equal Education, the Centre for Child Law, the Legal Resources Centre and Equal Education Law Centre 'SA government's declaration on education clause mars the welcome ratification of the International Covenant on Economic, Social and Cultural Rights' <http://www.lrc.org.za/press-releases/3359-joint-statement-sa-government-s-ratification-of-the-icescr> (accessed 14 February 2016).

57 Sec 29(1)(a) of the Constitution; *Governing Body of the Juma Masjid Primary School & Others v Essay NO & Others* 2011 (8) BCLR 761 (CC) para 37.

58 Art 15 of the International Covenant on Economic, Social and Cultural Rights General Assembly Resolution 2200A (XXI) of 16 December 1966.

(ESCR Committee) has commented that the right to take part in cultural life is

characterised as a freedom. In order for this right to be ensured, it requires from the state party both abstention (ie, non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).⁵⁹

It appears as if this positive action may have been lacking on the part of the South African government. The cultural rights of particular groups are protected, including children, persons with disabilities and minorities. Particularly, the rights of persons with disabilities in cultural life will require the state to take positive measures to provide for them to have, *inter alia*, the recognition of their specific cultural and linguistic identity, including sign language and the culture of the deaf.⁶⁰

The right to education is not the only entry point for holding the South African government to account; the right to cultural and linguistic identity, as described by the ESCR Committee, may also prove helpful.

The CRC does not explicitly recognise the use of sign language, but one of the aims of education is to develop respect for the cultural identity and language of children.⁶¹ The right to education is conceived as progressively realisable, and to be achieved on the basis of equal opportunity.⁶² For children with disabilities, their special needs may require assistance to ensure that the child has 'effective access to and receives education' in a way conducive to his or her 'fullest possible' social integration and individual development, including cultural development.⁶³ Cultural development should include the protection and development of the deaf culture. This, in turn, would also link with the aim of developing respect for a child's cultural identity (deaf) and language (sign language). The Committee on the Rights of the Child (CRC Committee) has commented that the main aim of article 23 is a child's inclusion in society, which would extend to maximum inclusion in education.⁶⁴ Such quality education recognises that children with disabilities are not homogenous and that they have different needs, requiring teachers and professionals to assist a child as individual to

59 ESCR Committee General Comment 21 Right of everyone to take part in cultural life (art 15 para 1(a) of the International Covenant on Economic, Social and Cultural Rights) 21 December 2009, E/C.12/GC/21, clause 6. Cf A Barratt & A Afadameh-Adeyemi 'Indigenous peoples and the right to culture: The potential significance for African indigenous communities of the Committee on Economic, Social and Cultural Rights General Comment 21' (2001) 1 *African Human Rights Law Journal* 560.

60 ESCR Committee General Comment 21 (n 59 above) clause 31.

61 Art 29(1)(c) of the CRC.

62 Art 29(1)(a) of the CRC.

63 Art 23(3) of the CRC.

64 CRC Committee General Comment 9 The rights of children with disabilities (2006) 27 February 2007, CRC/C/GC/9 para 11.

‘develop his or her ways and skills of communication, language, interaction, orientation and problem solving which best fit the potential of the particular child’.⁶⁵ Such an individualised understanding of education may necessitate personal assistance, which should include ‘teachers trained in methodology and techniques, including appropriate languages, and other forms of communication, for teaching children with a diverse range of abilities, and who are capable of using child-centred and individualised teaching strategies, and appropriate and accessible teaching materials, equipment and assistive devices’.⁶⁶ However, the rider on inclusive education is an acknowledgment that, in the short term, ‘[a] continuum of services and programme options must be maintained in circumstances where fully inclusive education is not feasible to achieve in the immediate future’.⁶⁷ This rider⁶⁸ is inconsistent with the Committee’s further explication of ‘inclusive education’ as not merely integration into mainstream classes.⁶⁹

The CRPD explicitly enjoins states to provide for sign language in many aspects of life, listing its inclusion in five articles:

- inclusion in the definition of ‘language’;⁷⁰
- linguistic access;⁷¹
- freedom of expression and opinion;⁷²
- education;⁷³ and
- participation in cultural life, recreation, leisure and sport.⁷⁴

65 CRC Committee General Comment 9 (n 64 above) para 43.

66 CRC Committee General Comment 9 (n 64 above) para 45 on early childhood education.

67 As above.

68 LN Murungi ‘Inclusive basic education in South Africa: Issues in its conceptualisation and implementation’ (2015) 18 *Potchefstroom Electronic Law Journal* 3160 3170.

69 CRC Committee General Comment 9 (n 64 above) para 66 notes: ‘The manner and form of inclusion must be dictated by the individual educational needs of the child, since the education of some children with disabilities requires a kind of support which may not be readily available in the regular school system ... However, the Committee underlines that the extent of inclusion within the general education system may vary. A continuum of services and programme options must be maintained in circumstances where fully inclusive education is not feasible to achieve in the immediate future.’ In para 67 the Committee continues to explain that the goal of inclusive education can be achieved by different organisational means which respect the diversity of children: ‘Inclusion may range from full-time placement of all students with disabilities into one regular classroom or placement into the regular class room with varying degree of inclusion, including a certain portion of special education. It is important to understand that inclusion should not be understood nor practised as simply integrating children with disabilities into the regular system regardless of their challenges and needs.’

70 Art 2 of the CRPD.

71 Art 9 of the CRPD.

72 Art 21 of the CRPD. Persons with disabilities have the right to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.

73 Art 24 of the CRPD.

74 Art 30 of the CRPD.

The latter provision entitles persons with disabilities, on an equal basis with others, 'to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture'.⁷⁵ During the negotiations for the drafting of the CRPD, the South African contingent supported other lobbyists for the inclusion of sign language, particularly for full access to information in sign languages and education in sign language, as well as linguistic human rights for the deaf community.⁷⁶ Article 9, on accessibility, obligates states to take appropriate measures, including the identification and elimination of obstacles and barriers to ensure equal access to facilities, including schools, medical facilities, information, communication and emergency services. Significantly, it also requires that appropriate measures should be taken 'to provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public'.⁷⁷

The vision of the CRPD for the education of learners with disabilities, set out in article 24, is inclusive education, within the general education system, in other words, that segregation into special schools is generally not supported. Three components are related to the rights of learners with hearing impairments: first, the guarantee of inclusive education, on an equal basis with others, which includes free primary education, within the general education system, in the communities where they live, with the necessary support measures or reasonable accommodation being made.⁷⁸ This right to education pertains to inclusive education at all levels, including life-long learning.⁷⁹ In other words, the value of education throughout the life span of the person is considered so that the person can develop their personality, talents, creativity, mental and physical abilities, and participate effectively.⁸⁰ A lack of competence in a person's vernacular would obliterate any meaningful development of these abilities, and would put the person at a distinct disadvantage compared to able-bodied persons competent in their spoken mother tongue.

Second, the learning of life and social skills that able-bodied peers may take for granted is guaranteed to allow full and equal participation in education and within the broader community, necessitating the state to take measures to facilitate 'the learning of sign language and the promotion of the linguistic identity of the deaf community'.⁸¹ Education should be delivered in the most appropriate language or modes and means of communication for an individual child, and this should be in an

75 Art 30(4) of the CRPD.

76 SCE Batterbury 'Language justice for sign language peoples: The UN Convention on the Rights of Persons with Disabilities' (2010) 11 *Language Policy* 253 262.

77 Art 9(e) of the CRPD.

78 Arts 24(1) & (2) of the CRPD.

79 Art 24(1) of the CRPD.

80 Arts 24(1)(b) and (c) of the CRPD.

81 Art 24(3)(b) of the CRPD.

environment which maximises his or her academic and social development.⁸² The CRPD anticipates the crucial role of teachers qualified in sign language, including those with disabilities.⁸³ The deaf culture and linguistic identity are best learnt from positive role models with the same culture and identity. The state is, therefore, bound to take measures to allow children to learn sign language from teachers qualified to teach it.

Third, according to Murungi, in articles 24(2)(d) and (e) a 'choice' is evident between alternative locations: general education and special schools.⁸⁴ The author's analysis of this provision concludes that the CRPD views freedom of choice in education not as the usual choice between public or private schools, or schools that represent moral or religious convictions, as extended in other international instruments, but in the context of children with disabilities, as a choice between mainstream and special schools.⁸⁵ Absolutely providing equal rights and, therefore, an equal and real choice to parents and children, would mean that states would have to properly equip special schools, with a serious cost implication that may not be sustainable.⁸⁶ However, policy implementation, evidenced in the case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* case, does not really provide an equal choice for learners with disabilities. Whilst this case dealt with education for children with severe and profound disabilities, it exposes the lack of political will to provide education for all children with disabilities on an equal basis with others.⁸⁷ De Beco indicates that 'environments that maximise academic and social development' in article 24(2)(e) could be understood as referring to special schools. However, article 24(2)(e) requires support measures consistent with the goal of full inclusion, which more likely refers to a 'mixed form of education as opposed to special education'.⁸⁸ This may be similar to the 'full service schools' provided for in White Paper 6.

Ngwena, on the other hand, indicates that articles 24(2)(d) and (e) are commensurate with the notion of 'full inclusion'; in other words, it

82 Art 24(3)(c) of the CRPD.

83 Art 24(4) of the CRPD.

84 Art 24(2)(d) provides: 'Persons with disabilities receive the support required, within the general education system, to facilitate their effective education.' Art 24(2)(e) provides: 'Effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.'

85 Murungi (n 68 above) 3184.

86 As above.

87 Ngwena (n 5 above) 139.

88 G de Beco 'The right to inclusive education according to article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, requirements and (remaining) questions' (2014) 32 *Netherlands Quarterly of Human Rights* 263 282.

conceives of individualised support to enable learners to receive effective education and to maximise their academic and social development.⁸⁹ This individualised support to be rendered to learners means that the CRPD requires states to accommodate the difference within the general education system. A holistic reading of article 24 is more in line with the idea of full inclusion than the idea of offering a 'choice' to children between mainstream and special schools. Article 24(1), for example, supports inclusive education as 'the principle', with special education as 'the exception'.⁹⁰

A special status is accorded to children who are deaf, but who are exempted from the principle of mainstream schooling and may be educated in special schools. This option, however, may 'not prevent them from requesting to participate in the general education system'.⁹¹ Generally speaking, there is a compromise in article 24, that children with disabilities should generally be educated in the regular education system. However, deaf children may be taught in 'environments which maximise academic and social development', in other words, where a special school will maximise such development. This does not mean that they cannot be taught in mainstream schools where it will maximise their development.

The African Charter on the Rights and Welfare of the Child (African Children's Charter) does not explicitly refer to sign language, but recognises the special measures needed to meet the physical and moral needs of children with disabilities 'under conditions which ensure their dignity, and promote self-reliance and active participation in the community'.⁹² Non-discrimination on the basis of a child's disability is guaranteed.⁹³ Assistance is to be provided to the child to have 'effective' access to training, preparation for employment, and so on, to allow social integration, individual development and cultural and moral development at the 'fullest possible' level.⁹⁴ Whilst the education of children with disabilities is not clearly identified, it is implicit in the requirement that states take special measures for 'disadvantaged children, to ensure equal access to education for all sections of community'.⁹⁵

The recognition of sign language and the deaf culture, especially in educational settings, is therefore an imperative under international law.

89 C Ngwena 'Human right to inclusive education: Exploring a double discourse of inclusive education using South Africa as a case study' (2013) 31 *Netherlands Quarterly of Human Rights* 473 479.

90 De Beco (n 88 above) 274.

91 De Beco (n 88 above) 286.

92 Art 13(1) of the African Children's Charter.

93 Art 2(1) of the African Children's Charter.

94 Art 13(2) of the African Children's Charter.

95 Art 11(3)(e) of the African Children's Charter.

2.2.3 Legislative and policy framework

In the mid and late 1990s, a profusion of legislative drafting ensued, providing for equal rights, especially after the Integrated National Disability Strategy White Paper⁹⁶ was adopted in 1997, which considered the ‘blueprint’⁹⁷ for inclusion and integration of disability in both policy and legislation. The policy recommended that the Department of Education, in consultation with the Department of Arts and Culture, DeafSA and other stakeholders, facilitate a process for the development of a comprehensive education policy to ‘promote and protect equal education opportunities for children with communication disabilities and to protect their language medium’.⁹⁸

In the education setting, the legislative framework consists primarily of the South African Schools Act of 1996 (SASA) and the National Education Policy Act 27 of 1996 (Policy Act), whilst the policy framework includes the Language in Education Policy, the Norms and Standards regarding Languages and the White Paper 6 on Special Needs Education (White Paper 6).⁹⁹ SASA particularly refers to SASL in the provision relating to language policy in government schools and explicitly acknowledges that ‘a recognised sign language has the status of an official

96 Integrated National Disability Strategy White Paper (1997) http://www.gov.za/sites/www.gov.za/files/disability_2.pdf (accessed 1 December 2015).

97 S Mitra ‘The recent decline in the employment of persons with disabilities in South Africa, 1998-2006’ (2008) Discussion Paper 2008 12 July 2008, Fordham University Department of Economics Discussion Paper Series 3.

98 Regulation 9(b) of the INDS (n 96 above) 68.

99 Department of Education *White Paper No 6: Special Needs Education* (2001) 49. The Department of Social Development’s *White Paper on the Rights of Persons with Disabilities* (2016) emphasises the importance of sign language in a number of instances, including for purposes of changing attitudes and behaviour: ‘disability rights awareness training programmes must be integrated into the curricula of all education and training programmes. This must include training in all forms of alternate communication. For example the teaching of South African Sign Language and the availability of Braille at schools, post school education and training institutions and at work places’ (51); access to information and communication: ‘Promote South African Sign Language (SASL) and train SASL Interpreters. A costed plan must be developed for promoting SASL through a number of interventions. The strategy and plan must include the training of SASL interpreters. Adequate budget must be provided for implementation of the plan’ (56); and life-long education and training, which requires implementation of specific programmes, including ‘facilitating the learning of South African Sign Language and the promotion of the linguistic identity of the Deaf community; ensuring that the education of persons, and in particular children, who are blind, deaf, hearing impaired, non-speaking autistic or deaf-blind is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development; employing teachers, including teachers with disabilities, who are qualified in South African Sign Language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities (84)’. Cf Department of Social Development’s *White Paper on the Rights of Persons with Disabilities: Implementation Matrix 2015-2030* (2015) 1.1.2; 1.1.3; and 1.4.4 identifying implementation measures and stakeholders, as well as timeframes for implementing the policy directives.

language for purposes of learning at a public school'.¹⁰⁰ SASA supports the notion of inclusion as integration,¹⁰¹ insofar as it stipulates that education for learners with disabilities should be provided in ordinary public schools, with the necessary support provided to these learners in such mainstream schools.¹⁰² The concept of integration is synonymous with 'location', in other words, geographically separate schools (mainstream versus special schools) are eschewed in favour of all learners, including those with disabilities, placed in mainstream schools.¹⁰³

The Policy Act guarantees the right to be instructed in the language of choice.¹⁰⁴ A policy for language in education under the Policy Act¹⁰⁵ has been developed: the short Language in Education Policy of 1997 within one year of the promulgation of the enabling legislation. The Policy Act includes in its aims three imperatives: supporting teaching and learning of SASL, as well as alternative and augmentative communication; countering the disadvantages arising from disparities between home language and languages of learning and teaching; and developing programmes to redress the historical injustices visited upon 'previously disadvantaged languages'.¹⁰⁶ However, the policy stipulates that languages of learning and teaching in public schools must be an official language. Fortunately, the recognition by SASA of SASL as an official language means that it is not excluded from languages of learning and teaching. The norms and standards regarding language policy, required by section 6(1) of SASA, explicitly recognises SASL as an official language for purposes of learning and teaching.¹⁰⁷ Diversity is considered a 'valuable asset' and, accordingly, the language goals in school education are considered to include (i) the protection, promotion, fulfilment and extension of the individual's language rights and means of communication in education; (ii) the facilitation of national and international communication through promotion of bi- or multilingualism through cost-efficient and effective mechanisms; and (iii) redressing the neglect of historically disadvantaged languages in school education.

The first goal embraces individual choice as a key component. The norms and standards set out the protection of an individual's right to language in schools, and the concomitant rights and duties of the school

100 Sec 6(4) of SASA.

101 Murungi (n 68 above) 3172.

102 Sec 12(4) of SASA.

103 Murungi (n 68 above) 3170.

104 Sec 4(a)(v) of the Policy Act. Cf sec 4(1) of the KwaZulu-Natal School Education Act 3 of 1996 which provides that every learner has the right to be educated in the language of his or her choice and that the education be provided in accordance with the child's aptitude, ability, needs and interests.

105 Sec 3(4)(m) of the Policy Act.

106 Items 5(5), (6) and (7) of the Language in Education Policy.

107 Item 3(4) of the National Norms and Standards regarding language policy defines language as all official languages recognised in the Constitution, and also South African sign language, as well as alternative and augmentative communication.

and provincial education departments. A learner has a choice of language of learning when being admitted to a school, and may request the provincial department to provide instruction in a chosen language where it is not offered within the district.¹⁰⁸ In reality, the choice is not as simple. A deaf learner rarely enrolls in a mainstream school with the expectation of being taught in SASL. Rather, the choice is much simpler. A deaf learner either enrolls in a special school for the deaf, where a sign language is used as language of teaching and learning, but not examined as a language subject and not standardised; or could enrol in a mainstream school where only official spoken languages would be the language of teaching and learning and recognised as language subjects. The third goal set out by the norms and standards emphasises redress for historically-disadvantaged languages, similar to the refrain in the policy, and may be interpreted to include SASL.

The obvious gap in the norms and standards is that the so called individual right of language choice is facially neutral, which disregards the particular need for the development and use of SASL as a language of teaching and learning. Therefore, the acquisition of SASL as a home language or mother tongue and as the language of learning and teaching was only offered in special schools for the deaf, without official recognition of SASL in the curricula of the Department of Education. Also, the need to redress the historical discrimination against SASL, in that spoken languages were preferred over sign languages, is not evident in the policies. The norms and standards inadequately deal with the development and use of SASL in schools. Simbo has called on the Minister of Education to regulate the use of languages in two ways: by ensuring that learners can communicate effectively with their teachers; and by the acquisition of basic learning needs.¹⁰⁹ Both these aims are vital for deaf learners. Simbo further suggests that this regulation of the use of languages should acknowledge the relationship between language and culture so that mother tongue usage may be promoted, including sign language, and, similarly, that the culture of the child be supported.¹¹⁰ As such, this would require the recognition of SASL as both a linguistic and cultural right of learners with hearing impairments.

White Paper 6 recommended that the Department of Education should ensure that all curriculum development, assessment and instructional development programmes address barriers to learning arising from language and the medium of learning and instruction. However, this goal is subject to the phased implementation plan of the White Paper, which made the conversion of special schools to full service schools

108 Items 4(2) to (4) of the Norms and Standards regarding language policy.

109 C Simbo 'The right to basic education, the South African Constitution and the *Juma Masjid* case: An unqualified human right and a minimum core standard' (2013) 17 *Law, Democracy and Development* 477 498.

110 Simbo (n 109 above) 498.

conditional on the need and availability of resources.¹¹¹ The view of the White Papers of inclusive education as progressively realisable is at odds with the Constitution and international law requirements.¹¹²

There is, therefore, a divergence between the policy position for basic education in South Africa, considered immediately realisable,¹¹³ whereas inclusive education is considered progressively realisable. Priorities in the promotion of languages in schools have followed this distinction, with the need to provide education in official languages as an immediate goal, whilst education in SASL and the development of the language were relegated to a progressive goal.

2.3 Denial of recognition of South African sign language

SASL is still not being used as a language of instruction in all schools. Even though sign language is the official means of instruction for educating deaf learners, very few learners and teachers are using it.¹¹⁴ Not utilising SASL as a medium of instruction or school language subject has also had repercussions for the qualifications of teachers at schools for the deaf. Until 1997, for example, there had been no formal training of sign language interpreters and the sign language skills of children of deaf adults were relied on for interpretation.¹¹⁵ As explained earlier, manual coding of sign language was initially used by teachers at schools for the deaf. However, the preference has changed towards a bilingual, bicultural approach, where both sign language and one spoken language are utilised to allow children to function in both the deaf and the hearing world.¹¹⁶

Storbeck et al highlight two important challenges facing the acquisition of SASL and the training of teachers. First, teachers enter the educational setting without the ability to sign and learn on the job as a result. Second, short-term training is not a substitute for exposure to the academic level of SASL required to deliver curriculum to deaf learners. The curriculum is, therefore, delivered based on a basic social competency in SASL.¹¹⁷ Merely having SASL recognised as a language subject in schools for the deaf is not enough. The advantages of having SASL recognised in schools are that teachers are properly qualified in SASL and that appropriate support services are provided in mainstream schools

111 White Paper 6 (n 99 above) 22-23.

112 Murungi (n 68 above) 3181.

113 J van der Vyver 'Constitutional protection of the right to education' (2012) 27 *South African Public Law* 331.

114 P Akach & R Morgan 'Sign language interpreting in South Africa' in M Erasmus (ed) *Liaison interpreting in the community* (1999) 67; MN Ganiso 'Sign language in South Africa: Language planning and policy challenges' unpublished MA thesis, Rhodes University, 2012 32.

115 Ganiso (n 114 above) 27.

116 Ganiso (n 114 above) 31.

117 Storbeck et al (n 13 above) 142.

where inclusive education is provided. The latter will require research into what exactly inclusion should entail for deaf learners in the South African context, together with the necessary support services to achieve this.¹¹⁸ The World Federation for the Deaf provides some insight into the way in which this should be accomplished, recommending that deaf learners in mainstream schools have access to the services of educated, trained and qualified sign language interpreters, other needed support services, deaf peers and role models, and full participation in both the educative and co-curricular processes.¹¹⁹

In reality, deaf learners have three options of study after completing Grade 9 (the General Education and Training phase). Glaser and van Pletzen explain these choices, namely, to leave formal education; to complete Grades 10 to 12 at mainstream schools in order to obtain a National Senior Certificate, possibly allowing entrance into tertiary education; or study at a further education and training (FET) college towards a National Certificate Vocational.¹²⁰ Unfortunately, while deaf users of SASL theoretically have the same options, very few schools for deaf students offer Grades 10 to 12. Thus, in practice, deaf students have the choice of studying for Grades 10 to 12 at hearing schools, changing to FET colleges, or attending special programmes for deaf people, where these exist. Kyle unwittingly chose to be schooled in mainstream schools, where SASL was not recognised.

Magongwa argues that the exclusion of sign language in education impinges on the language rights of hearing-impaired and deaf students:

The issue of sign language as used by Deaf and hard-of-hearing students is a human right and not one to be considered within welfare or health. The issue correctly belongs within the realm of human rights, language, and communication. It is the human right of Deaf and hard-of-hearing students to use the language to which they have the most access. Deaf people cannot hear but see sign language ... It is a violation of their human rights not to be allowed to have access to information through their most accessible language. Deafness becomes a communication disorder when sign language is not recognised.¹²¹

118 Storbeck et al (n 13 above) 143.

119 World Federation of the Deaf Education rights for deaf children (2007) http://www.wfdeaf.org/wp-content/uploads/2011/03/EducationRightsforDeafChildren_July-2007.pdf (accessed 1 December 2015).

120 M Glaser & E van Pletzen 'Inclusive education for deaf students: Literacy practices and South African sign language' (2012) 30 *Southern African Linguistics and Applied Language Studies* 25-28.

121 L Magongwa 'Deaf teachers' experiences of being students at the University of the Witwatersrand' unpublished Master's degree dissertation, University of the Witwatersrand, 2008 <http://wiredspace.wits.ac.za/bitstream/handle/10539/5926/Lucas%20Magongwa%20dissertation%20208910575A.pdf?sequence=1> (accessed 23 September 2015).

Not recognising SASL as a linguistic and cultural right *per se* has meant that other rights are denied, for example, the rights to a fair trial, political representation, access to information, freedom of expression and maintenance of cultural heritage.¹²² The non-recognition of SASL is thus perceived as a rights issue, not a medicalised issue. The litigation in *Springate*, as cases from other jurisdictions, brought to the fore the divide between the medical and social (or human rights) models of disability. Magongwa stressed that the nonsensical situation where students are taught in SASL at schools for the deaf, but may not officially study SASL as a language subject in schools, profoundly affected deaf persons on an educational, psychological and emotional level.¹²³

DPOs, such as DeafSA, certainly followed the rights approach in lobbying for the recognition of SASL, and this agency has been a catalyst for litigation as a strategy, not merely lobbying and protesting, based on the reframing of disability as an identity:

When the identity associated with the notion of disability is prescribed in this way, the expansion of rights (as opposed to charity or health or welfare policy) becomes the most appropriate way of combating disability discrimination and, by extension, litigation becomes one of the most appropriate forms of enforcement.¹²⁴

The reframing of disability based on the social model may be one of the reasons why DeafSA became a litigant in the *Springate* matter. Strategy choices are informed by the models of education preferred by particular interest groups. Snodden explains how the refuted separate underlying proficiency (SUP) model is still being utilised in deaf education.¹²⁵ This model translated into 'forbidding the use of ... native signed languages of the Deaf community in the education system, owing to conceptions that learning of a signed language will interfere with the development of spoken and written language skills'.¹²⁶ Since deaf children lack access to the same auditory base for the acquisition of spoken language as hearing children, depriving them of signed language can result in delayed or incomplete first language acquisition.¹²⁷ This lends further credence to the argument that forbidding the use of sign language, or the insufficient protection and development thereof, may constitute linguistic genocide, as discussed earlier.

122 T Skutnabb-Kangas & R Phillipson (eds) *Linguistic human rights: Overcoming linguistic discrimination* (1995) 32.

123 L Magongwa 'Deaf education in South Africa' (2010) 155 *American Annals of the Deaf* 493-496.

124 L Vanhala 'Anti-discrimination policy actors and their use of litigation strategies: The influence of identity politics' (2009) 16 *Journal of European Public Policy* 738 746.

125 K Snoddon 'Equity in education: Signed language and the courts' (2009) 10 *Current Issues in Language Planning* 255 256.

126 Snoddon (n 125 above) 256.

127 Snoddon (n 125 above) 256, citing J Morford & R Merry 'A re-examination of "early exposure" and its implications for language acquisition by eye' in C Chamberlain et al (eds) *Language acquisition by eye* (2000) 111.

The bilingual bicultural education model preferred today focuses on the native signed language of a particular country, as well as the language of the majority in the country,¹²⁸ for example Australian sign language (Auslan) and English, respectively. The implementation of these programmes has not been without challenges, including a lack of support for the signed language in the school and systems of teacher education. The inadequate support of bilingual education worldwide¹²⁹ has an adverse effect on the numbers of deaf graduates from tertiary institutions, teachers and professionals, who can *both* provide *and* advocate for bilingual bicultural models of education.¹³⁰ This also applies to South Africa. It is within this policy, legislative, constitutional and international law context that the *Springate* matter arose.

3 Litigation: *Springate v Minister of Education & Others*

3.1 South African sign language as a school subject

For Kyle, exemption from another language course, with SASL substituted as a language course, would have comprised the seven subjects required for entrance to university, where he had hoped to study towards Fine Arts. However, it transpired that the lack of recognition of SASL meant that he would either have to take up a brand new subject in his final school year or matriculate merely with an endorsed certificate as a learner with a barrier to learning (deafness).¹³¹ The latter option would spell the end to his dream of tertiary education. Without prejudicing his rights, Kyle decided to take up Dramatic Arts as the alternative subject, for which he had to complete a three-year portfolio, undergoing extra tuition, to enable him to sit for the examination in this subject. This proved to be an additional burden on Kyle. Supported by his mother, Paige McClennan-Smith, in Part A of the application, Kyle sought a declaration that the failure by the national and provincial departments to allow him to be examined in sign language as a subject for his senior certificate was unconstitutional and unlawful. Kyle sought an order directing the Department to allow him to sit for the examination in sign language.¹³²

128 H Gibson et al 'Deaf bilingual bicultural education' in J Cummins & D Corson (eds) *Encyclopaedia of language and education* (1997) 231, cited in Snoddon (n 125 above) 256.

129 Snoddon (n 125 above) 257.

130 Canadian Hearing Society *Status report on deaf, deafened and hard of hearing Ontario students in post-secondary institutions: Statistics, current trends, barriers and recommendations* (2004) cited in Snoddon (n 125 above) 257 (my emphasis).

131 Letter from the Director-General of Education dated 10 March 2009, annexure P18 to the founding affidavit (copy with the author).

132 Notice of Motion filed on 8 June 2009 Part A paras 2-3 (copy with the author). Kyle submitted that the failure of the department to recognise SASL as such infringed the rights of the learners, particularly in line with the following provisions: sec 6(5)(a)(iii)

In his application, Kyle submitted that the rights of deaf and hearing-impaired learners were infringed by the education policies existing at the time.¹³³ While sign language was a medium of instruction at some schools for the deaf, it was not recognised as a language subject for the purposes of matriculation – the National Senior Certificate. In Part B to the application, Kyle sought an order more in line with public interest and that of deaf, hard-of-hearing and hearing-impaired students to have SASL, or another form of sign language, recognised as an official language for purposes of learning at public schools, and for steps to be taken to implement sign language as a language subject (similar to Afrikaans, IsiZulu, and so on), either as home language, first or second additional language in high schools.¹³⁴

Kyle based his legal argument¹³⁵ in part on the basis of unfair discrimination, relying on provisions of the Equality Act¹³⁶ prohibiting unfair discrimination on the basis of disability or language. He submitted that the Department's actions in not recognising SASL as a language of learning constituted unfair discrimination as benefits, opportunities or advantages¹³⁷ were withheld from him on the basis of his disability and language.¹³⁸

The Department opposed his application on the basis that sign language was not an accredited language subject in the further education and training (FET) phase, but only in the general education and training (GET) phase. The Language Board was also cited as a respondent, being responsible for the promotion and creation of conditions for the development and use of sign language.¹³⁹

The *Springate* court application was supported by DeafSA and the KwaZulu-Natal Blind and Deaf Society (KNBDS) who brought the application in the public interest.¹⁴⁰ DeafSA, founded in 1929, represents the rights of more than 1,6 million deaf persons in South Africa. The KNBDS, established in 1936, provides rehabilitative services, such as

(PanSALBs role in developing SASL); sec 9(3) (right to equality); sec 28 (rights of children); sec 29 (right to basic education); sec 30 (right to language and cultural life of choice); and sec 31 (right of linguistic community to enjoy the use of their language) of the Constitution, as well as sec 6 of SASA (sign language has the status of an official language for purposes of learning at public schools). Furthermore, sec 4(1) of the KwaZulu-Natal School Education Act 3 of 1996 (children's right to be educated in the language of their choice).

133 Sec 4(a)(v) of the Policy Act (right of children with disabilities to be instructed in the language of their choice). In particular, the submissions are contained in para 87 of the founding affidavit averring that the policy is *ultra vires* the relevant empowering legislation (SASA).

134 Notice of Motion filed on 8 June 2009 Part B paras 2-4.

135 Founding Affidavit of P McLennan-Smith paras 61-62 (copy with the author).

136 Secs 6, 9 & 28(3) of the Equality Act.

137 Definition of discrimination in sec 1 of the Equality Act.

138 Founding Affidavit (n 135 above) para 68.4.

139 Sec 6(5)(a)(iii) of the Constitution.

140 Sec 38(d) of the Constitution.

counselling, audiometric assessments, braille literacy and sign language training in the province of KwaZulu-Natal. The KNBDS remarked that its own meetings with the Department to have sign language recognised in schools had not been fruitful and, accordingly, it supported Kyle in his court application.¹⁴¹ More vociferous was the struggle of approximately 13 years, through advocacy and lobbying, by DeafSA to have sign language recognised in South African schools as a language and school subject, also without success.¹⁴² In 2003, DeafSA, together with Disabled People South Africa (DPSA), marched and handed over a memorandum to the national and provincial Departments of Education. The memorandum demanded

That South African Sign Language (SASL) be recognised and implemented as an official language subject in the education of Deaf learners in general education and training (GET) and further education and training (FET);

That SASL be fully implemented as the official [language of learning and teaching] for Deaf learners in all special schools for deaf learners;

That all educators of Deaf learners receive compulsory in-service training in SASL;

That SASL teaching and learning materials be developed.¹⁴³

In the meantime, the KZNBDS (together with other institutions) also advocated for the recognition of SASL. In 2005, a memorandum was handed to the Minister and the MEC for Basic Education, requesting clarity regarding the development of sign language resources, and identifying the need for SASL to be recognised as first language and examinable language subject in schools.¹⁴⁴ The response from the MEC was that it was for the PanSALB, and not the Department, to first develop the language, and that it could not develop resources until the Language Board had achieved this. The Language Board, in turn, blamed the Department:

PanSALB regards this as a function of the Department of Education and as such [PanSALB is not responsible for curriculum development and the development of SASL in schools] ... recommends that you direct your request to the Department of Education: Directorate of Inclusive Education.

141 Jace Nair, CEO of the KNBDS, quoted in IOL News Department opposes sign language at schools 16 July 2009 <http://www.iol.co.za/news/south-africa/departement-opposes-sign-language-at-schools-1.449957#.VFt5sLccTIV>. See also 'Deaf learner gains support for court case' *IOL News* 16 July 2009 <http://www.iol.co.za/news/south-africa/deaf-learner-gains-support-for-court-case-1.449938#.VFt697ccTIV>.

142 DeafSA 'A history and struggle' (2005), annexure D1 to the confirmatory affidavit of Ingrid Parkin on behalf of the third applicant, DeafSA (copy with the author).

143 DeafSA (n 11 above) 19.

144 Supporting affidavit of the fourth applicant, Jayseelan Nair on behalf of KZNBDS, para 12 (copy with the author).

PanSALB does from time to time advise the Department of Education on curriculum issues, but that is how far it can go.¹⁴⁵

In 2006, the provincial Department of Education, at a meeting with KZNBDS, facilitated by the Language Board, undertook to ensure that SASL be introduced at schools for the deaf, but this undertaking did not materialise.¹⁴⁶ In its Education Position Paper in 2006, DeafSA remarked:

The urgency of the situation is that Deaf learners have little access to the regular curriculum for most of the time they spend in school. This is because the majority of educators in schools are not proficient in SASL. A recent survey highlighted that only 14% of educators in schools for the Deaf can sign proficiently. The negative impact on these learners in terms of any access to education is alarming.¹⁴⁷

In 2007, DeafSA handed a memorandum to parliament to recognise SASL as a twelfth official language.¹⁴⁸ It stressed the fact that the use of SASL by a deaf member of parliament to communicate required a standardised and recognised language. Unfortunately, this did not spur the government into action. Instead, the eventual recognition of SASL as a language subject in schools depended on the success of litigation. In court papers, DeafSA asserted the injustice and unfair discrimination because of the fact that the only language that can be the first language for deaf learners is not offered as a school subject in the FET phase, with the result that deaf adults are not integrated into mainstream society, due to disempowering educational experiences.¹⁴⁹ A number of schools for the deaf provided confirmatory affidavits, supporting the litigation by the two DPOs, affirming the challenges faced by both learners and teachers due to the non-recognition and standardisation of SASL.¹⁵⁰

It was asserted by the DPOs that both the Department of Education and the Language Board did not meet their legislative and constitutional mandates to vindicate the language rights of deaf learners. The Department of Education instead asserted that the parties, particularly the DPOs, did not comment on its curriculum development process for the

145 Letter from PanSALB to KZNBDS dated 6 April 2006, annexure to supporting affidavit of fourth applicant, para 16 (copy with the author).

146 Minutes of the meeting of 14 July 2006, annexure to supporting affidavit of fourth applicant, para 22 (copy with the author).

147 DeafSA (n 31 above) 5 (footnotes omitted).

148 DeafSA Memorandum towards the recognition of SASL as a 12th official language (1 February 2007) <http://www.pmg.org.za/docs/2007/070216memorandum.htm> (accessed 23 September 2015).

149 Supporting affidavit of the third applicant, deposed to by I Parkin on behalf of DeafSA, para 56 (copy with the author).

150 St Vincent School, Melrose; Fulton School for the Deaf, Gillits; Sizwile School for the Deaf, Dobsonville; Durban School for the Hearing Impaired, Amanzimtoti; VN Naik School for the Deaf, Newlands; Kwavulindlebe School for the Deaf, Havenside; and Vuleka School for the Deaf, Nkandla.

NSC in 2005, nor did the SAHRC or DeafSA indicate that SASL should have been included as a subject.¹⁵¹ The Department further denied that SASL was necessarily a recognised sign language referred to in the Schools Act, and that it was not an official language as the Constitution did not render it such, but merely required the Language Board to promote and create conditions for the development and use thereof.¹⁵² The Department threw down the gauntlet, stating that '[i]n the absence of a single version of SASL, a standardised SASL and an approved curriculum for SASL', it would be unable to recognise SASL as a subject.¹⁵³ The Department suggested that one of the options available was that a Ministerial Committee be appointed to start the process of curriculum development for SASL, with the help of the Language Board.¹⁵⁴ All applicable policies would have to be followed,¹⁵⁵ and this process could take years.

Since the Department put Kyle in the untenable situation of having to learn and pass a new subject in his final year of school, failing which he would not obtain university entrance, he launched the litigation in June 2009. In August 2009, a settlement was reached between the parties and Kyle withdrew his challenge. Accordingly, Kyle was exempted from the requirement of a seventh subject for his senior certificate and he would, therefore, qualify for an exemption to allow him to study towards a Bachelor's degree at university. As a result, Kyle's bid to have five years of study of sign language recognised was averted. The second part of his application, namely, to have sign language recognised as a language subject in schools, was postponed indefinitely. This was ostensibly used as a sword of Damocles to ensure that the Department remedy the failure to provide sign language as a language subject in schools, failing which the application would be reinstated.

3.2 Silence of the Language Board

The Language Board¹⁵⁶ was not a key player in the litigation, despite being cited as a respondent, nor was it an active participant in the preceding advocacy by DPOs and the lobbying of government departments to have sign language recognised, despite establishing a unit for SASL in 2003.¹⁵⁷ Instead of assisting the court, the Board asserted that its independence

151 Answering affidavit of the first and second respondents deposed to by P Vinjevold, para 33.3 (copy with the author). The deponent was referring to the policy document addendum to the policy document, the NSC: A qualification at level 4 on the National Qualifications Framework (NQF) regarding the National Protocol for recording and reporting grades (Grades R to 12) in *Government Gazette* 29467 of 11 December 2006; and *Government Gazette* 27607 of 24 May 2005 (which had called for public comments).

152 Affidavit of the first and second respondents deposed to by P Vinjevold, para 184.

153 Affidavit of the first and second respondents to the confirmatory affidavit of M Batchelor, deposed to by P Vinjevold, para 9.

154 Answering affidavit by P Vinjevold (n 151 above) paras 68-81.

155 Answering affidavit by P Vinjevold (n 151 above) para 165.

156 n 34 above.

157 DeafSA (n 31 above) 22 (footnotes omitted).

could be compromised should it enter the legal fray.¹⁵⁸ Its constitutional mandate included co-operation and consultation principles: to strive to promote close co-operation with any organ of state, person, body of persons or institution involved in the development and promotion of language, and to consult and work closely with any person with special knowledge or experience in South Africa's language problems, or who is in any way involved in the development and promotion of language.¹⁵⁹ Neither of these principles were heeded. The Department of Education denied being responsible for the development of sign language, submitting instead that this was the mandate of the Language Board.¹⁶⁰ The Language Board chose to comment after the settlement:

While we appreciate the settlement, as PanSALB we find it regrettable that it took a court case of this nature to sensitise the Department about the need to honour the Constitution and cater for the linguistic needs of the deaf community.¹⁶¹

Opposition parties also entered the fray on the political front. Helen Zille of the Democratic Alliance,¹⁶² using the opportunity to comment on the litigation, harshly reprimanded the Language Board for its tardiness in developing SASL.

Kyle and the DPOs were represented by the Legal Resources Centre (LRC). This litigation appears to have been reactive in that, whilst DeafSA had lobbied and advocated for the recognition of SASL, litigation was not part of its planned strategy to secure this objective. Kyle's conundrum, therefore, provided fertile ground to challenge the lack of SASL as a language subject. The litigation, however, was constrained by the urgency of Kyle's own circumstances: He needed clarity regarding his own situation in order to write his final examinations. Strategically, the public interest would have to wait for another day.

3.3 Curriculum development

The consequence of the litigation, although a 'loss' for Kyle and the deaf community, was that the Department of Education was sufficiently

158 Letter from the Language Board to the State-Attorney dated 14 July 2009, annexure to answering affidavit by P Vinjevold (n 151 above) para 154.

159 Secs 9(1) & 9(2) of the Language Board Act.

160 Answering affidavit by P Vinjevold (n 151 above) para 154.1, as well as answering affidavit to the supporting affidavit of I Parkin, para 23 (copy with the author).

161 PanSALB welcomes language settlement *SA News* 20 August 2009 <http://www.sanews.gov.za/south-africa/pansalb-welcomes-language-settlement>.

162 'We must listen to those who cannot hear - Helen Zille' *SA Today* 21 August 2009 <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71616/page71646?oid=140513&sn=Detail&pid=71646>.

pressured into developing a curriculum for sign language as a school subject,¹⁶³ which it started after the failed litigation.¹⁶⁴ The Minister appointed the Curriculum Management Team (CMT), a ministerial committee, to oversee the development and implementation of SASL as a language to be taught in schools. A writing team was subsequently appointed to develop a curriculum assessment policy statement for SASL. Both the CMT and writing team included a representative of DeafSA.¹⁶⁵ A decision was made that SASL would be developed as a home language to essentially support a parallel process for SASL to eventually attain official status in South Africa.¹⁶⁶

Further impetus was provided by a presidential proclamation that sign language be developed and standardised to be one of the 11 official languages of government.¹⁶⁷ Following submissions by DPOs at a community meeting in 2012 that deaf learners still were not being taught in SASL, the President remarked:

From today we can argue it better – whether in Parliament or Cabinet - to say that this must happen. Children with disabilities go to school and are taught by teachers who do not understand the language – you can imagine the difficulty.¹⁶⁸

As of 20 August 2014, deaf and hearing-impaired learners are allowed to choose sign language as a language subject for matriculation in schools.¹⁶⁹ However, the subject is available only at schools for the deaf, and not yet at ‘mainstream’ schools.¹⁷⁰ The DPOs have obtained victory, through continued advocacy and lobbying, and its intervention as a party to what, on the face of it, appeared to be ‘failed’ litigation.

163 The Department of Basic Education in its report explicitly mentioned the *Springate* litigation in its problem statement. Department of Basic Education Report: The development of the South African sign language curriculum for grades R-12 (2013) 2 http://www.deafsa.co.za/documents/SASL%20Report%20to%20Minister%20Aug%202013Final%20_2.pdf.

164 As above.

165 The writing team also included a representative from PanSALB.

166 Department of Basic Education National curriculum statement (NCS) curriculum assessment policy statement South African sign language: Further education and training phase grades 10-12.

167 Proclamation by the President of the Republic of South Africa 10 of 2013 in *Government Gazette* 36392 on the Use of Official Languages Act 12 of 2012 (26 April 2013). The Act commenced on 2 May 2013. See, in particular, sec 4(1)(d) of the Act.

168 Call to give South African sign language official status *SA News* 5 December 2012 http://www.southafrica.info/services/rights/disability-051212.htm#_VYfiTrcw_IU (accessed 23 September 2015).

169 Sign language approved first language *SA News* 20 August 2014 <http://www.sanews.gov.za/south-africa/sign-language-approved-first-language> (accessed 23 September 2015); Sign language included in education curriculum *SABC* 15 November 2013 <http://www.sabc.co.za/news/a/8cf88c8041d64e649eebf1c2eddf908/Sign-language-included-in-education-curriculum> (accessed 23 September 2015).

170 S Smillie & K Child ‘Deaf pupils to be taught in sign language’ *Times Live* 19 August 2014 <http://www.timeslive.co.za/thetimes/2014/08/19/deaf-pupils-to-be-taught-in-sign-language> (accessed 23 September 2015).

3.4 Monitoring, enforcement and advocacy

The monitoring of implementation of international law, constitutional, legislative and policy imperatives is vital to ensure that the promise that sign language is recognised is met. The protection of minorities in education demands adequate monitoring by relevant institutions.¹⁷¹

Key role players in the monitoring of outcomes of litigation, such as in *Springate*, and who are responsible for advocacy on the rights of sign language users include the Language Board (discussed above), and two institutions supporting democracy, the SAHRC and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission), the media,¹⁷² and civil society, such as DPOs. The gains made as a result of the *Springate* intervention have not been on the radar of the SAHRC. The DPOs involved have continued to advocate for the rights of the deaf, but have not marketed the positive aspects of the intervention, namely, that SASL is now a matric subject, through the legal intervention and continued advocacy by the deaf community. Perhaps the reason is because there was no judgment to rely on or precedent created.

The complementary oversight role of the SAHRC and CRL Commission means that, together with parliament, these institutions are watchdogs over government and they support parliament through information and reports, independent of the executive.¹⁷³ The effective utilisation by parliament of reports and recommendations of these institutions 'can greatly strengthen the culture of accountability and transparency'.¹⁷⁴ The Constitution, while acknowledging the need for independent institutions to act as a check on the branches of government to advance democracy and protect human rights, does not explicitly refer to the a disability-specific mandate of any of the Chapter 9 institutions.¹⁷⁵ The SAHRC has a specific mandate to promote and protect the rights of persons with disabilities.¹⁷⁶ In line with its obligations as the national

171 MS Mothatha & EM Lemmer 'The provision of education for minorities in South Africa' (2002) 22 *South African Journal of Education* 106 110.

172 The role of the media in promoting positive human rights norms through their reporting has been explored by N Nyika 'Media coverage as an instrument for language rights activism: The case of *Hoërskool Ermelo*' (2010) 28 *Southern African Linguistic and Applied Language Studies* 89; C de Wet 'The South African Human Rights Commission and human rights violations in education: An analysis of media reports' (2012) 10 *Journal for New Generation Sciences* 15.

173 H Corder et al 'Report on parliamentary oversight and accountability' (1999) para 7.1.2 <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/oversight&account.htm> (accessed 1 February 2016).

174 Institute for Democracy in South Africa 'The relationship between the state institutions supporting constitutional democracy and the national legislature Report to the *Ad Hoc* Committee on the Review of State Institutions Supporting Constitutional Democracy' (2007) 3 <https://pmg.org.za/committee-meeting/7772/> (accessed 15 February 2016).

175 Sec 181 of the Constitution.

176 South African Human Rights Commission Act 40 of 2013.

human rights institution (NHRI) under article 33 of the CRPD, the SAHRC is mandated, under the Constitution and its enabling legislation, to establish a framework to promote, protect and monitor the implementation of the CRPD. McClain-Nhlapo et al¹⁷⁷ noted that, despite sociological and anecdotal evidence of violations of the human rights of persons with disabilities, a dearth of complaints had been reported to the SAHRC, leaving the institution hamstrung to develop 'legislative prescriptions regarding disability rights'. The few complaints investigated to date include that of the non-admission of a learner with physical disabilities to a private school in an Equality Court case,¹⁷⁸ inaccessible airlines; the lack of reasonable accommodation in prisons; and the lack of rehabilitation for a child with a physical disability.¹⁷⁹ The SAHRC has conducted site visits to some special schools with no reports or further investigations emanating from these visits.¹⁸⁰ The SAHRC has reported on disability issues on two occasions, neither of which touched on the issue of sign language and/or education.¹⁸¹ The Commission has to date received no complaints about the usage of sign language, whether in schools or in the public sphere.

Holness and Rule have commented that media sensitisation and advocacy following litigation 'provide[s] spaces for the public, government and persons with disabilities to continue to advance the equality of persons with disabilities on equal basis with others'.¹⁸² Such initiatives should follow court interventions, such as *Springate*, to ensure that the public and government are made aware of not only legal victories, but also of the rights, values and principles at stake.

Aarons and Reynolds have argued that recognition of the deaf community, in particular sign language users, as a linguistic and cultural community would bring them under the protective rubric of the CRL Commission.¹⁸³ This Commission,¹⁸⁴ mandated with promoting respect

177 C McClain-Nhlapo et al 'Disability and human rights: The South African Human Rights Commission' in Watermeyer et al (n 21 above) 99-102.

178 *LH Oortman v St Thomas Aquinas Private School* (EqC) unreported Case 1/2010, Witbank.

179 Discussed in McClain-Nhlapo et al (n 177 above) 103-106.

180 SAHRC (undated) Commissioner Malatji conducts inspections of special needs schools to observe if compliance with the Convention of Rights of Persons with Disabilities <http://www.sahrc.org.za/home/index.php?ipkArticleID=311> (accessed 23 September 2015).

181 SAHRC *Towards a barrier-free society: A report on accessibility and built environments* (2002) http://www.sahrc.org.za/home/21/files/Reports/towards_barrier_free_society.pdf2002.pdf (accessed 23 September 2015); L Swartz 'Disability and equity in South Africa' in SAHRC *SAHRC Equality Report: Commentaries on equality: Race, gender, disability and LGBTI issues* (2012) 33-42 <http://www.sahrc.org.za/home/21/files/Equality%20Report%2020%20Oct%202012%20Final.pdf> (accessed 23 September 2015).

182 W Holness & S Rule 'Barriers to advocacy and litigation in the equality courts for persons with disabilities' (2014) 17 *Potchefstroom Electronic Law Journal* 1907-1925.

183 Aarons & Reynolds in Monaghan et al (n 25 above) 208.

184 Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002; secs 185 and 186 of the Constitution.

for the rights of cultural, religious and linguistic communities,¹⁸⁵ has to date not dealt with complaints regarding discrimination against sign language users. There have been calls for the rationalisation of the various Chapter 9 institutions with overlapping mandates, and the continued role of the CRL Commission, particularly, has been questioned.¹⁸⁶

The advocacy of DPOs, such as DeafSA, continues. In the Western Cape, through a pilot project, sign language has been introduced as a subject from Grade R to Grade 3, as well as from Grade 9,¹⁸⁷ at schools for the deaf. However, DeafSA has intimated that they have not been involved in the process, and that, therefore, there are concerns as to the roll-out of the new curriculum. Other members of the deaf community have cautioned that the Department is not ready for the roll-out because, while the curriculum has been developed, there is still a lack of specialists in SASL, and a lack of qualified deaf teachers and first language SASL users.¹⁸⁸

The role of the Language Board in developing sign language has been woefully inadequate. Financial difficulties may play a role here.¹⁸⁹ However, as in the case of the CRL Commission, it is possible that violations relating to particular cultural and language groups are prioritised over others due to the nature of complaints received (mostly from cultural and language groups with 'official' language or ethnic status) or the dearth of complaints received from deaf or sign language users. This may also be because of the evident lack of co-operation between institutions and overlapping mandates.

The following question is whether SASL should be recognised as the twelfth official language. DeafSA has since 2007 advocated for this inclusion.¹⁹⁰ It has been argued that articles 9 and 21 of the CRPD obligate states to give equal access to communication and information to deaf and hard-of-hearing persons through the recognition of sign language and the availability of appropriate technology, which effectively means

185 Sec 185 of the Constitution.

186 J Mubangizi 'The role of national human rights institutions in the promotion and protection of human rights in Uganda and South Africa: A comparative evaluation' (2006) 27 *Obiter* 463.

187 I Fredericks 'SA sign language added to curriculum' *IOL News* 1 December 2014 http://www.iol.co.za/news/south-africa/western-cape/sa-sign-language-added-to-curriculum-1.1788756#.VYfeUbcw_IU (accessed 23 September 2015).

188 Cara Loening, director of Sign Language Education and Development (SLED), quoted in K Scott 'The state of South African sign language' *Groundup* 26 September 2014 http://groundup.org.za/article/state-south-african-sign-language_2287 (accessed 23 September 2015).

189 PanSALB *Annual Report 2011/2* <http://www.pansalb.org/PanSALB%20Annual%20report%202012.pdf> (accessed 2 February 2016) (indicating a qualified audit, and dissolution of the Board).

190 South African Parliament: Joint Constitutional Review Committee Recognition of South African sign language as official language: Briefing by Deaf Federation of South Africa 16 February 2007 accessed on Parliamentary Monitoring Group <https://pmg.org.za/committee-meeting/7724/> (accessed 23 September 2015).

recognition as an official language.¹⁹¹ However, there has been no further development from parliament in this regard.

Unfortunately, the incident during the memorial for the late President Mandela, when a person with a psycho-social illness made up signs while interpreting, brought to the fore challenges with regard to the accreditation and standardisation of SASL.¹⁹² In time, these fears will be laid to rest as SASL is taught, throughout schools and tertiary institutions, as the language of the deaf and hearing-impaired and its usage is promoted by society at large. The continued monitoring of the linguistic and cultural rights of sign language users will hopefully address the shortcomings in the education system, but this will necessitate dedicated funding and political will. The level of protection of sign language in education may depend on the framing of the right in question as a disability or linguistic minority right, which is discussed next.

4 Legislative and policy choices: Sign language as a disability right or linguistic minority right

By and large, jurisdictions rely on sign language as a linguistic minority right (a human right) or as a disability right as the basis for the extent to which sign language is recognised in legislation and policy.¹⁹³ Snoddon has commented that countries that adopt disability rights legislation (such as the United States of America and Canada) view sign language as an accommodation provided for deaf persons to access public services on an equitable basis. However, such legislation serves the needs of 'autonomous Deaf adults' who already know and use these sign languages, but does not address the needs of 'pre-tertiary Deaf students right to learn or receive an education in signed language'.¹⁹⁴ In other words, couching the right to receive education in sign language as a civil-political right accruing to persons due to their disabilities, as opposed to a linguistic minority issue (a socio-cultural right), determines what entitlements are attainable. For example, in the USA, the classification of students as disabled has prevented them from benefiting from the Bilingual Education Act of 1968, legislation supporting the rights of language minority students.¹⁹⁵

191 SAPA 'Should sign language be an official language in SA?' *Health24* 29 January 2015 <http://www.health24.com/Medical/Hearing-management/Hearing-in-children/Should-sign-language-be-an-official-language-in-SA-20140926> (accessed 23 September 2015).

192 B Molosankwe 'Sign language "fake" blames illness' *IOL News* 12 December 2013 <http://www.iol.co.za/news/south-africa/gauteng/sign-language-fake-blames-illness-1621044> (accessed 23 September 2015).

193 See eg A Mülhke 'The right to language and linguistic development: Deafness from a human rights perspective' (1999) 40 *Virginia Journal of International Law* 705.

194 Snoddon (n 125 above) 256.

195 The USA's IDEA Act, originating in the Education for All Handicapped Children Act of 1975, provides for the accommodation of students with disabilities in schools.

Ball argues that the classification of the users of sign language as disabled offers better protection for the linguistic rights of sign language users than as a linguistic minority.¹⁹⁶ The author argues that this is possible through the employment of the framework of the CRPD to obtain recognition, since the CRPD identifies deafness as a 'distinct culture and identity, expressed throughout the world in numerous sign languages'.¹⁹⁷

The next question is whether the CRPD represents the best framework for ensuring the rights of the deaf to practise their culture and use their language. Batterbury argues that despite its 'disability provenance', the CRPD may be more effective for language justice and promulgation of sign language policies from a minority language perspective than the limited efficacy of minority language imperatives.¹⁹⁸ The author explains that the initiative for greater linguistic access during the negotiations around the CRPD was from a disability perspective,¹⁹⁹ not from a linguistic perspective as required by other international instruments.

Reading together the obligations under the CRPD that states are to facilitate the learning of sign language and the promotion of the linguistic identity of the deaf community; and to ensure that the education of children, in particular those who are deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual in environments maximising academic and social development,²⁰⁰ gives credence to both the linguistic and cultural rights and disability right status of sign language. The former focuses on the linguistic aspect, while the latter focuses on the disability (or impairment) aspect of deaf learners facing barriers to equal education where inappropriate languages are used in schools or school environments which are not conducive to their maximum development.

Murray reviewed research on the outcomes of existing legislation (and legislative efforts) and laments that subsequent outcomes have not fully realised the linguistic goals of the deaf community, noting that 'current legislation has not brought about legally codified sign language rights for deaf children'.²⁰¹ Whilst 31 countries, mainly in Europe, have afforded explicit legal status to sign language, poorer countries, including Benin, Bolivia, Cape Verde, Haiti, Suriname, Laos, Myanmar, Eritrea, Seychelles and Swaziland, have not recognised sign language, have no sign language dictionary, and appear not to accord equal rights to deaf citizens compared

196 AR Ball 'Equal accessibility for sign language under the Convention on the Rights of Persons with Disabilities' (2010) 43 *Case Western Reserve Journal of International Law* 759-798.

197 Ball (n 196 above) 798.

198 Batterbury (n 76 above) 267-268.

199 Batterbury (n 76 above) 263.

200 Arts 24(3)(b) and (c) of the CRPD.

201 J Murray 'Linguistic rights discourse in deaf community activism' (2015) 15 *Sign Language Studies* 379.

to their hearing counterparts.²⁰² Various law and policy reform measures have recognised the rights of sign language users, namely, either by the recognition of the linguistic status of sign language and its users, or the right to use sign language in particular contexts, educational, legal or medical.

A number of constitutions have explicitly recognised the status of a particular country's dominant sign language(s).²⁰³ The inclusion by South Africa of SASL under the mandate of the Language Board in the Constitution, grouping it with other minority languages, squarely identifies sign language users as a minority group. However, this protection has not translated into dedicated measures to advance the development of this language and to protect the linguistic and cultural interests of this segment of society.

A four-pronged education planning in deaf education rather than the ineffective use of disability legislation for language planning and upholding language rights in education has been recommended.²⁰⁴ First, attitude planning breaks down ethnocentric assumptions about the superiority of spoken languages over signed languages of the deaf, and rather refocuses the aims of education as a right and educational resource.²⁰⁵ Second, status planning requires legal and policy recognition of signed languages in education. Third, corpus planning requires developing signed language dictionaries, curricula, technology, and so forth. Fourth, acquisition planning focuses on the support for teachers of sign language, including formal organisations and training programmes for language instructors, particularly to study bilingual bicultural pedagogy.²⁰⁶

How has the South African education system fared in this regard? The attitude planning has not yielded results and will need further efforts from the relevant institutions responsible for monitoring the rights of sign language users. The Department of Education has obviously had to revise its attitude towards the status of sign language in schools, but regarded the provision of sign language to learners as a progressive step, starting with special schools and 'eventually' offering the subject in mainstream schools.

202 M de Keulder 'The legal recognition of sign languages' (2015) 15) *Sign Language Studies* 498.

203 Eg, sec 17 of the Constitution of Finland guarantees the rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability; art 74(2)(g) of the Constitution of Portugal recognises the duty of the state to protect and develop Portuguese sign language, as a cultural expression and instrument of access to education and equality of opportunity. Council of Europe 'The status of sign languages in Europe' (2005) 67 http://www.coe.int/t/e/social_cohesion/soc-sp/5720-0-ID2283-Langue%20signe_GB%20assemble.pdf (accessed 23 September 2015).

204 Snoddon (n 125 above) 268.

205 S Nover 'Politics and language: American sign language and English in deaf education' in C Lucas (ed) *Sociolinguistics in deaf communities* (1995) 109.

206 Cf Murray (n 201 above) 404-405.

This is not consistent with the vision of inclusive education offered in the CRPD. Status planning has its roots in the SASA and Policy Act, but needs to be prioritised at policy level. Corpus planning has commenced, with SASL as a language subject in special schools, but needs further expansion into mainstream schools for truly inclusive education to be realised. The assistance to and training of sign language teachers has a long way to go in realising the right to education and linguistic and cultural rights of the deaf community. A lack of training and support for teachers and insufficient post-provisioning has plagued the entire education system, not only special schools for the deaf.²⁰⁷ Education planning should complement and further entrench the protection already provided in the Constitution and legislation and obligations under international law to deaf learners as being entitled to equal rights in education, with reasonable accommodation or support measures where necessary, and as a linguistic minority.

5 Litigation and law reform for the recognition and use of sign language and sign language interpreters in other jurisdictions

Some lessons may be learnt from litigation in other jurisdictions. The availability of sign language interpreters to ensure equal participation in life, including in accessing education, has been the subject of litigation.²⁰⁸ Predominantly, however, litigation in health care settings has mushroomed and ensured that the deaf receive sign language interpretation and auxiliary services in accessing health care, including information about health care.²⁰⁹ This section outlines cases and law reform in select countries, namely, Australia, Canada, Columbia, Kenya,

207 Equal Education 'Taking equal education into the classroom: The challenges to teaching and learning, and possible campaigns to address the crisis of quality and equality in the pedagogic encounter' (2015) 102. *Linkside & Others v Minister of Basic Education & Others* Case 3844/2013 [2015] ZAECGHC 36 (26 January 2015).

208 *Julio David Perez v Mayors Office of Monteria* Decision of T-051/11 File T-2650185 (date of decision: 4 February 2011) Constitutional Court of Colombia <http://www.corteconstitucional.gov.co/relatoria/2011/t-051-11.htm> (accessed 23 September 2015). The Chilean Constitutional Court granted Constitutional Protection Claim *Molina contra Canales de Televisión* Appeals Court of Santiago, 2001, Rol No5527-2 -1/ Clínica de Acciones de Interés Público y Derechos Humanos – Programe Jurídico sobre Discapacidad – Facultad de Derecho, Universidad Diego Portales. The Appeals Court of Santiago ensured that access to information for the deaf in news programmes was placed on the public agenda. As a consequence of the litigation, an agreement was entered into between the deaf community of Chile, the National Television Council, the National Television Association and other political actors that sign language interpretation would be provided in at least one television news programme every day. Cf MS Cisternas Reyes 'Standard rules on equality of opportunities for persons with disabilities: Legal view of provisions on support services, auxiliary resources and training/View from Latin America' in MH Rioux et al (eds) *Critical perspectives on human rights and disability law* (2011) 419 446.

209 Eg, private hospitals and medical facilities in the USA.

New Zealand, the United States of America (USA) and the United Kingdom (UK).

5.1 Australia

Komesaroff has written extensively about discrimination claims brought by parents of child users of Auslan to vindicate their right to use sign language in schools.²¹⁰ She reviewed 11 discrimination cases before the Human Rights and Equal Opportunities Commission that were conciliated in Australia, and explains that such settlements mean that there is no admission of liability, the setting of legal precedent is avoided, and the requirement of confidentiality is more often than not imposed.²¹¹ The net effect is to provide solutions for particular individual claimants, but systemic discrimination is not addressed.

In *Clarke v Catholic Education Office & Another*,²¹² the Federal Court upheld the decision of the court *a quo*, finding that the school had discriminated against a prospective profoundly deaf student on the ground of his disability, by failing to provide Auslan interpreting assistance to support the student in the classroom, and awarded substantial compensation. The expert witness in that case, Komesaroff, stressed the inappropriateness of placing a child user of Auslan

in an educational environment that provides no access to that language. Furthermore, it is highly unreasonable to expect a deaf student to use note taking as his primary method of communication, and it is a monumental failure of the school system not to provide adequate access for a student who is culturally and linguistically deaf.²¹³

The provision of sign language to the Clarke child, and to Tiahna Hurst in the next case under discussion, occurred in mainstream schools, and was more akin to the reasonable accommodation measures understood before the CRPD finally entrenched support measures to ensure inclusive education on the international law front. Both cases are, therefore, not concerned with recognising sign language as a language subject, but rather with the provision of interpreters in sign language to facilitate children's learning. In this way, it is perceived as a disability right, and not a linguistic right *per se*.

210 LR Komesaroff 'Denying claims of discrimination in the Federal Court of Australia: Arguments against the use of native sign language in education' (2007) 7 *Sign Language Studies* 360.

211 LR Komesaroff 'Allegations of unlawful discrimination in education: Parents taking their fight for Auslan to the courts' (2004) 9 *Journal of Deaf Studies and Deaf Education* 210.

212 [2003] FCA 1085.

213 Komesaroff (n 211 above) 215.

In *Hurst v State of Queensland*,²¹⁴ two families of deaf children challenged the use by teachers of signed English and the absence of Auslan in the classroom. The case, heard in the Federal Court of Australia in 2005, was determined in favour of one family (Devlin) and against the other family (Hurst). However, in July 2006 the judgment against Hurst was overturned in the Appeals Court. The discrimination claim of Tiahna Hurst was based on the fact 'that she ought to have been taught in Auslan because that was not merely the best, but the only appropriate, method of communication with profoundly deaf children'. However, the court *a quo*, *per* Justice Landers, decided against Tiahna as she was fluent in Auslan, her first language. Evinced the oralist tradition, the court held:

There is no evidence, or no evidence which I am prepared to accept, to support a finding that Tiahna cannot be educated in English, including Signed English ... On Tiahna's own evidence, she has not established that she has fallen behind her hearing peers. It might be that she has not fallen behind her hearing peers because of the attention which she receives from her mother and the instruction which she no doubt receives from her mother in Auslan.²¹⁵

Tiahna's case, however, was that her ability to cope in the classroom did not translate into reaching her full educational potential, and she remained disadvantaged without it:

It only meant that her detriment was masked. Lack of Auslan assistance was an educational disadvantage to Tiahna because it denied her the opportunity to realise her full potential. In the case of a less able student, it might cause the student to fail rather than pass. In Tiahna's case, it caused her to perform at an average level rather than excel. In both cases, there is serious disadvantage. Neither student performs to the best of his or her ability.²¹⁶

On appeal, reliance on the ICCPR and CRC, *inter alia*, may have carried the day, particularly insofar as the independence of children was stressed. These submissions provided a broad interpretation of the Disability Discrimination Act²¹⁷ and the responsibility of Australian states to provide deaf students with equitable and optimal educational opportunities.²¹⁸ As discussed below, this may be contrasted with the USA decision in *Rowley*. However, the Federal Court watered down the precedent-setting nature of the decision:

It should be stressed that Tiahna's case is not a test case. The judgment of this court does not establish that educational authorities must make provision for Auslan teaching or interpreting for any deaf child who desires it. It does not

214 [2005] FCA 405.

215 *Hurst* (n 214 above) para 38.

216 *Hurst* (n 214 above) para 56.

217 Sec 6(c) of the Discrimination Act 1992.

218 *Hurst* (n 214 above) paras 78-81. Cf J Cumming *Valuing students with impairment: International comparisons of practice in educational accountability* (2012) 68.

establish that Auslan is better than signed English as a method of teaching deaf children. It does not determine that an educational authority necessarily acts unreasonably if it declines to provide Auslan assistance.²¹⁹

Recently, there have been advocacy efforts to bring about legislation recognising the legal right of deaf persons to use Auslan as a primary or preferred language.²²⁰ The Committee on the Rights of Persons with Disabilities dismissed a complaint lodged by a deaf person wishing to challenge his probable exclusion from jury duty due to the legal position that potential jurors requiring Auslan interpreting are exempted from jury duty for a lack of victim status being proven.²²¹ Should the admissibility hurdle be overcome in a case such as this, the arguments about exclusion from jury duty due to the need for support and Auslan interpretation, with concomitant violations of the right to exercise legal capacity and political rights may at a civil-political level raise the bar for the recognition of participation rights of sign language users on a global scale.

In summary, measures for reasonable accommodation in schools are based on an individual learner's requirements that can be fulfilled immediately. However, inclusive education is a process that will take longer to overcome the archaic attitudes evident in the *Hurst* case. In that case, the judgment, although a victory for Tiahna, does not recognise her rights to be taught in her language, Auslan, on an equal basis with her hearing peers, since she belongs to a linguistic and cultural minority. The *obiter* sentiments expressed by the judge is not in line with the requirement in the CRPD that the maximum development of the child is to be achieved. Hopefully, deaf learners will in future be able to frame their complaints against schools not providing sign language assistance in class, or as a language subject, as not meeting the inclusive education demands of the CRPD, and not only as 'reasonable accommodation' measures.

5.2 Canada

The Canadian decision in *Eldridge v British Columbia (Attorney-General)* was a landmark judgment in connection with the provision of sign language interpreters.²²² In this case, the failure of hospitals to provide sign language interpretation where necessary for effective communication of patients was held to constitute a violation of the rights of deaf persons under the Canadian Charter of Rights and Freedoms.²²³ A declaration of this failure

219 *Hurst v State of Queensland* [2006] FCAFC 100 131.

220 Deaf Australia *Equality, capacity and disability in commonwealth laws* (2014) Issue Paper 44 (IP44) http://www.alrc.gov.au/sites/default/files/subs/37._org_deaf_australia_jan_2014.doc (accessed 23 September 2015).

221 *AM v Australia* Committee on the Rights of Persons with Disabilities Decision CRPD/C/13/D/12/2013 Decision adopted by the Committee at its 13th session (25 March–17 April 2015).

222 [1997] 3 SCR 624.

223 Sec 15(1) of the Canadian Charter.

as unconstitutional was ordered, with a direction that the government administer the relevant legislation in a manner consistent with the Charter.

The initial enthusiasm following the outcome of the case was watered down by the disappointingly slow and reactive pace at which the order was implemented by provincial governments.²²⁴ A Canadian disability activist commented that follow-up on the case had not been prioritised by DPOs, and a cumbersome letter-writing campaign was utilised to enforce the order. Instead, a test case in a province to challenge the lack of an implementation plan in line with the *Eldridge* decision may have resulted in quicker, though more costly, action.²²⁵ However, this decision remained a unanimous victory.

5.3 Columbia

In *Julio David Perez v Mayors Office of Monteria*,²²⁶ the Constitutional Court of Columbia held that the right to education of a hearing-impaired college student had been violated by the denial of a sign interpreter being available in college due to a rule that only where there are more than ten hearing-impaired students in class would an interpreter be provided. Mr Perez was hearing-impaired and had completed the first semester at the Primary School Teachers College in Montería, but was unable to continue further than the first year of study because paragraph 3, article 9 of Decree 366/2009 established that the presence of a minimum of 10 students with hearing disabilities was necessary to require sign language interpreters in educational institutions.

Citing article 23 of the CRC, General Comment 5 of the ESCR Committee, the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, the Protocol of San Salvador, as well as articles of the Colombian Constitution and national case law, the Constitutional Court concluded that Perez's right to education had been violated, and granted protection to the fundamental right to inclusive education. Furthermore, the Court found that the provision making the appointment of sign language interpreters conditional on a minimum enrolment of hearing-impaired students was unconstitutional. This requirement, it was held, deepened the marginalisation and exclusion of students with hearing disabilities. The Court further ordered the Montería mayor's office to make the necessary corrections to the budgets, planning, curricula and organisation of its

224 L Vanhala 'Disability equality and opportunity in the Supreme Court of Canada' in L Vanhala (ed) *Making rights a reality? Disability rights activists and legal mobilisation* (2011) 127.

225 Snoddon (n 125 above) 264.

226 *Perez v Mayors Office* (n 208 above). Since the decision is in Spanish, the English summary of the case, provided by the court on its website, has been relied on <https://www.escri-net.org/docs/i/1600443> (accessed 23 September 2015).

educational institutions so as to effectively provide access to the right to education to those with hearing disabilities.

Since this decision, Colombia ratified the CRPD on 10 May 2011. Following a request by the Constitutional Court, the decision was communicated to economic, social and cultural rights organisations and centres and to civil society organisations focusing on disability rights involved in the case. This case led to a review of public policy regarding inclusive education in Colombia, mostly attributable to the finding that the applicable regulations included requirements that, when implemented, had a disproportionate impact on persons with disabilities. Therefore, the Court ordered public authorities to adopt general measures aimed at correcting policies and designing effective mechanisms to ensure inclusive education for students with disabilities. This judgment is commensurate with an understanding of inclusive education, albeit at higher education level, not merely integrating students with hearing impairments into mainstream institutions, but requiring support measures that allow effective communication for learning. The focus on necessary budgetary allocation is in line with the refrain by the UN Human Rights Council that an efficient budget is necessary to fund measures for inclusive education.²²⁷

5.4 Kenya

Kenya has been reported to be on the brink of introducing sign language in schools in line with the goal of inclusive education.²²⁸ However, Mweri has lamented the lack of recognition of Kenyan sign language (KSL) in schools, including the segregation of deaf learners in deaf 'units' within mainstream schools. The Basic Education Act 14 of 2013 promotes special needs education, establishing special institutions, including those for hearing-impaired learners.²²⁹ In particular, Mweri notes that the quality of teachers in institutions for the deaf 'is below par' as they 'lack the linguistic know how to use KSL to impart knowledge to the deaf'.²³⁰

227 UN Human Rights Council Thematic study on the right of persons with disabilities to education *Report of the Office of the United Nations High Commissioner for Human Rights A/HRC/25/29* 18 December 2013 para 49.

228 Jacob Kaimenyi, Cabinet Secretary for Education, cited in F Achanda 'State to introduce sign language in schools' *The Star (Nairobi)* 23 February 2015 <http://allafrica.com/stories/201502231830.html> (accessed 23 September 2015).

229 The Cabinet Secretary is required to ensure that every special school is provided with appropriate trained teachers and infrastructure for learners with disabilities.

230 JG Mweri 'Diversity in education: Kenyan sign language as a medium of instruction in schools for the deaf in Kenya' (2014) 4 *Multilingual Education* 4.

The Kenyan National Commission of Human Rights has reported the challenges faced by deaf learners, including the lack of proficient teachers, the lack of resources in schools and the lack of sign language interpretation when accessing public services and accessing information.²³¹ This is despite the recognition by the Kenyan Constitution of the role of the state in promoting and developing the use of indigenous languages, including KSL.²³² The Constitution emphasises the specific rights accruing to persons with disabilities.²³³ KSL is also recognised as one of the languages of parliament.²³⁴ The Kenyan Persons with Disabilities Act 14 of 2003 is currently being reviewed to bring it in line with the 2010 Constitution and the CRPD, as this Act predated both documents.²³⁵ The 2003 Act is aimed at providing for the rights and rehabilitation of persons with disabilities, to achieve equalisation of opportunities for persons with disabilities, and to establish the National Council for Persons with Disabilities, as well as the National Development Fund for Persons with Disabilities to provide monetary assistance to organisations and persons with disabilities.²³⁶ In a nutshell, legislative and policy provisions for equal education for deaf learners is still lacking in Kenya. There have been calls for the reform of the Basic Education Act of 2013 to bring it in line with the state's obligations under article 24 of the CRPD.²³⁷

5.5 New Zealand

The New Zealand Sign Language Act of 2006 declared New Zealand sign

- 231 Kenyan National Commission on Human Rights 'From norm to practice: A status report on the implementation of the rights of persons with disabilities in Kenya' (2014) <http://www.knchr.org/Portals/0/Reports/Disability%20Report.pdf> (accessed on 23 September 2015). The report finds that, whilst the policy environment of education is theoretically supportive of education for learners with disabilities, it faces bottlenecks in implementation. Eg, the inclusion policy is yet to be implemented and the implementation framework of the National Policy on Special Needs Education Policy of 2009 has not been developed.
- 232 Sec 7(3)(b) of the Kenyan Constitution of 2010. The listing of disability as a ground of discrimination in the Kenyan Constitution of 2010 (sec 27(4)) is welcomed, considering the outcome of the decision in *Duncan Otieno Waga v Attorney-General* [2013] EKLR, where the Kenyan High Court held that it could not find for the applicant since disability was not listed in the non-discrimination clause of the previous Constitution of 1969, as amended in 1997.
- 233 Sec 54 of the Kenyan Constitution *inter alia* guarantees the rights '(b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person; (c) to reasonable access to all places, public transport and information; (d) to use sign language, braille or other appropriate means of communication; and (e) to access materials and devices to overcome constraints arising from the persons disability'.
- 234 Sec 120(1) of the Kenyan Constitution.
- 235 Kenyan Persons with Disabilities Amendment Bill 2014.
- 236 For an overview of the 2006 Act, see K Kindiki 'Legal protection of persons with disabilities' in Kenya in Rioux et al (n 208 above) 309-340. Cf E Kamundia 'Country report: Kenya' (2014) *African Disability Rights Yearbook* 185-205 190.
- 237 Kamundia (n 236 above) 205.

language (NZSL) a third official language, alongside English and Te Reo Māori.²³⁸ The Act was reviewed in 2011 and, following a recommendation by the Human Rights Commission, a working group persuaded the government to establish an advisory board, the New Zealand Sign Language Board, and a fund to promote and maintain NZSL progress priorities for the language, and to support NZSL initiatives for the full participation in society of the deaf community.

The fund would include \$1.5 billion annually over four years. Resource allocation in line with policy and law reform measures was clearly deemed important. Although the Human Rights Commission acknowledged the fact that funding was available to support deaf people and NZSL users to access education through the provision of NZSL interpreters and other resources,²³⁹ this funding was still insufficient. It did not allocate NZSL resources and support to enable the acquisition of NZSL including funding for NZSL interpreters in schools and the capacity of staff to deliver NZSL in early childhood education centres and schools. The lack of an implementation strategy and resourcing has hampered the efficacy of the Act.²⁴⁰ Especially in the education and legal systems, limitations on accessing NZSL have persisted. Even where budgets are allocated for the development of sign language, its implementation will require continued monitoring to ensure that it is meaningful.

5.6 United States of America

The 1982 decision in *Board of Education of Hendrick Hudson Central School District v Rowley*²⁴¹ is an example of the domination of the medical model of deafness in law. Amy Rowley, profoundly deaf since birth, was a first-grade student in New York. Her parents sought the services of a sign language interpreter for Amy in the general education classroom. Although Amy was an excellent lip-reader, it was estimated that she was missing more than half of what was being said in the classroom. Her parents were deaf and believed that she should be receiving instruction in her own language, American sign language (ASL), rather than placing sole reliance on her ability to lip-read. When the school denied this request, her parents filed a complaint under the Individuals with Disabilities Education

238 New Zealand Office of Disability Issues Review of the New Zealand Sign Language Act 3 <http://www.odi.govt.nz/what-we-do/nzsl/2010-review-nzsl-act.html> (accessed 23 September 2015).

239 Eg, the NZ Human Rights Commission noted that the Ministry of Education provides funding through the Ongoing Resourcing Scheme for additional specialists, teacher aides, and/or equipment that a child might need in the classroom to access the curriculum. Office of the Minister for Disability Issues Promotion and maintenance of New Zealand sign language (2014) Cabinet Social Policy Committee <http://www.odi.govt.nz/documents/nzsl/nzsl-board/pdf-word-cabinet-paper-nzsl-board-may-2014.pdf> (accessed 23 September 2015).

240 RL McKee 'Action pending: Four years on from the New Zealand Sign Language Act 2006' (2011) 42 *Victoria University Wellington Law Review* 277-298 296.

241 458 US 176 (1982).

Act (IDEA Act). The matter eventually came before the Supreme Court, and the Court ruled that Amy was not entitled to a sign language interpreter as her excellent grades made an interpreter unnecessary.

The majority decision of the Court was that the failure by a school to provide free appropriate public education, as defined by the Education for All Handicapped Children Act²⁴² (the precursor of the IDEA Act), had to be because the school did not comply with the procedural standards in the Act, rather than as a result of an ineffective or even a poorly-designed individualised education programme. As such, the Court held that a student received free appropriate public education when the state provides 'personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction'.²⁴³ Therefore, 'if the child is being educated in the regular classroom', the individual education programme 'should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade'.²⁴⁴ The Court did not implement the standard of maximising a student's educational outcome, but rather to provide an education 'reasonably calculated' to provide 'some educational benefit' as a baseline of educational services and instruction to allow a student with disabilities to advance from one grade to the next.²⁴⁵ This has meant that the Court focused on attempts by the school at good enough access rather than on the student's actual good outcomes.²⁴⁶

The dissent, instead, indicated that the Act was intended to provide 'equal educational opportunity' for learners with disabilities and, accordingly:

The basic floor of opportunity is instead, as the courts below recognized, intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible. Amy Rowley, without a sign language interpreter, comprehends less than half of what is said in the classroom, less than half of what normal children comprehend. This is hardly an equal opportunity to learn, even if Amy makes passing grades.²⁴⁷

242 Pub L No 94-142, 89 Stat 773 (1975).

243 *Rowley* (n 241 above) 203.

244 *Rowley* (n 241 above) 204.

245 *Rowley* (n 241 above) 198-199. The District Court, on the other hand, had interpreted the Act to provide that each child with a disability should be given an opportunity to achieve their maximum educational potential commensurate with their non-disabled peers.

246 AK Kaufman & E Blewett 'When good enough is no longer good enough: How the high stakes nature of the No Child Left Behind Act supplanted the Rowley definition of a free appropriate public education' (2012) 41 *Journal of Law and Education* 5 6.

247 Justice Blackmun in *Rowley* (n 241 above) 213.

The *Rowley* decision epitomises another lost opportunity to address the lack of awareness and misguided assumptions about disability.²⁴⁸ Snoddon explains that the *Rowley* standard does not recognise students to excel academically with an education in sign language where they have already acquired a language.²⁴⁹ Rather, the approach underscores the idea that deaf learners must first fail before they can obtain access to their sign language, that is, ASL.²⁵⁰ The decision, if taken today, would not meet the maximum development standard in article 24 of the CRPD.

5.7 United Kingdom

British sign language (BSL) was officially recognised in 2003.²⁵¹ The policies currently in place in the UK are based on the assumption that deaf persons require 'assimilation to reduce the adverse effects of their disabilities', which Batterbury argues is contrary to the collective self-identity of the deaf community as a minority linguistic community.²⁵² The deaf community is advocating for full legal recognition of BSL,²⁵³ and a Scottish BSL Bill²⁵⁴ is also on the cards.²⁵⁵ Integration is not enough, as the CRPD demands inclusive education.

Policy and law reform efforts to recognise sign languages of particular deaf communities in specific countries, and inclusive education where deaf students attend 'mainstream' schools, have catapulted the acceptance of sign language and deaf culture into regular education.²⁵⁶ On the litigation front, however, an awareness of the value of sign language education is evident in the Australian and Columbian decisions only. Greater law and

248 TJ Seligmann 'Sliding doors: The Rowley decision, interpretation of special education law and what might have been' (2012) 41 *Journal of Law and Education* 71; JF Mead & MA Paige 'Board of Education of Hendrick Hudson v Rowley: An examination of its precedential impact' (2008) 37 *Journal of Law and Education* 329.

249 Snoddon (n 125 above) 266.

250 L Siegel *The educational and communication needs of deaf and hard of hearing children: A statement of principle regarding fundamental systemic educational changes* (2000); Greenbrae, CA: National Deaf Education Project 25 cited in Snodden (n 125 above) 265.

251 V Krausneker 'On the legal status of sign languages: A commented compilation of resources' (2009) 10 *Current Issues in Language Planning* 351.

252 SCE Batterbury 'Democratising policy theories: Enhancing prospects for language justice for sign language peoples' (2014) 42 *Policy and Politics* 547 559.

253 British Deaf Association Response by the BDA to the Office for Disability Issues: Draft UK initial report on the UNCRPD (2011); BDA *Transforming deaf people's lives: BSL strategy* (2012), both cited in Batterbury (n 251 above) 548.

254 British Sign Language (Scotland) Bill, lodged in the Scottish Parliament on 29 October 2014.

255 M de Meulder 'A barking dog that never bites? The British Sign Language (Scotland) Bill' (2015) 15 *Sign Language Studies* 446.

256 See, eg, the argument by R Rosen 'An unintended consequence of IDEA: American sign language, the deaf community, and deaf culture into mainstream education' (2006) 26 *Disability Studies Quarterly* <http://dsq-sds.org/article/view/685/862> (accessed 23 September 2015). Rosen argues that the integration of deaf students into American society is one of the laudable goals of the USAs Individuals with Disabilities Act. Its objective has been to foster speech and hearing skills and the placement of deaf and hard of hearing students in mainstream schools with hearing students. According to

policy reform efforts in Kenya and the UK will hopefully steer those jurisdictions towards compliance with article 24 of the CRPD, and their obligations, generally, under international and regional law to accord linguistic and cultural minority status and the promotion of inclusive education. However, the examples of New Zealand and Kenya illustrate that law reform efforts require funding priorities aimed at developing sign language to be maintained.

6 Conclusion

A resounding victory for deaf learners has been achieved following the settlement in *Springate* and the consequent curriculum development, in that these learners can start to learn sign language in schools and that they will hopefully not be relegated to unequal educational and employment opportunities compared to their hearing peers. The protection, though fragmented, in the Equality Act, the South African Schools Act, the Constitution and various policies for SASL should be read within the growing acceptance globally that sign language is both a right accruing due to disability accommodations, and due to the linguistic and cultural minority status of deaf users of sign language. The inattention of the constitutionally-mandated body, the Language Board, to these rights of deaf learners, and the blame-shifting by the Department of Education, evident in the way in which the advocacy and litigation have played out, have not been entirely remedied. These organs of state will continue to play a crucial part in the protection and promotion of SASL for deaf children and adults alike, and it is hoped that they will take their cues from the human rights framework in the Constitution, and on the international level, including through the explicit recognition of sign languages in the CRPD. Similarly, the SAHRC and CRL Commission will continue to play a monitoring role and should put the issue of sign language in schools on their agendas.

The majority of the litigation discussed predated the CRPD, and reliance on its framework for entrenching the recognition of sign languages in signatory countries has not yet been tested. In *Springate*, the settlement avoided a legal precedent. Submissions on the obligations on the state under the CRPD, therefore, may have been raised in argument. Despite the lack of consensus as to the best means of achieving the recognition of

Rosen, however, an analysis of historical and educational documents shows that IDEA *unintentionally* created the process for the inclusion of the language, community, and culture of signing deaf and hard of hearing students into the American education system. Whereas the legislation integrates signing deaf and hard of hearing students into the American education system; American Sign Language (ASL) and the American deaf community and culture are also mainstreamed into the system. However, Cripps & Suppalla (n 1 above) 89 indicate that integration of deaf learners in mainstream schools with non-disabled, non-signing peers has resulted in a lack of attention to the signed language, reflecting spoken language biases. These include the declining socialisation opportunities as well as ASL acquisition.

sign language in the various jurisdictions, particularly in the educational setting, a decision which interprets the state's obligations under the CRPD may inform the debate between advocates for sign language as a disability right and those preferring to frame it as a linguistic minority right. It appears that law reform efforts are proliferating around the globe to recognise sign languages, either (rarely) as official languages, or, more often, by promoting its usage within particular settings (such as the medical and legal spheres). For deaf children, whether placed in schools for the deaf or mainstream schools, meaningful access to their vernacular should maximise their educational opportunities. States should, therefore, be cognisant of their policies and legislative choices to avoid the pitfalls of approaches such as that of the USA in *Rowley*. Whether disability-specific legislation and, in particular, unequivocal legislative enactments for sign language will be necessary in the South African context should be carefully planned, bearing in mind the lessons learnt from other jurisdictions.

The next challenge for the deaf community in South Africa is the education of deaf learners in 'mainstream' schools, through the implementation of inclusive education. This will require teachers to be well versed and trained in SASL in order to teach both hearing-impaired students and hearing students in one classroom.²⁵⁷ Human Rights Watch has also recommended that the state 'adequately train all teachers deployed to schools where deaf or hard-of-hearing students are accommodated in South African Sign Language to address the gap in access to quality teaching in South African Sign Language'.²⁵⁸ This recommendation is based on reports of children facing exclusion from education due to the lack of materials in sign language in mainstream and special schools; that limited specialised centres are available for teaching sign language; and because of the dearth of teachers adequately trained in teaching sign language. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) has also stressed the need for educational planning to include the training of 'sufficient numbers of fully-competent and qualified teachers' able to teach in the mother tongue.²⁵⁹ Most recent available statistics reveal a ratio of one interpreter to 99 000 users of sign language in South Africa.²⁶⁰ Statistics for the incidence of teachers of sign language for every learner are not available. Fortunately, the curriculum planning process for SASL flowing from the *Springside* intervention appears to have anticipated this need. However, the

257 Glaser & Van Pletzen (n 120 above) 25.

258 Human Rights Watch *Complicit in education: South Africa's failure to guarantee an inclusive education for children with disabilities* (2015) 47 85.

259 UNESCO *Education in a multilingual world* (2003) 31 <http://unesdoc.unesco.org/images/0012/001297/129728e.pdf> (accessed 23 September 2015).

260 DeafSA 'Policy on the provision and regulation of South African sign language interpreters, Johannesburg' (2011) cited in T Zulu *The socio-economic status, sign language interpreter utilisation and the cost of providing South African sign language interpreter services in the Cape Metropole District health services* MPH thesis in Health Economics, University of Cape Town, 2014 10.

allocation of funding will have to match the staggering demand for qualified teachers and interpreters.

The disparities between budget allocation for special schools as opposed to inclusive education have persisted, despite the policy statements in White Paper 6, and the international law position requiring the adequate allocation of resources.²⁶¹ Ram and Muthukrishna have cautioned that inclusion does not merely involve moving deaf learners from special schools to mainstream schools, which means that, once 'mainstreamed', the students are 'included' and integrated.²⁶² Rather, inclusive education is a continuous process, requiring constant 'pedagogical and organisational transformation within the mainstream to ensure that the system is responsive to learner diversity'. Without challenging the curriculum and organisational arrangements and the failure to overcome barriers to learning and participation as experienced by deaf learners in mainstream schools, it will remain 'exclusionary'. Instead, the authors call for

the ethos of a school ... to affirm the culture and language of Deaf learners. Within the philosophy of inclusive education, the implication is that even schools for the Deaf should stress interventions that uncover and minimise barriers to learning.²⁶³

It has been suggested that the current policy and academic discourses on diversity and inclusion should be strengthened so that both concepts can facilitate the entrenchment of the language and other human rights of the deaf community. What is needed for understanding diversity is a group rights-based foundation, whereas inclusion should be understood as a form of societal inclusion of sign language persons, promoting bilingual sign education in a group setting and ensuring both individual and collective rights.²⁶⁴

The bias towards spoken languages continues: Whether in early childhood development, primary, secondary or tertiary education, it is clear that hearing teachers and lecturers dominate. Komesaroff calls for a systemic change, because

[t]he denial of linguistic and cultural difference, in preference for a disability construction, ignores the situation in which many deaf people find

261 Human Rights Watch (n 257 above) 76. Cf Department of Basic Education Progress report on inclusive education and special schools Portfolio Committee on Basic Education 23 June 2015; D Budlender 'Budgeting for realising the right to basic education for children with disabilities in South Africa' Annexure C in T Fish-Hodgson & S Khumalo *Left in the dark: Failure to provide access to quality education to blind and partially sighted learners in South Africa* (2015) <http://section27.org.za/wp-content/uploads/2015/11/S27-left-in-the-dark-2015-accessible.pdf> (accessed 14 February 2016).

262 A Ram & N Muthukrishna 'Voices of deaf adults' (2001) 19 *Perspectives in Education* 39.

263 Ram & Muthukrishna (n 262 above) 49.

264 Kusters et al (n 46 above) 25.

themselves. Language exists within a social and cultural context and is therefore political and bound up with issues of power. Schools and universities are powerful institutions whose practices can maintain the positions of particular cultural and linguistic groups.²⁶⁵

The positive changes in education of the deaf, therefore, can only be expanded upon if the deaf community continues to ensure that its 'voice' be heard through processes that strategise and implement education policies, as was the case for the decade before and during the litigation in *Springate*, and through concerted planned advocacy, litigation, lobbying and law reform, as evinced in other jurisdictions.²⁶⁶ As the quote at the beginning of the articles hows, offering sign language as a language subject in mainstream or full-service schools is considered to be constrained by the 'reasonable practicable' standard in South Africa. This is not in line with the notion of full inclusive education. Sign language in South Africa should not merely remain within the 'realms of special education', but should be placed 'within the mainstream'.²⁶⁷ The recent White Paper on the Rights of Persons with Disabilities, gazetted in 2016, recognises the linguistic identity of the deaf community and the importance of SASL within that framework.²⁶⁸ Hopefully, the implementation of the policy directives will bear fruit and bring us closer to meeting inclusive education imperatives under international and domestic law.

265 L Komesaroff 'Diversity and justice: Being different in universities and schools' (2000) paper presented at the AARE Sydney 2000 conference, 4-7 December 2000 1-11 10 <http://www.aare.edu.au/data/publications/2000/kom00269.pdf> (accessed 23 September 2015).

266 Storbeck (n 13 above) 133 143.

267 Dyson, cited in Cripps & Supalla (n 1 above).

268 Department of Social Development (n 99 above).

IMPLEMENTING ARTICLE 33 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: TANZANIAN APPROACH

*Abdallah Possi**

Summary

This article gives an account of institutional mechanisms in place for the implementation of the Convention on the Rights of Persons with Disabilities in Tanzania. The protection of human rights depends, among other things, on how effective the institutional mechanisms for the implementation of these standards are. Article 33 of the CRPD provides for domestic implementation, monitoring and consultative mechanisms. Tanzania has in place institution mechanisms for the implementation of disability legislation, which was enacted after the ratification of the CRPD by Tanzania. There are general institutional mechanisms for the monitoring of human rights, which may also be used to monitor specific issues of persons with disabilities. It is a fact that these institutions were in place even before the CRPD. The domestic arrangements in Tanzania for purposes of implementing the CRPD manifest the changing approach, moving away from the old and limited medical/welfare approach to disability, and towards the broader and more inclusive rights approach to disability. The complete change will not be abrupt, because of competing urgent interests, all of which require significant resource mobilisation. Some issues related to law and the disability movement also need to be addressed with a view to enhancing the performance of domestic mechanisms envisaged under article 33 of the CRPD.

* LL.B., LL.M. (Dar es Salaam), Dr.phil. (Erlangen); Lecturer, University of Dodoma, Tanzania (on secondment), currently serving as Deputy Minister of State, Prime Minister's Office (Persons with Disabilities) in Tanzania.

1 Introduction

The protection of human rights in legal or policy documents is only a step towards their actual realisation. Much also depends on how effective the institutional mechanisms for the implementation of these standards are. In various places around the world, the lack of a comprehensive approach to disability issues, and the neglect of a human rights approach to disability in policy making meant that disability rights required the transformation of social structures and not only the adoption of isolated measures.¹ The UN Convention on the Rights of Persons with Disabilities (CRPD) tackles the sidelining of disability by providing for means by which the rights of persons with disabilities can be implemented internationally as well as domestically. Generally, these means are through institutional/administrative as well as legislative measures, and there is also an emphasis on the participation of persons with disabilities.²

The article gives an account of institutional mechanisms for the implementation of the CRPD in Tanzania. The article begins with a brief introduction to the CRPD's requirements on national action, and proceeds to discuss the extent to which Tanzania's measures are in compliance with CRPD standards. The article is based on the view that the human rights approach to disability does not only end with the conceptualisation of disability, but the way in which the concept of disability is used to realise rights. This needs to be reflected in, *inter alia*, institutional mechanisms in place for implementation (which includes co-ordination), promotion, protection and monitoring of disability rights, as well as consultative mechanisms on matters related to persons with disabilities. This entails a shift away from the practice of limiting disability issues to health or welfare institutions.

2 CRPD and the requirement of national action

The earliest UN instrument to specifically address matters of persons with disabilities (albeit only a particular group),³ the Declaration on the Rights of Mentally Retarded Persons (DRMRP),³ did not place the emphasis on domestic monitoring and administrative measures to ensure its implementation. This also applied to the Declaration on the Rights of Disabled Persons (DRDP),⁴ save for the requirement of consultation with organisations of persons with disabilities. In 1993, the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (Standard

1 G de Beco 'Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: Another role for the national human rights institutions' (2011) 29 *Netherlands Quarterly of Human Rights* 87.

2 CRPD, arts 33(1), (2) & (3).

3 Declaration on the Rights of Mentally Retarded Persons of 1971.

4 Declaration on the Rights of Disabled Persons of 1975.

Rules)⁵ required states to establish and strengthen national co-ordinating committees, or similar bodies, to serve as national focal points on matters relating to disability. These ought to be permanent and based on legal as well as appropriate administrative regulation.⁶ The Standard Rules, among other things, emphasised the representation of private and public organisations, organisations of persons with disabilities and non-governmental organisations (NGOs).⁷ Significantly, the Standard Rules required that the national co-ordinating committee should be provided with sufficient autonomy and resources to fulfil its responsibilities in relation to its decision-making capacities.⁸

The non-binding nature of the previous disability rights instruments necessitated the insertion of similar provisions in article 33 of the CRPD, which provides:

- (1) States Parties, in accordance with their system of organisation, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.
- (2) States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.
- (3) Civil society, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process.

Article 33 is 'arguably the most complete provision on national level implementation and monitoring ever in international human rights',⁹ and one of the far-reaching structural innovations.¹⁰ It must, therefore, not be interpreted as a mere incentive for states to implement the Convention, but

5 Standard Rules on the Equalisation of Opportunities for Persons with Disabilities of 1993.

6 Standard Rules (n 5 above) rule 17(1).

7 n 5 above, rule 17(2).

8 n 5 above, rule 17(4).

9 OHCHR 'Study on the implementation of article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe' (unpublished) 4.

10 G de Beco & A Hoefmans 'National structures for the implementation and monitoring of the UN Convention on the Rights of Persons with Disabilities' in G de Beco (ed) *Article 33 of the UN Convention on the Rights of Persons with Disabilities* (2013) 21; OHCHR (n 9 above).

as an extension of a general duty upon state authorities by virtue of international human rights law.¹¹ The structural shifts with respect to implementation create ‘obligations of conduct’, defining how states should reach the desired goals.¹² By focusing on both international and domestic mechanisms, the CRPD bridges the gap between international and national monitoring and implementation mechanisms, and between human rights standards and their practical application.¹³ This approach is not found in older human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁴

Article 33 should be read together with other provisions of the CRPD, and should in no way limit measures intended to be taken with the ultimate goal of realising the rights of persons with disabilities. For example, article 4(1)(a) provides for the adoption of all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention.

2.1 Disability focal points and co-ordination mechanisms

Article 33(1) provides for two components of implementation: first, one or more entities for matters related to the implementation of the CRPD; and, second, the co-ordination mechanism aimed at boosting co-operation between ministries and avoiding that policy makers adopt isolated measures.¹⁵

This is in recognition of the fact that the implementation of international human rights treaties is ultimately a domestic issue, and also an acknowledgment that the responsibility at the national level extends across a wide range of government sectors, resulting in significant co-ordination and coherency challenges.¹⁶

11 Beco & Hoefmans (n 10 above) 21.

12 A Hoefmans & G de Beco *Background Document prepared for the International Conference* (2010) 18 http://www.socialsecurity.fgov.be/eu/docs/agenda/18-19_11_10_background_document.pdf (accessed 5 August 2013); De Beco (n 1 above) 85.

13 De Beco (n 1 above) 90.

14 LFA Gatjens ‘Analysis of article 33 of the UN Convention: The critical importance of national implementation and monitoring’ (2011) 8 *SUR – International Journal on Human Rights* 87. It should be noted that art 3 of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contained only ‘partial’ domestic mechanisms. See n 14 above, 72. It should also be noted that the focus of both international and national implementation mechanisms is a standard feature of environmental and other international agreements. See JE Lord & MA Stein ‘The domestic incorporation of human rights law and the United Nations Convention on the Rights of Persons with Disabilities’ (2008) 83 *Washington Law Review* 462.

15 OHCHR (n 9 above) 4; Gatjens (n 14 above) 73.

16 Lord & Stein (n 14 above) 463.

However, the establishment or designation of a co-ordination mechanism is optional, since the obligation is only 'to give due consideration' to the designation of a co-ordination mechanism.¹⁷

Article 33(1) also creates the possibility of mainstreaming disability rights throughout the public administration and the different levels of power and, under the circumstances, co-ordination is necessary to avoid isolated and, at times, inconsistent measures.¹⁸

The CRPD allows more flexibility with respect to the formation of disability focal points, as it gives wide options of designing these in accordance with systems or organisations in particular states. Therefore, a disability focal point within a government can be either a statutory organ (autonomous or not) or an administrative unit within a government ministry. Within a government ministry there may also be a combination of both the statutory organ and an administrative entity.

Although the CRPD allows states the freedom to find appropriate ways of forming the disability focal points within their system of organisation, it is important that the disability focal point should be within the executive branch of government in order to avoid the blurring of responsibility within government on matters related to the implementation of the CRPD.¹⁹ It should be close to the central authority which issues instructions and policies that have an effect on the rest of the ministries and government institutions, meaning that it should co-ordinate with other government agencies, and should not be a re-enforcement of the medical, welfare or other forms of limited approaches to disability.²⁰ It is also important that the principle of 'nothing about us without us' should be considered when establishing and during the conduct of the affairs of the disability focal point. It should, therefore, be open to co-ordination and consultation with organisations of persons with disabilities, and it is advisable to have among their leaders and staff persons with disabilities who are socially and politically empowered.²¹

The role of the disability focal point should not be service delivery, but to promote inclusive development in the field of the rights of persons with disabilities.²² The proper functioning of the disability focal point requires the designated entity to have the necessary human resources, equipment and budget to perform its duties.²³

17 OHCHR (n 9 above) 4.

18 De Beco (n 1 above) 100.

19 Gatjens (n 14 above) 73-74.

20 AS above

21 AS above

22 AS above

23 AS above; OHCHR (n 9 above) 4.

The oversight role of the entity tasked with promoting and co-ordinating the implementation of the CRPD should not be confused with the monitoring function of the independent mechanisms (national human rights institutions) provided for in article 33(2). The difference between the focal points under article 33(1) and the independent mechanisms under article 33(2) seems to be that the independent mechanisms are entrusted with the promotion, protection and monitoring of the implementation of the focal points.²⁴

They are focused on the way in which the state and its institutions are performing with regard to the rights of persons with disabilities.²⁵

In this case, monitoring by the entities mentioned in article 33(1) is aimed at promoting – in a co-ordinated manner – public policies and inclusive programmes.²⁶

2.2 National human rights institutions

National human rights institutions (NHRIs) may generally be described as permanent and independent bodies, established by states through law, for the specific purpose of promoting and protecting international human rights norms domestically.²⁷ NHRIs may be (and may not be limited to) ombudsmen, rights commissions or ‘hybrid’ human rights ombudsmen.²⁸ In Africa, a few ombudsman offices were established, starting in the mid-1960s and 1970s, and the popularity of NHRIs in Africa increased in the 1980s and 1990s.²⁹ These institutions are mentioned in the respective constitutions, and detailed information is often found in the respective Acts of parliament.

With the exception of ombudsman institutions, which spread through Scandinavia in the early to mid-twentieth century, the history of

24 De Beco (n 1 above) 100.

25 Gatjens (n 14 above) 78.

26 Gatjens (n 14 above) 75.

27 JW Koo & FO Ramirez ‘National incorporation of global human rights: Worldwide expansion of national human rights institutions, 1966-2004’ (2009) 87 *Social Forces* 1324; A Pohjolainen *The evolution of national human rights institutions: The role of the United Nations* (2006) 6; LC Reif ‘Building democratic institutions: Protection: The role of national human rights institutions in good governance and human rights’ (2000) 13 *Harvard Human Rights Journal* 5-6; A Smith ‘The unique position of national human rights institutions: A mixed blessing?’ (2006) 28 *Human Rights Quarterly* 909; S Cardenas ‘Emerging global actors: The United Nations and national human rights institutions’ (2003) 9 *Global Governance* 23; T Pegram ‘Diffusion across political systems: The global spread of national human rights institutions’ (2010) 32 *Human Rights Quarterly* 739.

28 Koo & Ramirez (n 27 above) 1324; Reif (n 27 above) 2; Pegram (n 27 above).

29 Reif (n 27 above) 61; Pegram (n 27 above) 741.

international initiatives for the formation of NHRIs began shortly after the birth of the United Nations (UN), and their formation expanded significantly in the 1990s.³⁰ In 1991, the Principles relating to the Status of National Institutions (Paris Principles) were adopted by an international conference of NHRIs, and were subsequently adopted by the UN General Assembly in 1993.³¹ Although these Principles are not binding rules, they are generally considered the international minimum standards for NHRIs.³² The Principles have been welcomed by various international and national organisations, and governments have been encouraged to follow them.³³

NHRIs have often been described as ‘Paris Principle institutions’. These institutions play a role as a bridge between international human rights standards, on the one hand, and their implementation at the national level, on the other.³⁴ Therefore, they are an answer to the question of the implementation gap – the inconsistency between formal treaty obligations and actual respect for human rights on the ground.³⁵ Their formation has brought hope for a possible avenue to address human rights concerns domestically.³⁶

Article 33(2) of the CRPD calls for the frameworks of one or more independent mechanisms, which are in line with the Paris Principles, to promote, protect and monitor the implementation of the CRPD. By ‘frameworks’, it is meant that the mechanisms, irrespective of their number or organisational structure, should form a coherent whole, and no standard model exists for such frameworks.³⁷

The spirit of article 33(2) is that these mechanisms should be independent and pluralist.³⁸ By being independent, it is meant that the

30 CR Kumar ‘National human rights institutions: Good governance perspectives on institutionalisation of human rights’ (2003) 19 *American University International Law Review* 266-268; Reif (n 27 above) 7-8; Pohjolainen (n 27 above) 6; Cardenas (n 27 above) 23, 28 & 29; Pegram (n 27 above) 729, 730 732.

31 Principles relating to the Status of National Institutions (Paris Principles), General Assembly Resolution 48/134 of 20 December 1993.

32 See Kumar (n 30 above) 266-268; Reif (n 27 above) 7-8; Pohjolainen (n 27 above) 6; Cardenas (n 27 above) 23, 28 & 29; Pegram (n 27 above) 729, 730 & 732.

33 Pohjolainen (n 27 above) 9.

34 R Carver ‘A new answer to an old question: National human rights institutions and the domestication of international law’ (2010) 10 *Human Rights Law Review* 1. The expectation that NHRIs will act as links to the international human rights regime seems to be ‘a reprise of an idea conceived in the earliest years of the United Nations that national human rights committees should be established to monitor state compliance with the norms contained in the Universal Declaration of Human Rights’ (n 34 above).

35 Carver (n 34 above) 30.

36 Kumar (n 30 above) 275; Y Ghai ‘Universalism and relativism: Human rights as a framework for negotiating interethnic claims’ (2000) 21 *Cardozo Law Review* 1099. CR Kumar ‘National human rights institutions: Good governance perspectives on institutionalisation of human rights’ (2003) 19 *American University International Law Review* 266-268;

37 De Beco (n 1 above) 97.

38 De Beco (n 1 above) 89.

mechanisms should be functionally independent, be personally independent and financially independent.³⁹ Pluralism links NHRIs with civil society,⁴⁰ such as the organisations of persons with disabilities or trade unions.

The inclusion in the CRPD of the obligation to align the independent mechanisms with the Paris Principles is a recent trend in human right treaties, and reflects the increased presence in recent years of NHRIs in human rights processes.⁴¹

This obligation is a 'call for change' aimed at enhancing the implementation of the rights of persons with disabilities by having independent bodies to constantly remind states of their obligations under the CRPD.⁴²

As most of the NHRIs have been in existence before the CRPD, the use of the Paris Principles should be construed in light of the specific mandate of the disability rights mechanisms, since article 33(2) of the CRPD deals with the mechanisms concerned solely with disability rights. Therefore, it follows that, while some matters with respect to the practice of the existing NHRIs may not change, such as the principle of independence, it may be necessary to determine the inclusion of persons with disabilities (often through the organisations of persons with disabilities) in such mechanisms.⁴³

An important question with respect to existing NHRIs is whether the existing institutions or others should be conferred with the mandate stipulated under article 33(2) of the CRPD. Despite the fact that the Paris Principles state that the human rights mandate of an NHRI should be as broad as possible,⁴⁴ they do not give a clear guidance as to the numbers of NHRIs within a state.⁴⁵ An argument has been raised that the choice of single or multiple institutions will depend on which mechanism offers more effective protection of human rights.⁴⁶

39 As above.

40 As above.

41 De Beco (n 1 above 97; Gatjens (n 14 above) 75.

42 De Beco (n 1 above) 87-88.

43 De Beco 93.

44 See para 2 on 'Competence and Responsibilities' (n 31 above).

45 Carver (n 34 above) 4.

46 R Carver 'One NHRI or many? How many institutions does it take to protect human rights? Lessons from the European experience' (2011) 3 *Journal of Human Rights Practice* 8.

It has also been suggested that other bodies, especially those already dealing with disability issues, might be designated as independent mechanisms, acting either alone or together with existing NHRIs.⁴⁷

One argument against conferring the CRPD mandate on the existing NHRIs is that, while existing NHRIs are obliged to pay attention to disability rights, conferring to such an institution an additional mandate with respect to the CRPD presents the danger of these institutions paying more attention to disability rights (than other human rights), resulting in the 'imbalance' of the mandates of NHRIs, and that these institutions may not equally execute the mandate under article 33(2).⁴⁸ On the other hand, the idea of separate institutions for separate groups has been criticised for, *inter alia*, portraying that 'one particular vulnerable group is more entitled than others to have its "own" institution'.⁴⁹

According to the general observations of the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights (International Co-ordinating Committee), the trend, which is a strong national human rights protection system in a state by having one consolidated and comprehensive national human rights institution, is encouraged. Only under very exceptional circumstances should more than one national institution seek accreditation by the International Co-ordinating Committee. Furthermore, the Statute of the International Co-ordinating Committee provides:⁵⁰

At general meetings only one NHRI per member state of the United Nations shall be eligible to be a voting member. Where more than one institution in a state qualifies for membership, the state shall have one speaking right, one voting right and, if elected, one International Co-ordinating Committee Bureau member. The choice of an institution to represent NHRIs of a particular state shall be for the relevant institutions to determine.

It follows, therefore, that the model of a single national human rights institution is widely accepted and, if effectively utilised, is likely to lead to greater effectiveness, provided that it is designed to guarantee that the unique interests of particular vulnerable groups, such as persons with disabilities, will not be neglected.⁵¹

47 De Beco (n 1 above) 94, 104 & 106. From De Beco's conclusion, the idea of designating the national human rights institutions as the independence mechanisms to monitor the CRPD is not totally rejected: 'NHRIs should not blindly be designated independent mechanisms. In the hypothesis that there is an NHRI in a state, the best option could be either to designate NHRI, to appoint other bodies, or to combine both.'

48 De Beco (n 1 above) 94, 104 & 106.

49 Carver (n 46 above) 21.

50 Art 39 Statute of Incorporation of the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

51 Carver (n 46 above) 2.

Because Tanzania already had in place a NHRI prior to the CRPD, whether or not to designate a new independent mechanism should depend on the possibilities of adjusting the role of the current NHRI in matters related to disability rights. That is, the current institutions may be maintained and given functions to promote, protect and monitor the implementation of the CRPD if only a human rights approach to disability is missing. It is also important to note that the reference to the Paris Principles in article 33(2) of the CRPD supports the view that the said designation should be made by a legal instrument,⁵² meaning that the designation of such independent mechanisms should be something more than an internal administrative arrangement within existing NHRIs.

2.3 Civil society and consultative mechanisms

The Declaration of the Rights of Disabled Persons (DRDP)⁵³ provided for consultation with organisations of persons with disabilities, through their organisations, in all matters regarding the rights of persons with disabilities. However, the language used was such that the relevant provision did not address consultation strongly enough because, under article 12 of the Declaration, consultation was optional.⁵⁴ The need to involve persons with disabilities was further emphasised in the Standard Rules⁵⁵ which, *inter alia*, urged states to support and recognise the ongoing advisory role of organisations of persons with disabilities in decision making⁵⁶ and in the development of a disability policy.⁵⁷ The advisory role of organisations of persons with disabilities is not limited to having persons with disabilities as permanent representatives in government institutions, serving on public commissions or providing expert knowledge on projects.⁵⁸ These organisations form part of a broader civil society to act as ‘pressure group’ and, thereby, propelling action by state actors.⁵⁹

The CRPD does not reproduce all that is stated in the Standard Rules and, as already stated, does not limit states to apply broader measures which are of benefit to persons with disabilities. States have unlimited options regarding ways in which to consult persons with disabilities. Article 33(3) of the CRPD requires civil society, in particular persons with disabilities and their representative organisations, to be involved and fully

52 De Beco (n 1 above) 92.

53 n 4 above

54 Art 12 of the Declaration provided: ‘Organisations of disabled persons may be usefully consulted in all matters regarding the rights of disabled persons.’

55 n 5 above.

56 According to Rule 17(6) (n 5 above), ‘[t]he advisory role of organisations of persons with disability should be ongoing in order to develop and deepen the exchange of views and information between the state and the organisations’.

57 n 5 above, Rule 18(1). Furthermore, according to Rule 17(8), ‘[t]he role of local organisations of persons with disability should be developed and strengthened to ensure that they influence matters at the community level’.

58 n 5 above, Rule 18(5).

59 n 5 above, Rule 18(6).

participate in the monitoring of the implementation of the Convention. Article 33(3) of the CRPD should be read together with other provisions of the CRPD, in particular article 4(3), which requires states to consult persons with disabilities (through their representative organisations) in the development and implementation of legislation and policies, and in other decision-making processes concerning issues relating to persons with disabilities.

The language of the CRPD has the effect that organisations of persons with disabilities should be consulted. Civil society can offer constructive opinion to government when they are driven by a clear goal of ensuring the equality of persons with disabilities. These organisations may also embark on self-initiative means of monitoring by demanding to be informed of what is happening, especially with regard to the entity designated to promote and co-ordinate the implementation of the CRPD.⁶⁰

They can be more active, for example by demanding to be informed and duly consulted during the preparation of reports submitted to the Committee on the Rights of Persons with Disabilities, to review of such reports to assess their accuracy and objectivity, or even to prepare shadow reports, if possible with the assistance and support of human rights NGOs.⁶¹ Generally, close co-operation between government and civil society will ensure that government policies on disability matters address the real problems of persons with disabilities.

Although the wording of article 33(3) is focused on the involvement of organisations of persons with disabilities, the article does not prohibit the involvement of more actors from civil society, a term generally used to refer to 'a domain mediating between state and society'.⁶² These are non-state actors acting as 'checks and balances' mechanisms – 'a counterweight to state power',⁶³ and, therefore, crucial to the development of not only the rights of persons with disabilities, but also human rights in general. The effectiveness of the role of organisations of persons with disabilities and civil society, generally, is largely dependent on how well they organise and advocate in interaction with disability rights processes.⁶⁴

60 Gatjens (n 14 above) 80.

61 n 14 above, 81.

62 M Karlström 'Civil society and its presuppositions: Lessons from Uganda' in JL Comaroff & J Comaroff (eds) *Civil society and political imagination in Africa: Critical perspectives* (1999) 33-50.

63 R Fatton 'Africa in the age of democratisation: The civic limitations of civil society' (1995) 38 *African Studies Review* 67.

64 Lord & Stein (n 14 above) 464.

3 Tanzanian approach

In Tanzania, there are several mechanisms which have been established for dealing with matters related to human rights, generally, and matters of persons with disabilities. Because of the constitutional and political structure of Tanzania, each side of the union (namely, Tanzania Mainland and Zanzibar) has separate institutions, save for the national human rights institution – the Commission for Human Rights and Good Governance. An examination of the institutional mechanisms under this section is limited to mechanisms in Tanzania Mainland.

The administration of policy and laws relating to disability has occasionally changed ministries. Furthermore, while there is one framework legislation dealing with disability issues, there are other pieces of legislation that provide for matters of persons with disabilities, a good example being the employment and labour legislation. On the other hand, matters of human rights generally fall under separate entities not primarily mandated to administer disability policy or legislation. Discussed in this section are the disability focal point(s) and co-ordination mechanisms; the Commission for Human Rights and Good Governance; and civil society and consultative mechanisms.

3.1 National Advisory Council for Persons with Disabilities

The Persons with Disabilities Act⁶⁵ re-establishes the national advisory body known as the National Advisory Council for Persons with Disabilities (NACPWD),⁶⁶ which replaces the former council established under the repealed Disabled Persons (Employment) Act.⁶⁷

The NACPWD is comprised of the Chairperson appointed by the President,⁶⁸ one member from the office of the Attorney-General,⁶⁹ six members from different ministries,⁷⁰ one member from the employers' association,⁷¹ one representative from the apex organisation of persons with disabilities,⁷² one member from the Commission for Human Rights and Good Governance,⁷³ and five other members to be appointed by the Minister (responsible for matters relating to persons with disabilities) from

65 Persons with Disabilities Act 9 of 2010.

66 n 65 above, sec 8(1). The former council was known as the 'National Advisory Council'.

67 See Disabled Persons (Employment) Act Cap 184 RE 2002, sec 3.

68 n 65 above, sec 11(1)(a).

69 n 65 above, sec 11(1)(b).

70 n 65 above, secs 11(1)(c)(i)-(vi).

71 n 65 above, sec 11(1)(d).

72 n 65 above, sec 11(1)(e). The first 'umbrella organisation' of persons with disabilities was established in 1992, about ten years after the enactment of the first disability legislation.

73 n 65 above, sec 11(1)(g).

organisations of persons with disabilities. This composition is not very different from the composition of the former council, except for the nature of representation, and also the fact that under the former disability legislation, the Chairperson was to be appointed by the Minister.⁷⁴

The NACPWD is the national advisory body through which the needs, problems, concerns, potential and abilities of persons with disabilities can be communicated to government and its agencies for action.⁷⁵ The body is tasked with advising the government on a wide range of issues, such that one would be justified in concluding that the Council is tasked with advising almost 'everything' related to the rights and welfare of persons with disabilities.⁷⁶

The Commissioner for Social Welfare is the Secretary to the NACPWD, who also exercises a number of functions under the disability legislation.⁷⁷ However, the Office of the Prime Minister is primarily responsible for the implementation of disability legislation, while co-ordinating with other ministries in appropriate circumstances. In this way, the NACPWE is linked to the office of the prime minister.

Linking the NACPWD with the office of the prime minister is a significant step away from the purely medical/welfare-oriented approach to disability. Furthermore, the placement of disability and labour issues in the office of the prime minister should not be viewed as limiting disability issues only to labour matters. Matters of disability, youth and employment have been elevated to the office of the prime minister because of the special emphasis the government have accorded to these issues. Previously, labour and disability matters were classed under the ministries responsible for labour and health respectively. Significantly, membership of the Council makes it open to co-ordination and consultation with organisations of persons with disabilities. It is also important to emphasise the fact that the functions of the Council, provided for in the Persons with Disabilities Act,⁷⁸ appear to embrace the human rights approach to disability.

While the Council is set at the national level, the Persons with Disabilities Act also establishes 'disability committees' which are expected to work very closely with the NACPWD and other administrative authorities. The committees trickle down to the grassroots. They are

74 See the 1st Schedule to the Disabled Persons (Employment) Act (n 67 above).

75 n 65 above, sec 12(1)(a).

76 n 65 above, secs 12(1)(a)-(l), 12(2)(a)-(j).

77 n 65 above, secs 9(a)-(m), 11(2), 23(1) & (2), 25(1)-(4), 31(4), 57(1), 58(2), 59(1) & 61(g); Persons with Disability (General) Regulations of 2012, Rules 11(1)(b), 40(1), 41(1) & (2).

78 n 65 above

established in three levels of government administration: Regional, Council and Village/Mtaa,⁷⁹ whereas the Council committees appear to take the position of the former district committees.

It is too early to assess the impact of the NACPWD, considering the fact that it has convened only once, and is yet to issue its first report.

3.2 Commission for Human Rights and Good Governance

The Commission for Human Rights and Good Governance (CHRGG) was established under the Constitution of the United Republic of Tanzania,⁸⁰ following the constitutional amendments of 2000,⁸¹ and became operational in 2001 after the coming into force of the Commission for Human Rights and Good Governance Act.⁸² However, the history of the Commission dates back to the 1960s. The Interim Constitution of Tanzania, 1965, established the Permanent Commission of Inquiry⁸³ and, in 1966, the National Assembly passed the Permanent Commission of Inquiry Act,⁸⁴ which prescribed the procedures, powers and privileges of the Permanent Commission.

The Permanent Commission, believed to be the first 'ombudsman' on the continent,⁸⁵ was designed to function as a mechanism by which citizens could be protected from the abuse of governmental power.⁸⁶ The Permanent Commission was incorporated into the Permanent Constitution of 1977. After the incorporation of the Bill of Rights in 1984, the enforcement of these rights was hampered by several unconstitutional

79 n 65 above, secs 14(1) & (2). Note that under the current legislation, the committees are established in three levels of government administration (Regional, Council and Village/Mtaa), compared to the previous two (Regional and District). The Council committees appear to take the position of the former District Committees. These committees can be compared with the 'lower councils' in Uganda (provided under secs 18 to 24 of the Uganda's National Council for Disability Act of 2003) and are expected to work very closely with the National Advisory Council for Persons with Disability and other administrative authorities. The committees have general functions with respect to the co-ordination and implementation of matters related to persons with disabilities. Experience from the previous disability legislation indicates that the committees were initially established in the then existing regions and districts, but they had not been operating due to various reasons, most notable being a scarcity of staff (social workers) and a lack of funds (LRCT, 2008 Report on the Review of Legal Framework on the Rights of Persons with Disability in Tanzania (unpublished) 17-18). The Law Reform Commission observed 'that it would make no sense to enact a new piece of framework legislation to address the rights of persons with disability if the problems facing the implementation of current laws are not addressed'.

80 Constitution of the United Republic of Tanzania of 1977.

81 Constitutional Amendment Act 3 of 2000, sec 3.

82 Commission for Human Rights and Good Governance Act.

83 Ch VI, Interim Constitution of Tanzania of 1965.

84 Permanent Commission of Inquiry Act of 1966.

85 ET Mallya *Promoting the effectiveness of democracy protection institutions in Southern Africa: Tanzania's Commission for Human Rights and Good Governance* (2009) 6.

86 B Frank 'The Tanzanian Permanent Commission of Inquiry: The Ombudsman' (1972) 2 *Denver Journal of International Law and Policy* 255.

laws, and the government had been under pressure, *inter alia*, to create a human rights commission.⁸⁷ Eventually, the constitutional amendments of 2000 brought about the CHRGG, which replaced the Permanent Commission of Inquiry.

The CHRGG is legally an autonomous department,⁸⁸ and has various functions, under both the Constitution and the relevant legislation, which include receiving and resolving complaints and conducting inquiries in relation to violations of human rights,⁸⁹ and instituting proceedings (where necessary) in court in order to prevent the violation of human rights or to restore the realisation of violated right(s).⁹⁰ Other functions include research and the promotion of human rights,⁹¹ and advising government and other public institutions and the private sector on human rights and good governance.⁹²

With respect to the rights of persons with disabilities, the CHRGG works closely with NGOs concerned with human rights and persons with disabilities.⁹³ The CHRGG had also established a desk or department dealing with 'special groups', which include persons with disabilities.⁹⁴ In addition, the CHRGG has one representative in the National Advisory Council for Persons with disabilities.⁹⁵

The CHRGG has issued country human rights reports, but disability rights have not featured strongly, and the previous work of the Commission appears not to have had a significant impact with respect to the rights of persons with disabilities. The CHRGG's approach towards disability could be a reflection of general past approaches to disability in Tanzania, and the history of the Commission itself, which has been focusing more on civil and political rights. Nevertheless, there are signs that the CHRGG has started to pay more attention to the area of disability rights. Disability features in the CHRGG's action plan for years 2013 to 2017.

3.3 Civil society and consultative mechanisms

The right to freedom of association is enshrined in the Constitution of the United Republic of Tanzania,⁹⁶ and a growing civil society, including organisations of persons with disabilities, are registered under various

87 Mallya (n 85 above) 6-7.

88 n 80 above, art 130(2).

89 n 80 above, arts 130(1)(b), (c), (f) & (g); n 82 above, secs 6(1)(b), (c), (f) & (g).

90 n 80 above, arts 130(1)(a), (d) & (e); n 82 above, sec 6(1)(e).

91 n 82 above, secs 6(1)(a), (d), (k), (l), (m) & (o).

92 n 80 above, art 130(1)(g); n 82 above, sec 6(1)(j).

93 E-mail communication from F Mtulya on 5 June 2014 (on file with author).

94 Mallya (n 85 above) 15.

95 n 65 above, sec 11(1)(f).

96 n 2 above, art 20(1).

laws.⁹⁷ The earliest registered organisations of persons with disabilities are impairment specific and operate nationwide. The Non-Governmental Organisations Act allows organisations to be registered and operate in different levels – district, regional and national.⁹⁸ In recent years, some registered organisations have linked disability with other matters, such as gender, economic empowerment, legal aid and access to justice.⁹⁹

Organisations of persons with disabilities can be a powerful force in promoting the rights of persons with disabilities. These organisations have a significant role in identifying the needs and promotion or provision of services to persons with disabilities, and they also act as representative bodies and a forum for persons with disabilities to voice opinions on their needs and to determine the destiny of their own development.¹⁰⁰

The organisations are involved in researching and reporting on the human rights status of persons with disabilities; creating awareness in persons with disabilities and the public in general regarding disability rights; monitoring government's adherence to different international commitments on the rights of persons with disabilities; providing services to persons with disabilities; and providing expertise on disability rights.¹⁰¹

The development of disability rights in Tanzania has progressed through the relationship between government and civil society, especially the organisations of persons with disabilities, which have been co-operating with the authorities to keep the services on course.¹⁰² Apart from having representation in the NACPWD, organisations of persons with disabilities are to be consulted by the minister in matters related to the development and implementation of the rights of persons with disabilities.¹⁰³ Generally, Organisations of Persons with Disability have occasionally been invited to present their plans, and a mechanism has been formed to co-ordinate their activities, and further to ensure that they are involved in development programmes.¹⁰⁴ According to official parliamentary records, organisations of persons with disabilities were consulted in the process that culminated in enacting the new disability

97 Non-Governmental Organisations Act 24 of 2002; Societies Act [Cap 337 R.E. 2002]; and Companies Act of [Cap 212 R.E. 2002].

98 Non-Governmental Organisations Act (n 97 above), sec 23(1).

99 See, eg, Disability Organisation for Legal Assistants for Social Economic Development (DOLASED); *Sauti ya Wanawake Wenye Ulemavu Tanzania* (SWAUTA) (literally translated as 'The voice of women with disabilities'); and Information Centre on Disability. The umbrella organisation is *Shirikisho la Vyama vya Watu Wenye Ulemavu* (SHIVYAWATA).

100 LRCT (n 79 above) 116.

101 E-mail communication from N Rukwago, 4 June 2014 (on file with author).

102 ETT Bagandanshwa 'Some highlights in the development of educational services for visually impaired and blind people in Tanzania' (1999) 2 *Huria: Journal of Open University of Tanzania* 55.

103 n 65 above, sec 5(3).

104 TN Mwendwa et al 'Mainstreaming the rights of persons with disabilities in national development frameworks' (2009) 21 *Journal of International Development* 670.

legislation.¹⁰⁵ According to this legislation, organisations of persons with disabilities have been given an advisory role to government in the promotion of the rights of persons with disabilities. For some time, some members of these organisations have been involved in active politics as members of parliament, and it should be noted that the current Deputy Permanent Secretary of the Ministry of Constitutional and Legal Affairs was the former Chairperson of the Federation of Organisations of Persons with Disabilities. The significant achievement of organisations of persons with disabilities' campaign has been the recent action (by the government) of placing matters of persons with disabilities under the office of the prime minister.

Other organisations can also play a significant role in the promotion of the rights of persons with disabilities. For example, an analysis of the recent reports of one of the human rights organisations in the country reveals signs of the organisation's greater engagement in disability rights issues.¹⁰⁶

4 General challenges in the implementation of article 33 of the CRPD

The domestic arrangements in Tanzania for purposes of implementing the CRPD (the provisions of which are implemented through the Persons with Disabilities Act) manifest the changing approach, moving away from the old approaches to disability. This complete change will take some time, and a number of issues need to be addressed in order to set realistic goals.

As a developing nation, Tanzania has competing interests in terms of budget, all touching fundamental aspects of life. This means that, over a period of time, the financial needs of the disability focal point should be properly addressed. During the process of the review of the former disability legislation, it was suggested that, in order to overcome this challenge, and perhaps as a way of drawing more attention to disability issues, disability co-ordination should be shifted to the high commanding office of government. In December 2015, a Deputy Minister of State in the prime minister's office was appointed, with a specific mandate on disability issues.

With respect to monitoring mechanisms, one challenge calls for some attention. The absence of specific disability-related provisions in the law

¹⁰⁵ *Hansard* 13 April 2010 (first session) 47-49.

¹⁰⁶ LHRC ZLSC, 2013 Tanzania Human Rights Report 2012 (unpublished); LHRC ZLSC, 2012 Tanzania Human Rights Report 2011 (unpublished) 155-156; LHRC ZLSC, 2010 Tanzania Human Rights Report 2009 (unpublished) 89-92; LHRC ZLSC, 2009 Tanzania Human Rights Report 2008 (unpublished) 93-94; LHRC ZLSC, 2008 Tanzania Human Rights Report 2007 (unpublished) 67-69; LHRC ZLSC, 2007 Tanzania Human Rights Report 2006 (unpublished) 75-78.

prescribing the mandate of the CHRGG has the result that the CHRGG interprets its general mandate only in a limited way to cover persons with disabilities.¹⁰⁷ In the disability legislation, the CHRGG is mentioned only once, and this is with respect to the representative from the CHRGG in the disability council.¹⁰⁸

Despite this legal challenge, the equality provisions under the Constitution of the United Republic of Tanzania of 1977 are applicable to persons with disabilities (despite the fact that disability is not specifically mentioned in the Bill of Rights), meaning that disability should also feature strongly in CHRGG activities; and that CHRGG reports should continuously and comprehensively cover disability issues.

The strength of consultative mechanisms largely depends on the strength of the disability movement. Organisations of persons with disabilities in developing nations have been reported as lacking various elements essential for making their voice heard.¹⁰⁹ In Africa, these organisations have been perceived to be weak and experiencing financial, organisational and operational constraints,¹¹⁰ and their dependence on donor funding may also mean competing over funding.¹¹¹ Financial problems were found to be among the reasons rendering many organisations of persons with disabilities in Tanzania ineffective,¹¹² and a lack of transparency among some of these organisations may have enabled some individuals to use these for their own interests.¹¹³ Furthermore, most of the 'well-known' organisations of persons with disabilities in Tanzania are urban-centred, which means that they are not easily accessible by many persons with disabilities living in rural areas, where poverty is likely to aggravate the problems of persons with disabilities. In Tanzania Mainland, in order to minimise organisational and financial challenges, it was suggested that it may be appropriate for government to co-ordinate the activities of these organisations and to provide subsidies to them to improve and maintain their quality, but without interfering with the main objective of their establishment.¹¹⁴ However, the provision of subsidies to the organisations of persons with disabilities is made difficult because not

107 E-mail communication from F Mtulya, 5 June 2014 (on file with author).

108 n 65 above, sec 11(1) (f).

109 D Fritz et al 'Making poverty reduction inclusive: Experiences from Cambodia, Tanzania and Vietnam' (2009) *Journal of International Development* 675.

110 Generally, civil society organisations in Africa face difficulties in effectively representing, promoting or protecting the interests of their supposed beneficiaries; J Makumbe 'Is there a civil society in Africa?' (2002) 74 *International Affairs* 316-317; DFID Uganda, 2009 Disability Scoping Study (unpublished); Disability Scoping Study for DFID Uganda: Final Report 26, http://www.ucl.ac.uk/lc-ccr/downloads/06052009_Disability_Scoping_Study_Uganda.pdf (accessed 17 January 2014).

111 T Haapanen 'Civil society in Tanzania' 2007 (unpublished) KEPA's working papers 19 12.

112 LRCT (n 79 above) 115.

113 LRCT 115-116.

114 n 79 above, 116.

only of limited financial resources,¹¹⁵ but also because of the fact that an increasing number of organisations have been dealing with disability issues, in addition to the 'traditional' organisations.¹¹⁶ Issues regarding resources for organisations of persons with disabilities have also been reported elsewhere in Africa.¹¹⁷

5 Conclusion

The CRPD is one of the few international instruments prescribing the institutional mechanism for the domestic implementation of the rights of persons with disabilities. The institutional mechanisms envisaged under the CRPD include NHRIs, the disability focal points and the participation of civil society. Tanzania has in place the human rights commission (CHRGG) and the disability focal point (NACPWD). All these were established prior to the signing of the CRPD. The disability movement and civil society, in general, appear to be making progress, inviting more expectations of increased co-operation between governments and civil societies in matters related to persons with disabilities. Despite some progress, some challenges still need to be addressed.

A number of options need to be explored for purposes of enhancing Tanzania's institutional mechanisms. Some of these may involve the amendment of current laws to enhance the mandate and power of the NACPWD to follow examples from Ghana, Kenya, Uganda and Zambia, whose disability councils are body corporates.¹¹⁸ The general focus should always be on mainstreaming disability in all possible aspects of life, and achieving substantial equality to persons with disabilities in Tanzania. With respect to the mandate and structure of the CHRGG, some amendments to the existing law are likely to improve the efficiency of the CHRGG in matters relating to the rights of persons with disabilities. When an extra entity (Paris Principle-like institution) is desired, it is much more practical (in terms of resource and shared experience of marginalisation) to combine disability and other equality entities, in order to avoid the danger of having too many entities dealing with different marginalised groups. Of course, the fact that the accreditation criteria of NHRIs are restricted to only one institution per state could mean that the other (extra) institution may, in some ways, lack the full qualities of the 'bridge aspect' between international law and domestic implementation. Except for the

115 Telephone communication with J Lyengi, 24 May 2014.

116 There is no consolidated national register of all organisations of persons with disabilities, since they are being registered under different laws (see n 97 above), and also at different levels (district, region or national), a fact which makes it difficult to establish their exact number. It also appears that there are fewer active organisations than the actual number of organisations registered.

117 I Grobbelaar-Du Plessis & C Grobler 'South Africa' (2013) 1 *African Disability Rights Yearbook* 333.

118 Persons with Disabilities Act of 2006; Persons with Disabilities Act 14 of 2003; n 79 above, secs 3(1) & (2); Persons with Disabilities Act of 2012, sec 11(1).

accreditation limitations, the establishment of another Paris Principles-like institution to deal with marginalised groups would place more emphasis on the protection of the rights of these groups. Regarding consultative mechanisms, these should produce powerful results where there is a strong disability movement. Therefore, in order to give more power to their voice, organisations of persons with disabilities should also consider strengthening their corporation with other civil society or professional organisations.

SECTION B: COUNTRY REPORTS

ANGOLA

*Eduardo Kapapelo**

1 Population indicators

1.1 What is the total population of Angola?

The total population of Angola, according to the census conducted in 2014 by the National Institute for Social Security (INSS), was 24 384 301.¹

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Angola. What criteria are used to determine who falls within the class of persons with disabilities in Angola?

National statistics conducted by the INSS were used to obtain data on the prevalence of disabilities in Angola. Local non-governmental organisations (NGOs), such as the Federation of Organisations of Disabled People in Angola (FAPED), which is the umbrella body representing organisations working within the area of disability, also provide data, statistics and information as to the prevalence of disability.

Angola does not have an official body responsible for conducting a focused census on the prevalence of disabilities.

1.3 What is the total number and percentage of persons with disabilities in Angola?

In Angola, there is no particular organisation which conducts a national census on the state of disability in the country. The Ministry for Social Assistance and Reintegration puts the figure at 170 000, while the League for the Support of the Disabled (LARDEF) claims that the number is 1,2 million. However, according to statistics obtained by the INSS, in 2014 the organisation responsible for social security establishes that there are 170 000 people with disabilities in Angola.²

* DPhil Candidate, Centre for Human Rights, University of Pretoria.

1 <http://www.cdi.inss.gv.ao> (accessed 17 June 2015).

2 <http://www.cdi.inss.gv.ao> (accessed: 17 June 2015).

1.4 What is the total number and percentage of women with disabilities in Angola?

According to statistics obtained from the INSS in 2014, the total number of women living with disabilities in Angola is 79 900.³ This constitutes 0,7 per cent of the total population of women living with disabilities in Angola.

1.5 What is the total number and percentage of children with disabilities in Angola?

There is no nationally-acquired statistic highlighting the number of children living with disabilities in Angola.

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Angola?

According to statistics obtained from the INSS, the most prevalent forms of disability are the following:⁴

- motor disabilities (62 per cent). Of those with motor disabilities, 75 per cent were due to amputation resulting from contact with explosive devices, especially mines, while 22 per cent suffered from poliomyelitis;
- sensory disabilities (28 per cent); and
- mental disabilities (10 per cent).

2 Angola's international obligations

2.1 What is the status of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in Angola? Did Angola sign and ratify the CRPD? Provide the date(s).

Angola acceded to the United Nations Convention on the Rights of Persons with Disabilities (CRPD) on 19 March 2014.

2.2 If Angola has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Angola submit its report? If so, and if the report has been considered, indicate if there was a domestic effect of this reporting process. If not, what reasons does the relevant government department give for the delay?

Angola acceded to the CRPD on 19 March 2014. Angola was scheduled to send an initial report to the Committee of the CRPD on 19 March 2016, which marks two years since it acceded to the Convention. However, at this stage there is no information confirming that such initial report was sent to the Committee. After the initial two reports, Angola's first state report on the status of the

³ As above.

⁴ As above.

implementation of the CRPD is due to be submitted on 19 March 2018. The government department responsible for the drafting of such a report is the Ministry of Justice and Human Rights in co-ordination with the Office of the Presidency.

2.3 While reporting under various other United Nations instruments, under the African Charter on Human and Peoples' Rights, or the African Charter on the Rights and Welfare of the Child, did Angola also report specifically on the rights of persons with disabilities in its most recent reports? If so, were relevant 'concluding observations' adopted? If relevant, were these observations given effect to? Was mention made of disability rights in your state's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations/recommendations?

Angola follows a semi-monist approach to international law, meaning that after the state ratifies a treaty, such treaty law is first made public in the *Diário da Republica*. Only after this has been done is such law domesticated. To that end, following ratification of international instruments, such law is not immediately made national law. As per Angola's regional reporting mechanisms under the African Charter on Human and Peoples' Rights (African Charter), Angola submitted its national report on the implementation of the African Charter in 2010, and observed:⁵

The high number of persons with disabilities, in particular amputees, is related to the effects of the armed conflict which ravished Angola for nearly three decades. A contributing factor was the weak state of the health system and a lack of programmes which would aid in prevention of ailments, such as congenital conditions, which was further compounded by the low level of education within the Angolan populace. Persons with disabilities are faced with a number of problems arising from factors related, among others, to health (difficulty in accessing health services, shortage of special equipment, difficulty in accessing medical assistance and curative medicine, insufficient rolling stock and a meager compensation plan due to the lack of financial resources).

- water and hygiene (difficulty in accessing water points due to distance and physical barriers);
- social and family Issues (low level of social awareness, preventing persons with disabilities to recognise their abilities and skills which would otherwise have allowed them to carry out useful activities; abuse; neglect; ill-treatment; marginalisation and stigmatisation; disrespectful behavior; psychological violence; family humiliation and abandonment; lack of leisure facilities; difficulty in accessing public transport; parents who feel ashamed to register children);
- economic factors (extreme poverty due to lack/insufficient resources, loss of property after acquiring a disability, and lack of social protection).

As a result, the Angolan government has undertaken to establish:⁶

- community based rehabilitation (RBC). This project includes physical rehabilitation, education, technical and professional training, career guidance, and community-based psycho-social follow-up, the idea being to integrate persons with disabilities within their own communities;
- social integration projects have been developed with a view to gradually reducing discrimination and stigmatisation faced by persons with disabilities. These projects include agricultural production, animal husbandry and professional training.

5 African Commission on Human and Peoples' Rights, Second periodic report, [Http//www.achpr.org/states/angola/reports/2nd 1999-2010](http://www.achpr.org/states/angola/reports/2nd%201999-2010) (accessed 20 June 2015).

6 As above.

With regard to the Universal Periodic Review (UPR), Angola last submitted a report for review in December 2010.⁷ A reference was made regarding the rights of persons with disabilities under the UPR report of 2010. The report observes that persons with disabilities benefit from 'special services', especially targeting physical rehabilitation, schooling, vocational technical training, work orientation and psychosocial counselling aimed at reinsertion in the community without discrimination or stigmatisation.

2.4 Was there any domestic effect on Angola's legal system after ratifying the international or regional instruments in 2.3 above? Does the international or regional instrument that has been ratified require Angola's legislature to incorporate it into the legal system before the instrument can have force in Angola's domestic law? Have Angola's courts ever considered this question? If so, cite the case(s).

Regarding domestic effects on Angola's legal system as it relates to court decisions, Angola does not publicise its cases. Regarding reporting to the Committee of the CRPD, Angola acceded to the CRPD on 19 March 2014, as per regulations its initial report was due on 19 March 2016. At the time of writing, no information regarding the status of such report could be found.

However, Angola submitted its national report in 2010 on the implementation of the African Charter on Human and Peoples' Rights. As a result, the Angolan government has opted to establish community-based rehabilitation projects. This project includes physical rehabilitation, education, technical and professional training, career guidance, and community-based psychosocial follow-up, the idea being to integrate persons with disabilities within their own communities.⁸

Second, social integration projects have been developed with a view to gradually reducing discrimination and stigmatisation faced by persons with disabilities. These projects include agricultural production, animal husbandry and professional training.⁹

2.5 With reference to 2.4 above, has the CRPD or any other ratified international instrument been domesticated? Provide details.

Angola follows the semi-monist principle and, as a result, treaties ratified are published within the *Diario da Republica* (national gazette) and thereafter become law. Angola has ratified a number of international instruments and regional treaties, including the International Covenant on Civil and Political Rights (ICCPR), the CRPD, the African Charter and the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, Angola has difficulties in complying with its reporting obligations.¹⁰ In respect of the UPR, Angola submitted its last report in February 2010. The UPR submitted by Angola made reference to persons with disabilities. A number of recommendations were made to Angola regarding the framework of the protection of human rights, of which Angola accepted the following:¹¹

7 http://www.univie.ac.at/bimtor/dateien/angola_upr_2010_report.pdf Human Rights Council 'National report submitted in accordance with para 15(a) of the annex to Human Rights Council Resolution 5/1*' 19 February 2010 (accessed 16 June 2015).

8 African Commission (n 5 above).

9 As above.

10 <http://www.osisa.org> (accessed 7 March 2015); Open Society Initiative for Southern Africa, Country Profiles Report Southern Africa Disability Rights and Law School Project 2012.

11 <http://www.upr-info.org/database> (accessed 12 August 2016).

- allocating additional resources to improving the country's health infrastructures, while ensuring that ongoing health reforms take into account the rights of women and children;
- clarifying the procedures for the establishment and recognition of associations and NGOs, and to guarantee their participation in the reform process;
- considering as a priority the most vulnerable groups in its population, in particular women and children; and
- considering heeding the appeals to proceed with the ratification of the remaining core human rights treaties, including the International Covenant on the Elimination of All Forms of Discrimination (ICERD), the Convention Against Torture (CAT) and the CRPD.

Despite the acceptance of these recommendations, at present no data is available indicating whether Angola has followed through with the recommendations. In compliance with recommendations by the African Commission, Angola has established community-based rehabilitation projects and social integration projects with the objective of gradually lowering levels of discrimination and stigmatisation faced by persons with disabilities.¹²

3 Constitution

3.1 Does the Constitution of Angola contain provisions that directly address disability? If so, list the provisions, and explain how each provision addresses disability.

- Article 77(1) of the Angolan Constitution (Constitution) states that the state 'shall promote and guarantee the measures needed to ensure the universal right to medical and health care, as well as the right to child care and maternity care, care in illness, disability, old age and in situations in which they are unable to work, in accordance with the law'.¹³ Although this provision provides for health and social security, the problem remains of actually applying in practice the provisions set forth in the Constitution.
- Article 80(3) of the Constitution states that the state shall ensure special protection to children who are orphaned, disabled, abandoned or in any way deprived from a family environment.
- Article 83(1) of the Constitution states that disabled citizens shall fully enjoy the rights and be subject to the duties enshrined in the Constitution, without prejudice to any restrictions on the exercise or fulfilment of rights and duties they are unable, or not fully able, to enjoy or carry out. Article 83(2) of the Constitution further provides that the state shall adopt a national policy for the prevention of disability, the treatment, rehabilitation and integration of disabled citizens, the provision of support for their families and the removal of obstacles to mobility.
- Article 84(1) of the Constitution states that combatants of the national independence struggle, the country's veterans, those disabled during the course of military or paramilitary service and the minor children and surviving spouses of combatants killed in action, shall enjoy a special status and the protection of the state and society, under the terms of the Constitution and the law.

¹² African Commission (n 5 above).

¹³ Constitution of the Republic of Angola, 2010.

3.2 Does the Constitution of Angola contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

Article 54(2) of the Constitution states that the right to vote may not be restricted except with regard to the incapacities and ineligibilities prescribed in the Constitution. This provision, however, is very vague in nature. It does not spell out the degree of disability which would render a person incapacitated and ineligible. The same criticism applies to articles 129, 130 and 153 of the Constitution. These articles all mention incapacity in the form of mental illness, but do not clarify the level of disability which would constitute an individual being incapacitated to perform a particular function.

4 Legislation

4.1 Does Angola have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

Angola has enacted different pieces of legislation that mention people with disabilities or deal with issues relating to disabilities. The following table sets out the most prominent legislation that mentions or refers to disability-related issues:

Disability Allowances Law (Act 6/98 of 7 August 1998)	Concerns grants made by the government to citizens who are prevented by disability or other forms of permanent incapacitation from doing any form of work. To be eligible, a person with a disability must not be a beneficiary of any other social assistance regime, or have private sources of funding.
Draft Baseline Law on Social Protection (Act 7/04 of 15 October 2004)	Gives guidance on the norms that should govern national policies on the protection of vulnerable groups. Article 4 of this Law (paragraphs (b), (c) and (d)) describes the objective of basic social protection, which is to improve the wellbeing of individuals, families and communities by guaranteeing all citizens a minimum means of livelihood. This is to be achieved through assistance to people and families in especially difficult circumstances, whether due to unpredictable circumstances or any other cause beyond their control.
National Rehabilitation Institute Act of 1991 established by Decree 6-E/91 of 9 March 1991)	Establishes the National Rehabilitation Institute (INR), a government organ responsible for the development of a national policy of rehabilitation for people with disabilities. Its duties include planning, co-ordinating and controlling all projects relating to rehabilitation. The Institute, which works under the oversight of the head of state, is presided over by a president, assisted by a vice-president.

Decree 20/07 of 20 April 2008	Creates the National Council of Children.
Law 7/05 and Decrees 38/98 of 6 November and 46-C/92 of 9 September 2007	Provides family allowance and the law on support which strengthens the progenitors' responsibility with regard to the support of their children.
General National Police Command, by Order 242 of 11 October 2005	Creates the Violence against Women and Children Unit.
Law 1/05 of 1 July 2007	Establishes the conditions for awarding, acquiring, losing and reacquiring Angolan citizenship.

Furthermore, the Basic Law of Social Protection makes provision for the protection of vulnerable groups, both women and children.

Article 5 of the Social Protection Law states that basic social protection covers the resident population, which is in a situation of a lack, or reduction of substantial means and cannot take full responsibility for their protection. According to article 5 these individuals are the following:

- people or families in situations of grave poverty;
- women in disadvantaged situations;
- children and adolescents in need; and
- persons with disabilities at risk of social exclusion.

Regarding children's rights, Angola does not have any comprehensive legislation dealing directly with children's rights, such as comprehensive children's legislation. Rather, such legislation is found within Angola's constitutional law, resolutions of the national assembly, presidential decrees ministerial dispatches and resolutions. An important aspect is that ministerial dispatches are legislative in nature.¹⁴

Furthermore, there also seems to be some inconsistencies regarding the discrimination clause as it applies to children with disabilities. The Committee on the Rights of the Child has been critical of the law in allowing both girls and boys to marry under the age of 18 years without supervision by the courts. Girls are able to marry from the age of 15 years, whereas boys may marry from the age of 16 years. Despite the fact that the Constitution contains an anti-discriminatory clause, the Committee still highlights concerns relating to the safeguarding of the rights with children with disabilities, in particular highlighting those with HIV/AIDS. Furthermore, the CRC is directly enforceable in Angola, as article 26(3) of the Angolan Constitution permits that in the event of disputes that arise with regard to the nature of fundamental rights, judges an analysis of international instruments even if such conventions have not been raised by the parties themselves. Therefore, despite guarantees, as seen within the law, there is still a tension between the law and its implementation. This problem is compounded by the difficulties faced by minority groups in accessing justice, in particular persons with disabilities.

14 <http://www.crin.org/en/library/publications/angola-national-laws> (accessed 20 June 2015).

4.2 Does Angola have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.

Article 21(d) of the Constitution of Angola provides that the state will promote the well-being, social solidarity and improved quality of life of the people of Angola, especially among the most deprived groups of the population. Article 21(h) further provides for the promotion of equal rights and opportunities between Angolans, regardless of origins, race, party affiliation, sex, colour, age or any other form of discrimination.¹⁵

Article 23(1) of the Constitution maintains that no one may be discriminated against, privileged, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, ethnicity, colour, disability, language, place of birth, religion, political, ideological or philosophical beliefs, level of education or economic, social or professional status.

Law 8/04 on HIV and AIDS (2004) protects the rights of persons living with HIV, in particular the right to employment, free public health care, and confidentiality.

Article 77 of the Constitution states that the state shall promote and guarantee the measures needed to ensure the universal right to medical and health care, as well as the right to child care and maternity care, care in illness, disability, old age and in situations in which they are unable to work, in accordance with the law.

Law 7/05 and Decrees 38/98 of 6 November and 46-C/92 of 9 September 2007 establish a unit which allows for government to support families in need. This Law also indirectly targets persons with disabilities who are in a position where they cannot work due to their disability.

Law 13/01 of 31 December 2001 is the framework law on the education system. It establishes the national education plan as part of its objective to better produce an environment which makes it easier for persons with disabilities to receive an education.

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Angola ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases with the facts, the decision(s) and the reasoning.

No data is available on the decisions made by judiciary in Angola in respect of an issue or issues relating to disability. This is so mainly because of the fact that case law does not generally play a particularly strong role in the formation of Angolan law. Furthermore, the Supreme Court (*Tribunal Supremo*) and the courts in general do not report cases.¹⁶

15 Constitution of the Republic of Angola, 2010.

16 <http://www.crin.org/en/library/publications/angola-national-laws> (accessed 15 June 2015).

6 Policies and programmes

6.1 Does Angola have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

Decree 50/05 of 8 August 2005	Establishes a programme to assist street children, the community education programme, and support for children in difficulty.
Law 7/05 and Decrees 38/98 of 6 November 2007 and 46-C/92 of 9 September 2008	Makes provision for family allowance and the law on support which strengthens parents' responsibility with regard to the support of their children.
General National Police Command, by Order 242 of 11 October 2010	Creates the Violence against Women and Children Unit
Law 13/01 of 31 December 2001, the framework law on the education system	Establishes the National Action Plan for Education for All (PAN/EPT 2001-2015) and an Integrated Strategy for Improving the Educational System (2001-2015) which aim to ensure that all children have access to basic and compulsory education.

The Angolan education system was initially designed without a human rights approach, and, as such, human rights as a subject is not specifically enshrined in the school curriculum. However, the Ministry of Education, in collaboration with other public entities and civil society organisations, has begun the process of adopting human rights approaches in various sectors of government. This has been done by establishing a Co-ordinating Committee for the Integration of Human Rights in Subsystems Primary and Secondary Education. This Committee has proceeded to establish methodological guidelines for both primary and secondary education so as to mainstream human rights education. In addition, in 2013 the government began training teachers on human rights issues in order to introduce this subject to the school curriculum.¹⁷ Regarding programmes directly impacting persons with disabilities, the Angolan government has set up a programme supporting persons with disabilities with no means of transport with transportation and technical assistance, and community-based rehabilitation.¹⁸ The programme to provide a means of transportation and technical assistance has provided services for approximately 73 730 persons with disabilities as well as many devices and means of transportation, such as 200 wheelchairs for children, 2 004 three-wheeled manual vehicles, 16 560 guides for the blind, 3 698 pairs of crutches and 8 254 pairs of walking canes.

17 <http://www.crin.org/en/library/publications/angola-childrens-rights-references-universal-periodic-review> (accessed 10 August 2015).

18 As above.

6.2 Does Angola have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

Angola has enacted different pieces of legislation that mention people with disabilities or deal with issues relating to disabilities. The following table sets out the most prominent legislation that refers to disability:

Legislation name	Legislation description
Decree 21/82 of 22 April 1982	Declares that 2% of employment vacancies in both the public and private sectors should be reserved for people with disabilities. Under the framework provided by the Decree, employers, whether in state institutions or private businesses, are instructed to absorb people with disabilities into their staff complement. They are also expected to create working conditions that accommodate the requirements of particular disabilities and comply with the norms of hygiene and safety.
Decree 6-E/91 of 9 March 1991 (<i>Instituto Nacional de Reabilitacao</i>)	Establishes the National Rehabilitation Institute (INR), a government organ responsible for the development of a national policy of rehabilitation for people with disabilities. Its duties include planning, co-ordinating and controlling all projects relating to rehabilitation. The Institute, which works under the oversight of the head of state, is presided over by a president, assisted by a vice-president.

7 Disability bodies

7.1 Other than the ordinary courts and tribunals, does Angola have any official body that specifically addresses violations of the rights of people with disabilities? If so, describe the body, its functions and its powers.

The Ministry for Social Assistance and Reintegration (*Ministerio da Assitencia e Reinsercao Social* (MINARS)) has the objective of controlling policy in the area of education, assistance in social reinsertion with a perspective of social and human development and the promotion of social inclusion and reintegration.¹⁹

Established by Presidential Decree 1/10 of 5 March 2010 the Secretary of State for Human Rights (SEDH) has the objective of promoting and protecting the rights of individuals in Angola. The secretariat, driven by a secretary of state, has the mission of formulating and executing policies which promote and protect human rights.²⁰

¹⁹ A Luacuti *Genese da Constituicao Angolana de 2010 – O jornalismo ao service ao direito* (2010).

²⁰ Luacuti (n 19 above) 108.

Established by Decree 6-E/91 of 9 March 1991, the National Rehabilitation Institute (INR) is a government organ responsible for the development of a national policy for the rehabilitation of persons with disabilities.

7.2 Other than the ordinary courts or tribunals, does Angola have any official body that though not established to specifically address violations of the rights of persons with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.

Although not focusing solely on disability rights issues, the following organisations address violations of the rights of persons with disabilities.²¹

Institution/body	Description
Ministry for Social Assistance and Reintegration (MINARS)	Although not an official body dealing specifically with the disabled, it focuses significantly on addressing issues relating to the disabled. 'MINARS is the government department most involved in projects dedicated to the disabled.' In Angola, MINARS is the government body responsible 'for supervising and co-ordinating the implementation of social policy on the most vulnerable groups of the population, ensuring their rights and promoting their development through measures that report the implementation of basic social policies of rehabilitation and social care'. ^a
National Family Council	The National Family Council is an organ of the Ministry of Family, the consultative organ which meets annually to discuss issues related to the family in Angola in various fields of national life. ^b

a. <http://www.minars.gov.ao/Institucionais> (accessed 16 March 2015).

b. <http://www.portalangop.co.ao/angola> Agencia Angola Press 'Encerrou Conselho Nacional da Familia em Catete' 12 July 2013.

21 H Kotze *Southern Africa Disability Rights and Law Project* (accessed 27 March 2015).

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

- 8.1 Does Angola have a Human Rights Commission, an Ombudsman or Public Protector? If so, does its remit include the promotion and protection of the rights of people with disabilities? If your answer is yes, also indicate whether the Human Rights Commission, the Ombudsman or Public Protector of Angola has ever addressed issues relating to the rights of persons with disabilities.**

Angola has an Office of the Ombudsman established in terms of article 192 of the Constitution. The Ombudsman and Deputy Ombudsman are elected by the National Assembly on the decision of two-thirds of members in full exercise of their office.

Article 192(4) of the Angolan Constitution provides that citizens and corporate bodies may present the Ombudsman with complaints concerning acts or omissions by public authorities, which they shall consider, with no powers of decision, submitting the necessary recommendations for the prevention and remedying of injustices to the appropriate bodies.

Furthermore, article 192(5) goes on to state that the activity of the Ombudsman shall be independent of the means for ruling on appeals or disputes provided for in the Constitution and the law.

Angola also has an office of the public prosecutor, established by section 3, article 185 of the Angolan Constitution. Under article 186 of the Constitution, the public protector is responsible for representing the state, defending democratic legality and the interests defined by law, promoting the penal procedure and conducting penal actions, under the terms of the law.²²

Presidential Decree 1/10, of 5 March 2010 establishes a Secretariat of State for Human Rights (SEDH). The SEDH has the mission of formulating, executing and evaluating the policies of the Angolan state with regard to the promotion and protection of human rights in terms of the Angolan Constitution and international conventions.²³

²² <http://www.governo.gov.ao/Organismos.aspx?op=SG> (accessed: 21 June 2015).

²³ Luaucuti (n 19 above).

9 Disabled peoples organisations (DPOs) and other civil society organisations

9.1 Does Angola have organisations that represent and advocate for the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.

Angola has a number of DPOs advocating for persons with disabilities. The following table sets out the most prominent of these DPOs.

Organisation	Description
Federation of Organisations of Disabled People in Angola (FAPED) (the umbrella body for DPOs)	FAPED is the national affiliate of the Southern African Federation of the Disabled (SAFOD) in Angola. FAPED appears in the ambit of the self-representation of the associations of disabled people at both national and international levels. It aims to co-ordinate the actions of its members to partner with the Angolan government in developing disability politics and including it in the national politics of development. ^a The aim of FAPED is to represent associations of disabled people at national level and to participate in discussions with government about the policies linked to people with disabilities ^b
National Association for the Near-Sighted and the Blind (ANCA)	The ANCA assists persons with disabilities with accessing medical facilities and employment opportunities. The ANCA is however still in its embryonic stage. ^b

a. <http://safod.net/Angola.html> (accessed 23 March 2015) The Angolan Federation of the Association of People with Disabilities.

b. <http://www.afub-uafa.org/southern-africa> (accessed 24 March 2015) 'African Union of the Blind'.

9.2 In the countries in Angola's region (East Africa) are DPOs organised/co-ordinated at national and/or regional level?

In this region, DPOs do not function under any kind of umbrella body, but rather function through coalitions and networks working in different thematic areas

9.3 If Angola has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

Information on the structuring of DPOs in Angola could not be found. However, although the structures of the internal organisation of DPOs in Angola could not adequately be found, it was evident that, internally, Angolan DPOs are associated with organisations such as the Open Society, Human Rights Watch and Amnesty International, which serve as platforms of advocacy for their issues. Angola has

ratified the CRPD. Despite the government having worked with organisations such as the Lwini foundation, the National Association of the Disabled in Angola, the Angolan League of Support and Reintegration of the Physical Disabled,²⁴ there is no evidence that the Angolan government has involved DPOs in the implementation process of legislation relating to persons with disabilities.

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

DPOs in Angola have extensively lobbied the Angolan government to be included in the process of formulation and implementation of policies relating to persons with disabilities. More direct approaches have been made by creating both internal and external advocacy campaigns of the situation of persons with disabilities, and aware-raising campaigns.

However, despite these interventions, it has been acknowledged that, although equal rights for disabled persons in Angola are central in the Constitution, these rights are insufficient unless persons with disabilities are helped to exercise these rights. The disabled need a range of practical support measures that will help them to overcome the many barriers they face on a daily basis.²⁵

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

The main barriers faced by DPOs are that, despite the government having acceded to the CRPD, the subsequent effects are not felt domestically.

9.6 Are there specific instances that provide ‘best-practice models’ for ensuring proper involvement of DPOs?

No data has been recorded with regard to best practice models for ensuring the proper involvement of DPOs.

9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?

The following organisations operating in the areas of disability work in the Southern African region

- Open Society Foundation
- Disability and Social Response in Southern Africa
- Leonard Chesire Disability
- Norwegian Peoples Aid

Although the above-mentioned organisations have worked with local organisations in Angola, there has been limited implementation of disability rights projects in Angola. Furthermore, there does not seem to be any academic institutions openly supporting the work of DPOs.

24 <http://www.portalangop.co.ao/> (accessed 10 May 2016).

25 Kotze (n 21 above).

To date, there is no legislation pertaining solely to persons with disabilities. However, although Angola has recently ratified the CRPD, a successful outcome would be its implementation at domestic level, along with more co-ordination with local DPOs.

9.8 Has your research shown areas for capacity building and support (particularly in relation to research) for DPOs with respect to their engagement with the implementation process?

DPOs in Angola seem to be doing effective work in the area of disability. However, most organisations lack proper institutional backing by government. Such effectiveness is also compounded by a lack of technical expertise on the ground, compounded by a massive brain drain, which hampers the effectiveness of established organisations which support the disability rights frameworks, inhibiting them from fully and effectively lobbying government institutions.

Furthermore, there seems to be a difficulty with communication between DPOs already operating in Angola and those in the region, due to a gap in the technical and informative skills held by the leadership of a great number of DPOs in Angola. This has hampered adequate and valuable communication and sharing of best practices with other DPOs in the Southern African region.

9.9 Are there recommendations that come out of your research as to how DPOs might be more comprehensively empowered to take a leading role in the implementation processes of international or regional instruments?

The research conducted regarding persons with disabilities in Angola has revealed that DPOs in Angola suffer tremendously due to a lack of technical expertise. Such a deficit minimises the way in which these organisations' vision and objectives are disseminated to the public and interested parties.

It is, therefore, recommended that DPOs in Angola set forth mechanisms that would make clear to government the importance of domestically implementing the provisions of the CRPD. Second, a clear strategy is necessary on how to develop a national plan of action with the co-operation of all major DPOs in Angola.

9.10 Are there specific research institutes in the region where Angola is situated (East Africa) that work on the rights of persons with disabilities and that have facilitated the involvement of DPOs in the process, including in research?

The following organisations in the area of disability work in the Southern African region:

- Open Society Foundation
- Disability and Social Response in Southern Africa
- Leonard Chesire Disability
- Norwegian Peoples Aid

10 Government departments

10.1 Does Angola have a government department or departments that is/are specifically responsible for promoting and protecting the rights and welfare of persons with disabilities? If so, describe the activities of the department(s).

The *Ministerio da Assitencia e Reinsercao*, although not specifically focusing on issues of disability as part of its mandate. Furthermore, its mandate also deals with formulating policy, which promotes inclusion and social integration.²⁶

The Angolan Department of Education undertakes the education of children with disabilities.²⁷

Furthermore, the Ministry of Education and Social Integration works in collaboration in the area of education. This collaboration also includes education by providing an environment for learning of those with disabilities.²⁸

11 Main human rights concerns of people with disabilities in Angola

11.1 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses

Despite the Constitution of 2010 which protects the fundamental rights of all citizens, persons with disabilities still face a number of challenges. First, access for persons with disabilities to the labour force remains difficult. Persons with disabilities still face grave discrimination in obtaining employment, and in situations where they do find employment, the work environment is not conducive to them to work adequately. Although article 3(1) of the Labour Law promotes the principle of equality, no mention has been made of this where persons with disabilities are involved.

Second, a social stigma exists, namely, that persons with disabilities are not entitled to legal recourses but, rather; the little that is being done is an act of charity. In interviews conducted by the Open Society Initiative, interviewees stated that the integration of persons with disabilities within broader society should not be one of charity, but rather one of human rights.²⁹

Lastly, another major challenge, encapsulating the above two, pertains to access to justice of persons with disabilities. Angolan society is not very open to the

26 Luacuti (n 19 above) 108 109.

27 Kotze (n 21 above).

28 Luacuti (n 19 above) 108.

29 Kotze (n 21 above).

needs of persons with disabilities, despite there being legislation that speaks in the language of equality. In reality, this is not the case.

The lack of education among persons with disabilities is also a major contributing factor, which prevents them from understanding their legal rights.

Despite its international agreements in the domain of human rights, Angola is still lacking as far as the implementation of these laws is concerned.

11.2 Do people with disabilities have a right to participation in political life (political representation and leadership) in Angola?

There is an exclusion from the right to vote and to stand for election inscribed in Angola's Constitution and electoral laws, directed at persons with psychosocial disabilities.³⁰

- Article 12 states that persons interned in a medical establishment or when so declared by a doctor's certificate, even if not interdicted by a judgment, or those notoriously recognised as demented, do not enjoy active electoral capacity.

According to the Angolan Constitution, participation in public life is fundamental, and enshrined in the Constitutional Act. However, this is limited in cases of persons with mental disabilities. It is important to note that the severity of the disability was not specified.

Such open-ended limitations may be problematic and open to abuse, especially as it would inevitably infringe on the right to equality, and participation in the political life of the state.

11.3 Are people with disabilities' socio-economic rights, including the right to health, education and other social services protected and realised in your country?

According to public policy, persons with disabilities benefit from special services, especially targeting physical rehabilitation, schooling, vocational technical training, work orientation and psychosocial counselling aimed at reinsertion in the community without discrimination or stigmatisation.³¹

According to the Angolan government, under the UPR submitted in February 2010, '[i]n the years 2005–2006, 20 877 persons with disabilities were looked after, 30 per cent of the total objective for those years'.³²

Article 83 of the Constitution grants persons with disabilities full rights without restriction and calls on the government to adopt national policies to prevent, treat, rehabilitate and integrate people with disabilities; to support their families; to remove obstacles to their mobility; to educate society about disability; and to encourage special learning and training opportunities for the disabled. It does not specifically mention the rights of persons with disabilities with regard to transportation, including air travel (Republic of Angola 2010 Constitution).

30 Submission to the human rights committee on the right to vote of persons with disabilities in Angola, 107th session, 2012 <http://www.ida.org> (accessed 27 March 2015).

31 Human Rights Council national report submitted in accordance with para 15(a) of the annex to Human Rights Council Resolution 5.1, 19 February 2010, <http://www.univie.ac.at> (accessed 27 March 2015).

32 <http://www.ohchr.org/EN/HRbodies/UPR/pages> (accessed 7 April 2015).

Despite the enactment of these decrees and legislations, the important question remains of equal access to the workplace and to educational institutions. This is because, despite persons with disabilities having legal rights to non-discrimination, where the implementation of these rights on the ground is concerned, this is lacking.

Access to education is, therefore, limited; because of the fact that the government does not make the environment for learning conducive for persons with disabilities, for instance, modifying the physical environment to accommodate these persons. There is also a lack of trained teachers who are in a position to adequately assist students with disabilities.

11.4 Case studies of specific vulnerable groups

No information is available regarding case studies of vulnerable groups in Angola.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in your country at the moment?

The current debate in Angola is about civil society organisations advocating for the rights of disabled persons on mechanisms the government should take to ratify the CRPD and its Optional Protocol.

12.2 What legal reforms would you like to see in your country? Why?

Angola is a country on the brink of economic and social development after the civil war lasting almost three decades. However, with this rate of development, the inequality gap is one which is steadily rising. Added to this, there is the neglect of fundamental rights, in general, and, more specifically, as far as persons with disabilities are concerned. Although Angola is party to international conventions and is attempting to put forth legislation to address the issue of disability rights, these steps have not been very effective.

GABON

*Christophe Tchudjo**
*Victorine Maptue Toguem***

1 Les indicateurs démographiques

1.1 Quelle est la population totale du Gabon?¹

Selon les résultats du Quatrième Recensement Général de la Population et de l'Habitat (RGPH) réalisé en mai 2013 et validé par la Cour constitutionnelle en mai 2015, la population gabonaise est estimée à 1 802 728 habitants.

1.2 Méthodologie employée en vue d'obtenir des données statistiques sur la prévalence du handicap au Gabon. Quels sont les critères utilisés pour déterminer qui fait partie de la couche des personnes handicapées au Gabon?

La prévalence du handicap a été obtenue à partir du troisième Recensement Général de la Population et de l'Habitat (RGPH) qui a couvert l'ensemble du Gabon.

Dans le RGPH 2003 le terme « handicapé » est attribué « aux individus présentant une déficience physique ou mentale. Ce sont notamment: Les sourds, les muets, les aveugles, les sourds-muets, les handicapés des membres supérieurs, les handicapés des membres inférieurs, les handicapés des membres supérieurs et inférieurs, les personnes qui présentent un déficit mental, les autres handicaps ».

1.3 Quel est le nombre total et le pourcentage des personnes handicapées au Gabon?

Au Gabon, 26 790 personnes handicapées ont été dénombrées lors du troisième Recensement Général de la Population et l'Habitat (RGPH) en 2003; soit 2,1% de la population totale.

* Avocat au barreau du Cameroun.

** M.Sc. Sociology / MPH, Yaounde Cameroon.

1 Recensement général de la population et de l'habitat (RGPL), 2013.

1.4 Quel est le nombre total et le pourcentage des femmes handicapées au Gabon?

La population féminine des personnes handicapées est de 12 283, soit (45,8%) de l'ensemble des personnes handicapées du Gabon.

1.5 Quel est le nombre total et le pourcentage des enfants handicapés au Gabon?

Le Gabon compte environ 6670 enfants handicapés (0-19 ans) soit 24.9%

1.6 Quelles sont les formes de handicap les plus répandues au Gabon?

Les infirmités motrices (48.2%) notamment l'infirmité des membres inférieurs, la déficience visuelle (23.8%) malvoyants et aveugles).

2 Obligations internationales

2.1 Quel est le statut de la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) au Gabon? Le Gabon a-t-il signé et ratifié la CDPH? Fournir le(s) date(s). Le Gabon a-t-il signé et ratifié le Protocole facultatif? Fournir le(s) date(s).

Le statut de la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) au Gabon est signé et ratifié.²

Oui! Le Gabon a signé et ratifié la Convention relative aux droits des personnes handicapées respectivement le 30 mars 2007 et le 1 octobre 2007. Le protocole facultatif a été signé et ratifié respectivement 25 septembre 2007 et le 26 juin 2014.

2.2 Si le Gabon a signé et ratifié la CDPH, quel est/était le délai de soumission de son rapport? Quelle branche du gouvernement est responsable de la soumission du rapport? Le Gabon a-t-il soumis son rapport? Sinon quelles sont les raisons du retard telles qu'avancées par la branche gouvernementale en charge?

Le délai de soumission de son rapport était de trois ans (2010). Le Ministère des droits humains, de l'égalité des chances et des Gabonais de l'étranger est responsable de la soumission du rapport. Le rapport initial a été soumis au comité des Droits des personnes handicapées le 22 mai 2015.

2 Nations Unies: Collection des traités, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&lang=fr&clang=_fr Page consultée le 06 février 2016.

2.3 Si le Gabon a soumis le rapport au 2.2 et si le comité en charge des droits des personnes handicapées avait examiné le rapport, veuillez indiquer si le comité avait émis des observations finales et des recommandations au sujet du rapport du Gabon. Y'avait-il des effets internes découlant du processus de rapport liés aux questions handicapées au Gabon?

Au terme de l'examen du rapport initial du Gabon par le comité des droits des personnes handicapées en Août 2015, des observations finales et des recommandations ont été faites sur un certain nombre de points.

2.4 En établissant un rapport sous divers autres instruments des Nations Unies, la Charte Africaine des Droits de l'Homme et des Peuples ou la Charte Africaine relative aux Droits et au bien-être de l'Enfant, le Gabon a-t-il également fait mention spécifique du droit des personnes handicapées dans ses rapports les plus récents? Si oui, les observations finales adoptées par les organes statutaires ont-elles fait mention du handicap? Si pertinent, ces observations ont-elles été suivies d'effet? Etait-il fait mention des droits des handicapés dans le rapport de la Revue Périodique Universelle (RPU) des Nations Unies de votre Etat? Si oui, quels étaient les effets de ces observations ou recommandations?

Conformément à l'article 62 de la charte africaine des droits de l'homme et des peuples, la république Gabonaise a soumis le 25 février 2013 une combinaison du rapport initial et des rapports périodiques couvrant la période allant de 1986 à 2012. Bien que le Gabon ait établi une série de lois visant à promouvoir et à protéger les droits et les libertés fondamentales de l'homme, notamment la loi relative à la protection sociale des enfants handicapés, l'absence des lois spécifiques aux droits des personnes handicapées a été relevée. La revue périodique universelle des nations Unies de la république Gabonaise qui a eu lieu en mai 2013 ne fait aucune allusion des droits des personnes en situation de handicap.³

2.5 Y'avait-il un quelconque effet interne sur le système légal du Gabon après la ratification de l'instrument international ou régional au 2.4 ci-dessus?

Après la ratification de la charte africaine des droits de l'homme et des peuples, Plusieurs actions ont été menées par le gouvernement gabonais pour favoriser un mieux être pour les personnes handicapées. Il s'agit entre autre, de la réduction des tarifs dans les transports publics, dans les centres culturels et sportifs publics, une assistance financière annuelle de 50 000 FCFA ainsi que la dotation périodique des tricycles gratuits aux handicapés moteurs. A cela s'ajoute, la création d'une école pour enfants malentendants et muets, l'initiative de la célébration de la journée nationale des personnes souffrant d'handicap et de la collaboration de l'État avec les organisations de défense des droits des personnes vivant avec handicap.⁴

3 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/139/70/PDF/G1313970.pdf?OpenElement> Human Rights Council, Twenty-third session, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

4 <http://www.achpr.org/fr/states/gabon/reports/1-1986-2012/> Observations Finales et Recommandations relatives au Rapport initial et cumulé de la République Gabonaise sur la mise en œuvre de la Charte africaine des droits de l'homme et des peuples (1986 – 2012), 15ème Session extraordinaire, Du 7 au 14 mars 2014, Banjul, Gambie.

2.6 Les traités internationaux ratifiés deviennent-ils automatiquement loi nationale sous le system légal Gabonais? Si oui y'a-t-il des cas où les cours et tribunaux appliquent directement les dispositions du traité international?

Tout instrument international dûment ratifié a force de loi. Toutefois, avant la ratification par le Président de la République, le Parlement vote une loi d'autorisation et la vérification de la valeur constitutionnelle de l'instrument par la Cour Constitutionnelle. Donc, dans tous les Dossiers pendants en justice, si une disposition d'un traité ou d'un accord international (ratifié par le Gabon) est invoquée cette disposition reçoit application directe sans qu'il n'ait besoin de faire appel à une disposition de la loi nationale.

2.7 En référence au 2.4 ci-dessus, la Convention des Nations Unies relative aux Droits des Personnes Handicapées CDPH ou tout autre instrument international ratifié, en tout ou en partie, a-t-il été incorporé textuellement dans la législation nationale? Fournir les détails.

Non.

3 Constitution

3.1 La constitution du Gabon contient-elle des dispositions concernant directement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite du handicap.

La Constitution Gabonaise en son article premier, alinéa 8, précise que « l'Etat, selon ses possibilités garantit à tous, notamment à l'enfant, à la mère, aux handicapés, aux vieux travailleurs et aux personnes âgées, la protection de la santé, la sécurité sociale, un environnement naturel préservé, le repos et les loisirs. » En application de ces dispositions constitutionnelles, qui sont par ailleurs conformes au contenu de la convention, le Gabon a enrichi son cadre juridique, au travers de:

- l'article 3 de la loi 19/95 du 13 février 1996, portant protection sociale des personnes handicapées qui donnent droit à la réduction des tarifs de transports publics ; à la réduction des frais d'accès aux centres culturels et/ou sportifs et, à la réduction des frais de scolarité dans les établissements publics ou ceux reconnus d'utilité publique;
- Le décret no 152/PR/MSNASBE du 4 février 2002 fixe les attributions, l'organisation et le fonctionnement du Comité national d'insertion des personnes vivant avec un handicap. Ledit décret prévoit en son article 15 une commission technique des infrastructures chargée notamment de:
 - Définir les critères d'accessibilité aux équipements collectifs;
 - Encourager l'utilisation des transports aménagés pour des personnes vivant avec un handicap;
 - Proposer et suivre l'attribution des aides matérielles aux personnes vivant avec un handicap;
 - Donner un avis sur la création des aménagements destinés à rendre les équipements collectifs accessibles aux personnes vivant avec un handicap;

- Donner un avis sur les problèmes de transport des personnes vivant avec un handicap.
- Le Chapitre V du code de travail prévoit que 1/40 d'emploi soit réservé aux personnes handicapées et autre dispositions garantissant leurs protections :
- Article 179. A qualification professionnelle égale, toute discrimination fondée sur le handicap physique ou mental d'une personne à l'embauche pendant la durée de son contrat de travail ou à la cessation de celui-ci, est strictement interdite.
- Article 180. L'employeur qui emploie des personnes handicapées doit créer, dans la mesure du possible, sur les lieux de son entreprise, un accès facile au travailleur et un environnement de travail propice, de façon à rendre l'exécution du travail par la personne handicapée aussi facile que pour une personne non handicapée dans la mesure du possible, et considérant le handicap du travailleur.
- Article 181. Les chefs d'entreprise doivent réserver un quota d'emplois aux personnes handicapées possédant la qualification professionnelle requise. Le taux de ce quota est fixé à un quarantième de l'effectif total de l'entreprise ou de l'établissement. Tout employeur qui emploie 40 travailleurs ou plus doit déclarer chaque année, par écrit auprès de l'inspecteur du travail, le nombre d'employés à son emploi, le nombre d'employés handicapés à son emploi et le handicap particulier de chacun de ces derniers.
- Article 182. En cas de licenciement économique, l'employeur s'efforcera, autant que possible, de maintenir l'emploi du travailleur handicapé.

3.2 La constitution du Gabon contient-elle des dispositions concernant indirectement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite indirectement du handicap.

Le titre préliminaire « des principes et des droits fondamentaux » de la constitution précise à son alinéa 7 que « *chaque citoyen a le devoir de travailler et le droit d'obtenir un emploi* ». Dans cet esprit, la loi no 3/94 du 21 novembre 1994 portant Code du Travail en République gabonaise, indique en ses articles 2 et 8 les développements ci-après:

- « Toute personne, y compris la personne handicapée a droit au travail, l'exercice d'une activité est un devoir naturel. La formation professionnelle est une obligation pour l'Etat et pour l'employeur. »
- « Tous les travailleurs sont égaux devant la loi et bénéficient de la même protection et des mêmes garanties. Toute discrimination en matière d'emploi et des conditions de travail est interdite. »

4 Législation

4.1 Le Gabon a-t-il une législation concernant directement le handicap? Si oui énumérez la législation et expliquez comment la législation aborde le handicap.

- Le Décret no 1389/PR/MASPF, du 12 novembre 1982 portant l'institutionnalisation d'une Journée Nationale des Personnes Handicapées;
- La célébration de la Journée internationale des personnes handicapées;
- L'adoption de la loi no 19/15 du 13 février 1996, portant protection sociale des personnes handicapées qui donne droit à la réduction des frais médicaux dans les établissements publics, à la réduction des tarifs de transports publics, la réduction des frais d'accès aux centres culturels et/ou sportifs et, la réduction des frais de scolarité dans les établissements publics ou ceux reconnus d'utilité publique;

- La loi 19/95 du 13 février 1996 portant Protection sociale des Personnes handicapées;
- Le Décret no 000152/PR/MNASBE du 4 février 2002, fixant attributions, organisation et fonctionnement du Comité National d'Insertion des Personnes Handicapées;
- L'arrêté no 0012/MASSBE/DGAS du 5 novembre 1985, portant création d'une école pour enfants déficients auditifs et l'adoption du projet de Décret d'accessibilité aux édifices publics pour les personnes handicapées;
- L'article 5 de la loi no 19/95 qui institue une carte d'invalidité en faveur des personnes handicapées, leur ouvrant ainsi le droit au bénéfice de la réduction des frais médicaux dans les établissements de service publics de santé ; la réduction des frais de transports publics ; la réduction des frais d'accès aux centres culturels, sportifs et des loisirs sur le territoire national et la réduction des frais de scolarité dans les établissements publics ou ceux reconnus d'utilité publique;
- L'article 7 de la loi no 19/95 du 3 juillet 1995 qui stipule que « les établissements scolaires et professionnels publics et confessionnels reconnus d'utilité publique sont tenus d'accorder la priorité à l'inscription à l'école de l'élève handicapé physique ».

4.2 Le Gabon a-t-il une législation concernant indirectement le handicap? Si oui énumérez la principale législation et expliquez comment elle réfère au handicap.

Le décret no 00269/PR/SEAS/UNFG/CAB du 31 mai 1971 relatif à l'aide sociale au Gabon qui octroie une aide annuelle de 75000frs aux personnes handicapées et l'appui de l'Etat en matière de matériel orthopédique, renouvelable tous les cinq ans. Ce décret permet aux personnes dont le handicap entraîne des difficultés à se procurer un travail d'améliorer leur condition socio économique et de s'épanouir.

5 Décisions des cours et tribunaux

5.1 Les cours (ou tribunaux) dans votre pays ont-ils jamais statué sur une question(s) relative au handicap? Si oui énumérez le cas et fournir un résumé pour chacun des cas en indiquant quels étaient les faits ; la (les) décision(s), la démarche et l'impact (le cas échéant) que ces cas avaient entraînés.

Ne disposant pas d'un répertoire de jurisprudence, il est difficile de ressortir les cas qui ont été jugés devant les Tribunaux avec les conséquences éventuelles. Nous n'avons donc pas trouvé des décisions de justice sur le handicap.

6 Politiques et programmes

6.1 Le Gabon a-t-il des politiques ou programmes qui englobent directement le handicap? Si oui énumérez la politique et expliquez comment cette politique aborde le handicap.

La politique du Gabon pour les personnes handicapées se fonde sur le principe de l'égalité des chances, en vue de leur participation à la vie de la cité et de l'affirmation de leur citoyenneté. Dans cette optique, le gouvernement a pris, entre autres, les mesures ci-après:

- Le décret no 00269/PR/SEAS du 3 mai 1971, relatif à l'aide sociale au Gabon qui octroi une aide annuelle de 75000frs aux personnes handicapées;
- Décret 003/PR/MSASF fixant les normes d'accessibilité dans les bâtiments, édifices et lieux publics pour les personnes à mobilité réduite;
- Une ligne budgétaire de 150 millions pour l'achat du matériel orthopédique, renouvelable tous les deux ans;
- L'ouverture en 1985 d'une Ecole nationale pour enfants déficients auditifs (ENEDA) dont le fonctionnement nécessite encore un appoint multiforme;
- Classe intégrée pour aveugle au collège Quaben;
- Le secteur privé;
- Horizons nouveaux;
- Une école pour enfants autistes;
- Une école pour enfants trisomiques 21;
- L'institutionnalisation d'une journée nationale des personnes handicapées, créée par le décret no 1389/PR/MASPF du 12 novembre 1982;
- La célébration de la journée internationale des personnes handicapées;

6.2 Le Gabon a-t-il des politiques ou programmes qui englobent indirectement le handicap? Si oui énumérez chaque politique et décrivez comment elle aborde indirectement le handicap.

- Le programme de sensibilisation: Des campagnes d'information et de sensibilisation sont organisées régulièrement afin d'asseoir les droits des personnes handicapées et d'édifier sur l'importance des actions et mesures nationales visant à faciliter l'implication des personnes handicapées dans la vie politique et économique de chaque pays de la sous-région
- Le programme d'éducation pour tous: En matière d'éducation, le Gabon dispose de deux outils essentiels, une commission technique spéciale chargée d'orienter les enfants handicapés vers les structures spécialisées, avec l'attribution de bourses, et une Commission technique des infrastructures qui définit les critères d'accessibilité aux équipements collectifs.
- Programme d'adaptation et de réadaptation, placé sous la responsabilité d'une commission technique de réadaptation et de rééducation fonctionnelle qui est chargée d'orienter les personnes handicapées physiques, moteurs ou sensoriels vers les structures médicales spécialisées, et de favoriser l'accès aux soins.
- Plan d'évacuation d'urgence national qui s'applique à tous en cas de situation d'urgence et de conflit, conformément à l'architecture de paix et de sécurité de l'UA

7 Organismes en charge des personnes handicapées

7.1 En dehors des cours ou tribunaux ordinaires, le Gabon a-t-il un organisme officiel qui s'intéresse spécifiquement de la violation des droits des personnes handicapées? Si oui décrire l'organe, ses fonctions et ses pouvoirs.

Non.

7.2 En dehors des cours ou tribunaux ordinaires, le Gabon a-t-il un organisme officiel qui, bien que n'étant pas spécifiquement en charge de la violation des droits des personnes handicapées s'y attèle tout de même? Si oui décrire l'organe, ses fonctions et ses pouvoirs.

Non.

8 Institutions Nationales des Droits de l'Homme (Commission des Droits de l'Homme ou Ombudsman ou Protecteur du Citoyen)

8.1 Le Gabon est-il doté d'une Commission de Droits de l'Homme ou d'un Ombudsman ou d'un Protecteur du Citoyen? Si oui ses missions incluent-elles la promotion et la protection des droits des personnes handicapées? Si votre réponse est oui, indiquez également si la Commission de Droits de l'Homme ou l'Ombudsman ou le Protecteur du Citoyen de votre pays à jamais abordé des questions relatives aux droits des personnes handicapées.

Créée en 2005 par la loi no 19/2005 du 3 janvier 2006, la Commission Nationale des Droits de l'Homme a été effectivement mise en place le 12 septembre 2011. Oui, le Gabon a été toujours animé par la volonté de protéger les droits des personnes handicapées.

9 Organisation des personnes handicapées (OPH) et autres Organisations de la Société Civile

9.1 Avez-vous au Gabon des organisations qui représentent et défendent les droits et le bien-être des personnes handicapées? Si oui énumérez chaque organisation et décrivez ses activités.

Oui

Organisations des personnes handicapées et autres organisations de la société civile	Activités
Association nationale des personnes handicapées du Gabon (ANPHG)	Plaidoyer et sensibilisation organisation des séminaires de sensibilisation et de réflexion sur les politiques et les stratégies les plus adaptées en vue de l'autonomisation des personnes handicapées
Liebe Handicap	Lutte pour la scolarisation des enfants handicapés et des personnes démunies Prévention des handicaps Réinsertion des enfants atteints d'un handicap
Organisation des Personnes Handicapées » (OPH)	Sensibilisation en faveur de l'intégration des personnes handicapées
la Fondation Sylvia Bongo Ondimba pour la famille	Faciliter la mise en œuvre des actions initiées par la Première Dame au bénéfice des femmes, des enfants et des personnes vulnérables en général
Fédération nationale des Sourds Muets du Gabon	Promotion et protection des droits des personnes sourds muets
Fédération nationale des associations des personnes handicapées (FNAPHG)	œuvrer pour l'amélioration des conditions de vie et l'autonomie des personnes handicapées.
Amicale des femmes handicapées du Gabon (AFHG)	Sensibilisation Appui aux femmes handicapées
Association Non Gouvernementale d'action sociale et communautaire, ANDES-GABON	Défense et promotion des droits des personnes devenues sourdes et malentendantes
Fondation Horizons nouveaux	s'adresse aux déficients visuels avec intelligence normale, aux handicapés déficients intellectuels comme les trisomiques et, à ceux qui ont des troubles du développement comme les autistes
Association gabonaise de Basket Ball en fauteuil roulant	Fédérer, organiser, diriger et développer le basket bail en fauteuil roulant

9.2 Dans les pays de votre région, les OPH sont-elles organisées ou coordonnées au niveau national et/ou régional?

Au Gabon, les OPH sont regroupées au sein de la fédération nationale des associations des personnes handicapées.

9.3 Si le Gabon a ratifié la CDPH, comment a-t-il assuré l'implication des Organisations des personnes handicapées dans le processus de mise en œuvre?

La loi 19/95 portant protection sociale des personnes des personnes handicapées interpelle les organisations des personnes handicapées et principalement la Fédération nationale des associations des personnes handicapées et l'Association nationale des personnes handicapées du Gabon (ANPHG) a une prise en compte effective de la problématique du handicap.

9.4 Quels genres d'actions les OPH ont-elles prise elles-mêmes afin de s'assurer qu'elles soient pleinement intégrées dans le processus de mise en œuvre?

Les actions prises par les OPH sont notamment l'organisation des séminaires de sensibilisation et de réflexion sur les politiques et les stratégies les plus adaptées en vue de l'autonomisation des personnes handicapées.

L'on peut par exemple lire dans le quotidien Gabon eco, un journal d'information en ligne qui publie dans son édition d'août 2011 que Le ministre de la Santé, Flavien Nzengui Nzoundou, a annoncé, le 19 août à Libreville, le décaissement de 200 millions de francs CFA pour financer 194 micro-projets élaborés et présentés par des handicapés gabonais de la capitale. Cette aide qui vise l'autonomisation des handicapés.⁵

9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH lors de leur engagement dans la mise en œuvre?

La sous représentativité : les personnes handicapées ne sont pas encore suffisamment représentées de manière structurelle et formelle dans la mise en œuvre.

Y'a-t-il des exemples pouvant servir de 'modèles' pour la participation des OPH?

Comme exemple pouvant servir de modèles pour la participation des OPH, nous avons noté le dynamisme et l'engagement des organisations de la société civile gabonaise qui contribuent largement au processus de mise en œuvre. Il faut dire que les OPH se mobilisent régulièrement pour se déployer dans des activités visant l'autonomisation de la Personne handicapées au Gabon. Le 12 février 2014 (Gabon Infos), la fédération nationale des associations des personnes handicapées du Gabon (FNAPHG), a lancé ses activités pour l'année 2014 par un séminaire de formation et de renforcement de capacité des responsables d'associations de l'ensemble du territoire national, sous le thème: « Lancement du programme des personnes vivant avec un handicap: professionnalisation des leaders des

5 <http://www.gaboneco.com/ge/img/logo.png>.

associations » organisé conjointement par La fédération nationale des associations des personnes handicapées du Gabon, l'ambassade France par truchement du fonds de développement de l'ambassade.⁶

9.6 Y'a-t-il des résultats spécifiques concernant une mise en œuvre prospère et/ou une reconnaissance appropriée des droits des personnes handicapées résultant de l'implication des OPH dans le processus de mise en œuvre?

Oui, l'on peut toujours revenir sur l'article du quotidien Gabon eco, un journal d'information en ligne qui publie dans son édition d'août 2011 que Le ministre de la Santé, Flavien Nzengui Nzoundou, a annoncé, le 19 août à Libreville, le décaissement de 200 millions de francs CFA pour financer 194 micro-projets élaborés et présentés par des handicapés gabonais de la capitale. Cette aide qui vise l'autonomisation des personnes handicapées.⁷

Il ne s'agit en effet que d'un cas parmi tant d'autres. Il faut aussi dire que le Gouvernement Gabonais verse annuellement un pécule aux personnes handicapées.

9.7 Votre recherche (pour ce projet) a-t-elle identifié des aspects qui nécessitent le développement de capacité et soutien pour les OPH afin d'assurer leur engagement dans la mise en œuvre de la Convention?

Les capacités des OPH devraient être renforcées dans la mobilisation des ressources financières, matérielles et techniques nécessaires à la réussite et la pérennité de leurs programmes. En outre, les OPH gabonaises n'ont pas suffisamment d'informations sur les différents organes régionaux de promotion et protection des droits des personnes handicapées, ainsi que les mécanismes créés par la Commission pour une prise en charge effective des différents domaines thématiques des droits des personnes handicapées.

9.9 Y'a-t-il des recommandations provenant de votre recherche au sujet de comment les OPH pourraient être plus largement responsabilisées dans les processus de mise en œuvre des instruments internationaux ou régionaux?

Les OPH devraient avoir le statut d'Observateur dans le processus de mise en œuvre des instruments internationaux ou régionaux.

9.10 Y'a-t-il des instituts de recherche spécifiques dans votre région qui travaillent sur les droits des personnes handicapées et qui ont facilité l'implication des OPH dans le processus, y compris la recherche?

Non.

6 <http://www.gabon-infos.com>.

7 <http://www.gaboneco.com/ge>.

10 Branches gouvernementales

10.1 Avez-vous de(s) branche(s) gouvernementale(s) spécifiquement chargée(s) de promouvoir et protéger les droits et le bien-être des personnes handicapées? Si oui, décrivez les activités de cette (ces) branche(s).

La branche gouvernementale chargée de protéger et de promouvoir les droits et le bien-être des personnes handicapées est le ministère des affaires sociales à travers la Direction des Affaires Sociales. Elle est chargée de:

- Contribuer à la protection de la famille, de l'enfance et de la jeunesse;
- Concourir à l'animation sociale dans les actions de développement concerté;
- Participer à la lutte contre les fléaux sociaux et contre la délinquance juvénile;
- Assurer le contrôle des œuvres et services publics ou privés à caractère social.
- A ces charges traditionnelles, s'ajoute la promotion de l'insertion sociale des personnes handicapées et inadaptées.

11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

11.1 Quels sont les défis contemporains des personnes handicapées au Gabon? (exemple: Certaines régions d'Afrique pratiquent des tueries rituelles de certaines catégories de personnes handicapées telles que les personnes atteintes d'albinisme. A cet effet La Tanzanie est aux avant-postes. Nous devons remettre en cause les pratiques coutumières qui discriminent, blessent et tuent les personnes handicapées.

La ghettoïisation qui correspond au fait de distinguer les personnes handicapées des autres tout en les mettant à l'écart. Pour la Fédération nationale des associations des personnes handicapées du Gabon, le timide appui mis en place par le ministère des affaires sociales en 2002 est loin de maîtriser l'univers des handicapés. Selon la conscience populaire toute personne vivant avec un handicap est soupçonnée de sorcellerie.⁸ La conscience populaire pense que le handicap est le prix payé par ceux qui sont des sorciers. Les handicapés sont donc considérés comme des mystiques et du coup, ils ne sont pas bienvenus dans l'organisation de la société. Ils ne doivent pas aller à l'école, ils ne doivent pas se marier, ils ne doivent pas être intégrés dans la société de manière générale. De nombreuses familles ont tout simplement honte d'avoir un handicapé en leur sein les cachent dans les domiciles et les privent de leurs droits en les gardant derrière les maisons, et derrière la société entière.

8 Pascal Benga Tonangoye, Fédération Nationale des Associations des personnes handicapées : <http://partenia-au-dela-des-frontieres.over-blog.com/article-federation-nationale-des-associations-des-personnes-handicapees-78040622.html>.

11.2 Comment le Gabon répond-t-il aux besoins des personnes handicapées au regard des domaines ci-dessous énumérés?

Il y a des textes en vigueur qui condamnent les discriminations, mais dans la vie quotidienne les préjugés perdurent. Ce qui justifie la multiplication des campagnes de sensibilisation et d'information sur la problématique du handicap en général et les droits des personnes handicapées en particulier.

- Accès aux bâtiments publics.
- Les pouvoirs publics gabonais sont conscients de l'intérêt d'assurer l'accessibilité aux personnes handicapées à tous les lieux publics pour leur permettre de participer pleinement à la vie en société. En effet dans la constitution gabonaise, l'article 13 de la loi no 19/95 affirme que « toute construction d'édifices ou de voies publiques doit répondre aux normes d'accessibilité et de circulation des personnes handicapées. Les édifices et voies existants doivent faire l'objet d'aménagement appropriés. ». Le Gouvernement Gabonais s'est engagé à rendre les lieux publics plus accessibles aux personnes handicapées et des efforts sont faits dans le domaine architectural. A titre d'illustration, les ministères de la santé et des droits humains disposent d'un ascenseur adapté au déplacement des personnes handicapées motrices et aux malvoyants. En outre, l'aéroport international de Libreville est équipé pour permettre aux handicapés de ne pas y rencontrer d'obstacles. Quant aux bâtiments plus anciens, cette adaptation se fait de manière progressive. Les lieux publics sont rendus eux aussi plus accessibles, cela de manière croissante. Accès au transport public.
- En ce qui concerne l'accès au transport public, l'état gabonais a institué la réduction des frais de transport public à travers l'article 5 de la loi no 19/95 qui institue une carte d'invalidité en faveur des personnes handicapées et l'article 12 de la loi no 19/95 qui précise que « les sociétés publiques de transport en commun sont également tenues de faciliter l'utilisation des différents moyens de transport pour les personnes handicapées ». Les voiries de Libreville ont été réhabilitées en tenant compte de l'approche handicap. La première dame, Mme Bongo Ondimba, a remis en 2010 et 2012 un très important lot de matériel roulant composé de plusieurs fauteuils, des scooters et des béquilles (cannes anglaises), et a rendu possible la mise en place d'une formation au code de la route et d'un atelier de service d'entretien des fauteuils, au profit des personnes handicapées sur tout le territoire. Accès à l'éducation.

La législation gabonaise reconnaît le droit à l'éducation inclusive de la personne vivant avec un handicap. En fait, le programme d'enseignement est le même dans tous les établissements scolaires. La différence réside plutôt dans les techniques d'approches. Les personnes vivant avec un handicap sont admises en milieu scolaire, même si un examen médical est obligatoire pour déterminer à tout le moins le degré du handicap et ainsi connaître le Quotient intellectuel des déficients mentaux ; le niveau de la surdité des Sourds et Sourds-Muets ; le champ visuel pour les malvoyants, etc. En matière d'éducation, le Gabon disposait en 2013, de six structures spécialisées, deux outils essentiels : une commission technique spéciale chargée d'orienter les enfants handicapés vers les structures spécialisées, avec l'attribution de bourses, et une Commission technique des infrastructures qui définit les critères d'accessibilité aux équipements collectifs.⁹

- Accès à la formation professionnelle et l'emploi
- L'Etat reconnaît aux personnes handicapées les mêmes droits à l'emploi et à la formation professionnelle qu'aux autres citoyens. Aucune personne handicapée reconnue apte, ne doit, en raison de son handicap, être écartée d'un concours ou être lésée dans sa progression professionnelle. Au niveau législatif, le droit à l'emploi et à la formation professionnelle des personnes handicapées est garanti par la loi no 3/

9 <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16340&LangID=F#sthash.RnW8RslY.dpuf>

94 du 21 novembre 1994 portant code du travail, modifiée par la loi no 12/2000 du 12 octobre 2000, son chapitre 5 consacré au travail des personnes handicapées en ses articles 179, 181 et 182 fixent l'exercice du droit à l'emploi des personnes handicapées en milieu professionnel. Le code du travail stipule que les entreprises doivent employer un quota de travailleurs handicapés qui est fixé à un quarantième de l'effectif au minimum. Au Gabon, cela fait l'objet d'une déclaration annuelle relative aux effectifs de chaque entreprise. Par ailleurs, deux cents millions de francs CFA ont permis de financer en 2011, 196 projets de création d'emplois en faveur d'handicapés – dans les domaines des soins de beauté, de la coiffure ou pour la création de cyber-cafés. Accès à la détente et au sport

En ce qui concerne la participation des personnes handicapées à la vie récréative, aux loisirs et aux sports, la loi no 19/15 du 13 février 1996 portant protection sociale des personnes handicapées donne droit aux dites personnes, entre autres, à la réduction des frais d'accès aux centres culturels et aux centres sportifs ; à la réduction des frais de scolarité dans les établissements publics ou ceux reconnus d'utilité publique. Pendant les journées commémoratives telles que la journée internationale des personnes en situation de handicap, plusieurs activités sportives et culturelles à l'instar de l'athlétisme pour les handicapés moteurs (course en tricycle et en fauteuil roulant), et des matchs de basket-ball et de football sont organisées. A cela s'ajoutent les championnats pour personnes en situation de handicap auxquels l'équipe de Gabon est appelée à assister.

- Accès à la justice
- Les personnes handicapées, sans distinction, bénéficient de l'accès à la justice. En effet, la Constitution de la République gabonaise précise en son article premier, alinéa 4 que: « Les droits de la défense, dans le cadre d'un procès, sont garantis à tous ; la détention préventive ne doit pas excéder le temps prévu par la loi. » La Constitution Gabonaise qui précise que « nul ne peut être pénalement privé de sa liberté sous le prétexte d'un handicap » est scrupuleusement respectée dans les différentes juridictions. Accès aux soins de santé

Le Gabon reconnaît le droit à la santé pour les personnes handicapées. En effet, la Constitution gabonaise en son article premier, alinéa 8, précise que « L'Etat selon ses possibilités garantit à tous, notamment à l'enfant, à la mère, aux handicapés, aux vieux travailleurs et aux personnes âgées, la protection de la santé, la sécurité sociale, un environnement naturel préservé, le repos et les loisirs ». A cela s'ajoutent les outils juridiques, tels que l'ordonnance 1/95 du 14 février 1995, portant orientation de la politique de la santé en République gabonaise, qui précise la protection des personnes handicapées dans ses sections 30 et 31. En ce qui concerne la santé, l'Etat Gabonais a aussi mis en place une commission technique chargée de concevoir et d'élaborer, en collaboration avec la Commission nationale de coordination de la santé, la politique en faveur des personnes handicapées. Quant à l'adaptation et la réadaptation, elles sont sous la responsabilité d'une commission technique de réadaptation et de rééducation fonctionnelle qui est chargée d'orienter les personnes handicapées physiques, moteurs ou sensoriels vers les structures médicales spécialisées, et de favoriser l'accès aux soins.¹⁰

11.3 Le Gabon accorde-t-il des subventions pour handicap ou autre moyen de revenue en vue de soutenir les personnes handicapées?

Oui! Les subventions accordées aux personnes handicapées sont entre autres:

- L'aide annuelle de 75000 francs CFA accordée aux personnes handicapées et l'appui en matière de matériel orthopédique, renouvelable tous les deux ans;

10 <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16340&LangID=F#sthash.RnW8RslY.dpuf>

- Le financement des micros projets par l'Etat en vue de l'autonomisation de la personne handicapée pour un montant de 200 millions par an.

11.4 Les personnes handicapées ont-elles un droit de participation à la vie politique (représentation politique et leadership, vote indépendant etc.) au Gabon?

Oui! Le Code électoral ne comprend aucune disposition excluant les personnes handicapées. Par ailleurs le Gabon s'assure à ce que les personnes handicapées puissent effectivement et pleinement participer à la vie politique sans discrimination. En ce sens, les citoyens handicapés en âge de voter ont bien le droit de voter et d'être élus s'ils sont candidats à une élection.

11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilité:

- **Femmes handicapées**

Conscient qu'elles pourraient faire l'objet d'une double discrimination, notamment sur la base de leur sexe et de leur handicap, le gouvernement a mis en place un Observatoire des droits de la Femme et de la Parité (ODEFPA), dont les objectifs sont la défense des droits de toutes les femmes, de la famille et de l'enfant.¹¹

- **Enfants handicapés**

Accès à la santé et à l'éducation

- **Femmes enceintes**

Pas de mesures spécifiques

- **Personnes du troisième âge**

Pas de mesures spécifiques

- **Pygmées**

Le Gouvernement gabonais s'est engagé à protéger les pygmées et à mieux promouvoir leur intégration sociale.

12 Perspective future

12.1 Y'a-t-il des mesures spécifiques débattus ou prises en compte présentement au Gabon au sujet les personnes handicapées?

Non

12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir au Gabon? Pourquoi?

La principale réforme légale que nous aimerions voir dans notre pays est la mise en application des lois et décrets relatifs à la protection et la promotion des droits des

11 disabilitycouncilinternational.org/documents/CRPD_C_GAB_1_6955_F.doc: Disability Council International.

personnes handicapées car le Gabon a beaucoup de lois et de décrets dans ce sens, mais très peu sont mis en application. A titre d'illustration, la loi interdit la discrimination envers les personnes porteuses de handicaps « physiques, mentaux, congénitaux et accidentels » et exige qu'elles aient accès aux bâtiments et aux services, notamment aux bureaux de vote pour autoriser leur participation aux élections. Toutefois, la plupart des édifices publics n'offrent pas un accès adéquat aux personnes handicapées. Dans le droit, les déficiences sensorielles sont assimilées aux handicaps congénitaux et « accidentels », mais le concept de handicap intellectuel n'est pas reconnu. La loi accorde aux personnes handicapées les droits à l'éducation, aux soins de santé et au transport, mais son application a été limitée et il n'y a pas de programme visant à assurer l'accès de ces personnes aux bâtiments, à l'information et aux communications.

SÉNÉGAL

*Abdoulaye Thiam**
*Seydi Ababacar Sy Sow***

1 Les indicateurs démographiques

1.1 Quelle est la population totale du Sénégal?

La population du Sénégal s'élève à 13 508 715 habitants dont 6 735 421 hommes et 6 773 294 femmes.¹

1.2 Méthodologie employée en vue d'obtenir des données statistiques sur la prévalence du handicap au Sénégal. Quels sont les critères utilisés pour déterminer qui fait partie de la couche des personnes handicapées au Sénégal?

La méthodologie employée en vue d'obtenir des données statistiques sur la prévalence du handicap est conforme à la recommandation des Nations Unies (CES-2010)² concernant la prise en charge des questions sur le handicap dans les recensements généraux de la population. Les questions relatives au handicap sont posées aux populations âgées d'au moins un an.³

L'innovation apportée dans la méthodologie du recensement de 2013 par rapport au recensement de 2002 a été de mesurer le niveau ou le degré de chaque handicap. En effet, l'approche précédente, axée sur l'absence de modulation du statut de l'handicap (souffrez-vous d'un handicap), est apparue très limitative. A ce titre, il a été utilisé une série de questions (Washington Group) qui permettent d'identifier les personnes à risque au sein de la population générale. Les questions ont porté sur six domaines fonctionnels ou des actions de base: voir, entendre, marcher, avoir la faculté cognitive, prendre soin de soi et communiquer. Chaque

* Ecole Nationale des Travailleurs Sociaux Spécialisés, Dakar Sénégal.

** Ecole Nationale des Travailleurs Sociaux Spécialisés, Dakar Sénégal.

1 Rapport définitif du Recensement général de la Population et de l'Habitat, de l'Agriculture et l'Élevage de 2013, p 63.

2 Conference of European Statisticians 2010.

3 Rapport définitif du Recensement général de la Population et de l'Habitat, de l'Agriculture et l'Élevage de 2013 ; p 135 (n1 ci-dessus) 135.

question comporte quatre modalités de réponse: (1) Non, pas de difficultés, (2) Oui, quelques difficultés, (3) Oui, beaucoup de difficultés et (4) Pas du tout capable de faire. L'échelle de gravité s'utilise dans les catégories de réponse, afin de cerner l'éventail complet des domaines fonctionnels allant de la forme bénigne à la forme la plus sévère.⁴

1.3. Quel est le nombre total et le pourcentage des personnes handicapées au Sénégal?

En 2013, la prévalence du handicap au niveau de la population sénégalaise âgée d'un an et plus a été dénombrée à 5.9% soit 797014 habitants en valeur absolue.⁵

Ce chiffre révèle un écart important entre les résultats du recensement général de la population et de l'habitat de 2013 et les estimations, 15% de personnes handicapées, du rapport mondial sur le handicap (OMS-BM, 2011).

1.4. Quel est le nombre total et le pourcentage des femmes handicapées au Sénégal?

Au Sénégal, la prévalence du handicap est plus élevée chez les femmes que chez les hommes, avec 88 hommes pour 100 femmes⁶ souffrant de limitations soit 419.944 habitantes en valeur absolue en 2013.

1.5. Quel est le nombre total et le pourcentage des enfants handicapés au Sénégal?

Au Sénégal, il n'existe pas de données statistiques pour les jeunes âgés de moins de 18 ans et souffrant de limitations. Cependant, il est mentionné que le risque de se retrouver en situation de handicap augmente avec l'âge.⁷

1.6. Quelles sont les formes de handicap les plus répandues au Sénégal?

Les formes de handicap les plus répandues au Sénégal sont généralement liées aux limitations visuelles et motrices.⁸

2 Obligations internationales

2.1. Quel est le statut de la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) au Sénégal? Le Sénégal a-t-il signé et ratifié la CDPH? Fournir le(s) date(s).

Le Sénégal a signé⁹ et ratifié la convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) ainsi que son protocole facultatif

4 (Comme ci-dessus) 135.

5 (Comme ci-dessus) 139.

6 (Comme ci-dessus) 135.

7 (Comme ci-dessus) 144.

8 (Comme ci-dessus) 150.

9 Handicap international Dakar, « Etude synthétique et comparative des cadres juridiques nationaux

respectivement les 25 Avril 2007 et 7 Septembre 2010. La convention est ainsi un instrument juridique infra constitutionnel et supra législatif et par conséquent au-dessus des lois.

2.2. Si le Sénégal a signé et ratifié la CDPH, quel est/était le délai de soumission de son rapport? Quelle branche du gouvernement est responsable de la soumission du rapport? Le Sénégal a-t-il soumis son rapport? Sinon quelles sont les raisons du retard telles qu'avancées par la branche gouvernementale en charge?

Le Sénégal ayant ratifié la Convention relative aux Droits des Personnes Handicapées disposait d'un délai de 2 ans, à compter de l'entrée en vigueur soit la date du 7 Septembre 2012, pour la soumission de son rapport.

Le Ministère de la Justice à travers le Conseil consultatif national des droits de l'homme, chargé de veiller à l'harmonisation des textes nationaux avec les traités internationaux ratifiés par le Sénégal, est responsable de la soumission du rapport.

Mais on dit souligner que le Sénégal a finalement soumis son rapport initial en décembre 2014 du fait de l'instabilité institutionnelle due au changement de gouvernement survenu au lendemain de l'élection d'un nouveau Président de la République le 25 mars 2012.

Par ailleurs, il faut lier ce retard à une certaine léthargie du Conseil National des Droits de l'Homme comme en atteste le propos ci-après du Directeur des Droits Humains au Ministère de la Justice: « depuis 1997, le Sénégal fait partie, malheureusement, de ce lot de pays qui ne respectent pas l'obligation de présenter des rapports périodiques à cause de la léthargie dans laquelle la structure (consultative) était tombée ... »¹⁰

2.3. Si le Sénégal a soumis le rapport au 2.2 et si le comité en charge des droits des personnes handicapées avait examiné le rapport, veuillez indiquer si le comité avait émis des observations finales et des recommandations au sujet du rapport du Sénégal. Y'avait-il des effets internes découlant du processus de rapport liés aux questions handicapées au Sénégal?

Par lettre du 21 avril 2015, la rapporteuse spéciale des Nations Unies sur les droits des personnes handicapées, Madame Catalina DEVANDAS-AGUILAR, a soumis cinq (5) questions au gouvernement du Sénégal.¹¹ Aussi, le 12 mai 2015, des réponses ont été apportées¹² en attendant les observations finales et recommandations à ce sujet.

et internationaux liés aux droits des Personnes handicapées: cas du Sénégal »; F.S.J.P.- UCAD Dakar; p 17.

10 Extrait de la déclaration de M. Mouhamadou Moustapha Sèye, Directeur des Droits Humains au Ministère de la Justice, en marge du lancement des activités du Conseil consultatif le Samedi 18 janvier 2014 à Dakar.

11 Cf. Réponses du Gouvernement du Sénégal au questionnaire de Madame Catalina Devandas-Agular, Rapporteuse spéciale des Nations-Unies sur les droits des personnes handicapées.

12 Idem.

2.4 En établissant un rapport sous divers autres instruments des Nations Unies, la Charte Africaine des Droits de l'Homme et des Peuples ou la Charte Africaine relative aux Droits et au bien-être de l'Enfant, le Sénégal a-t-il également fait mention spécifique du droit des personnes handicapées dans ses rapports les plus récents? Si oui, les observations finales adoptées par les organes statutaires ont-elles fait mention du handicap? Si pertinent, ces observations ont-elles été suivies d'effet? Etait-il fait mention des droits des handicapés dans le rapport de la Revue Périodique Universelle (RPU) des Nations Unies du Sénégal? Si oui, quels étaient les effets de ces observations ou recommandations?

Dans les rapports relatifs aux instruments des Nations Unies notamment la Convention des droits de l'Enfant et la Charte Africaine relative aux Droits et au bien-être de l'Enfant, il est bien fait mention spécifique du droit des personnes handicapées.¹³

Les observations finales des organes statutaires des Nations Unies et de l'Union Africaine mentionnent particulièrement l'éducation inclusive des enfants handicapés.¹⁴ Même si toutes les enfants handicapés n'ont pas encore la possibilité de fréquenter les écoles ordinaires comme tous les autres enfants, des mesures spécifiques sont prises par le gouvernement dans le cadre de la mise en œuvre des programmes sociaux tels que la carte d'égalité des chances, la bourse de sécurité familiale, la couverture maladie universelle. Ainsi, toutes les personnes handicapées titulaire de la carte d'égalité des chances, en situation de vulnérabilité, sont désormais éligibles à tous ces programmes de gratuité.

2.5 Y'avait-il un quelconque effet interne sur le system légal du Sénégal après la ratification de l'instrument international ou régional au 2.4 ci-dessus?

La ratification, par la loi no 2009-30 du 2 décembre 2009, de la Convention relative aux Droits des Personnes Handicapées par le Sénégal a effectivement produit un effet positif sur le système légal. En effet, elle a permis l'adoption de divers textes, entre autres:

- la loi d'orientation sociale 2010-15 du 6 juillet 2010 relative à la promotion et la protection des personnes handicapées;
- le décret no 2012-1038 du 2 octobre 2012 relatif à la création de 2 commissions techniques départementales chargées d'instruire les demandes de cartes d'égalité des chances et de la promotion de l'éducation spéciale. Ce décret est le 1^{er} d'une série de textes réglementaires que le Sénégal va prendre au profit des personnes handicapées;
- l'arrêté no 4867/MSAS/DGAS/DPPPH du Ministre de la Santé et de l'Action Sociale fixant les modalités de création et délivrance de la carte d'égalité des chances.

13 Article 13 de la Charte Africaine des Droits et du Bien-Etre de l'Enfant.

14 L'article 24 de la Convention des Nations unies relative aux Droits Personnes handicapées rappelle aux dirigeants la nécessité d'assurer un accès égal à un « système d'éducation inclusif à tous les niveaux » et de fournir des aménagements raisonnables et des services individuels d'aide aux personnes handicapées en vue de faciliter leur éducation, en garantissant ce droit sans discrimination et sur la base de l'égalité des chances.

2.6 Les traités internationaux ratifiés deviennent-ils automatiquement loi nationale sous le system légal Sénégalais? Si oui y'a-t-il des cas où les cours et tribunaux appliquent directement les dispositions du traité international?

Selon le système légal du Sénégal, les traités internationaux ratifiés deviennent automatiquement loi nationale. En effet, la loi no 2009-30 du 2 décembre 2009 autorise le chef de l'Etat du Sénégal à ratifier la Convention relative aux droits des personnes handicapées et, le cas échéant, à être appliquée comme loi d'Etat.

Dans ce cas de figure, les cours et tribunaux appliquent directement les dispositions du traité international qui sont textuellement repris dans la loi qui autorise la ratification.

2.7 En référence au 2.4 ci-dessus, la Convention des Nations Unies relative aux Droits des Personnes Handicapées CDPH ou tout autre instrument international ratifié, en tout ou en partie, a-t-il été incorporé textuellement dans la législation Sénégalaise? Fournir les détails.

La Convention des Nations Unies relative aux Droits des Personnes Handicapées ou tout autre instrument international ratifié, en tout ou en partie, a est incorporé textuellement dans la législation nationale au nom de la constitutionnalisation des conventions et traités relatifs aux droits de la personne humaine. A ce sujet, la Constitution de 2001 est allée plus loin que le principe de primauté des conventions et traités régulièrement ratifiés et publiés sur les lois. En effet, dans le préambule de la constitution il est clairement stipulé que les conventions sur les droits de la personne humaine adoptées au sein de l'Union Africaine et de l'Organisation des Nations Unies et ratifiées par l'Etat du Sénégal. Ainsi le préambule de la Constitution stipule: « Le peuple du Sénégal souverain, (...) affirme (...) son adhésion à la Déclaration des Droits de l'Homme et du Citoyen de 1789 et aux instruments internationaux adoptés par l'Organisation des Nations Unies et l'Organisation de l'Unité Africaine, notamment la Déclaration Universelle des Droits de l'Homme du 10 décembre 1948, la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes du 18 décembre 1979, la Convention relative aux Droits de l'Enfant du 20 novembre 1989 et la Charte Africaine des Droits de l'Homme et des Peuples du 27 juin 1981; (...) approuve et adopte la présente constitution dont le préambule est partie intégrante. »

Ce faisant, les conventions citées, et celles appartenant à la même catégorie, sont élevées au rang de normes constitutionnelles; ce qui leur donne une force obligatoire équivalente à celle de la charte fondamentale (la Constitution), en vertu du principe de la hiérarchie des normes.

3 Constitution

3.1 La constitution du Cameroun contient-elle des dispositions concernant directement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite du handicap.

La constitution du Sénégal du 22 janvier 2001 contient une disposition relative au handicap. Il s'agit de l'article 17 qui stipule que « L'Etat et les Collectivités publiques ont le devoir social de veiller à la santé physique, morale et mentale de la famille, et en particulier des personnes handicapées et des personnes âgées. L'Etat garantit aux familles en général et à celles vivant en milieu rural en particulier, l'accès à la santé et au bien être ».

3.2 La constitution du Sénégal contient-elle des dispositions concernant indirectement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite indirectement du handicap

La constitution du Sénégal contient des dispositions concernant indirectement le handicap faisant référence aux déclarations de droits, au respect de la dignité de la personne humaine et à l'élimination de toute forme de discrimination¹⁵. « Le peuple du Sénégal souverain affirme son adhésion à la Déclaration des Droits de l'Homme et du Citoyen de 1789 et aux instruments internationaux adoptés par l'Organisation des Nations Unies et l'Organisation de l'Unité Africaine, notamment la Déclaration Universelle des Droits de l'Homme du 10 décembre 1948, ... la Convention relative aux Droits de l'Enfant du 20 Novembre 1989 et la Charte Africaine des Droits de l'Homme et des Peuples du 27 juin 1981 ». Il y a également une référence marquant le fait que le constituant a manifesté sa volonté d'accorder des droits et libertés aux citoyens quelles que soient leurs situations sociales. Ainsi il est inscrit au titre II de la constitution l'existence « des libertés publiques et de la personne humaine, des droits économiques et sociaux et des droits collectifs ».

A la lecture de ces dispositions constitutionnelles on se rend compte qu'il y a une obligation pour l'Etat de protéger la personne humaine de quelque catégorie qu'elle soit surtout les couches les plus vulnérables. C'est en ce sens que l'article 7 de la constitution laisse expressément entendre que « la personne humaine est sacrée. Elle est inviolable. L'Etat a l'obligation de la respecter et de la protéger ... Tout individu a droit à la vie, à la liberté, à la sécurité, au libre développement de sa personnalité, à l'intégrité corporelle (...). Le peuple sénégalais reconnaît l'existence des droits de l'homme inviolables et inaliénables comme base de toute communauté humaine, de la paix et de la justice dans le monde ».

De même, l'article 8 de la Constitution sénégalaise fait une sorte d'énumération des droits et des libertés qui sont inhérents à la personne humaine pour son plein épanouissement. L'Etat garantit en effet à tous les citoyens les libertés individuelles fondamentales, les droits économiques et sociaux ainsi que les droits collectifs.

15 Préambule de la constitution de la République du Sénégal.

4 Législation

4.1 Le Sénégal a-t-il une législation concernant directement le handicap? Si oui énumérez la législation et expliquez comment la législation aborde le handicap.

Le Sénégal a une législation concernant spécifiquement le handicap. Il s'agit de:

- la loi no 2009-30 du 2 décembre 2009 autorisant le Président de la République à ratifier la Convention relative aux Droits des Personnes handicapées et son Protocole facultatif adoptés par l'Organisation des Nations Unies, le 13 décembre 2006;
- la loi no 2010-15 du 6 juillet 2010 relative à la promotion et à la protection des droits des personnes handicapées qui définit le cadre juridique pour l'amélioration des conditions de vie des personnes handicapées;
- la loi du 30 janvier 1991 portant orientation de l'Éducation Nationale organise le système éducatif.

4.2 Le Sénégal a-t-il une législation concernant indirectement le handicap? Si oui énumérez la principale législation et expliquez comment elle réfère au handicap.

Le Sénégal a une législation concernant indirectement le handicap:

- la loi 2004-37 du 15 décembre 2004 qui modifie et complète la loi d'orientation de l'Éducation Nationale no 91-22 du 16 février 1991, l'État rend l'éducation obligatoire et gratuite pour les enfants de 6 à 16 ans: «La scolarité est obligatoire pour tous les enfants des deux sexes âgés de 6 ans à 16 ans. L'État a l'obligation de maintenir, au sein du système scolaire, les enfants âgés de 6 à 16 ans ».
- la loi du 2 mars 1998 relative à la création, à l'organisation et au fonctionnement des établissements publics de santé pose un principe de non-discrimination: «la recherche du bénéfice est incompatible avec la mission de service public de santé qui doit permettre à tout individu d'avoir accès aux soins à un coût compatible avec ses ressources ».

5 Décisions des cours et tribunaux

5.1 Les cours (ou tribunaux) du Sénégal ont-ils jamais statué sur une question(s) relative au handicap? Si oui énumérez le cas et fournir un résumé pour chacun des cas en indiquant quels étaient les faits; la (les) décision(s), la démarche et l'impact (le cas échéant) que ces cas avaient entraînés.

Les juridictions du Sénégal ont déjà statué sur une question relative au handicap.¹⁶ Il s'agit de l'application d'une disposition de l'arrêté no 5588 du 15 juin 1995

¹⁶ Handicap international Dakar, « Etude synthétique et comparative des cadres juridiques nationaux et internationaux liés aux droits des Personnes handicapées: cas du Sénégal »; F.S.J.P.- UCAD Dakar ; p 45-46.

portant création du Projet des Volontaires de l'Education et fixant les conditions de sélection des volontaires. En effet, les articles 11 et 12 dudit arrêté stipule que « l'entretien de confirmation a pour objet de déceler les cas d'infirmité avérée incompatibles avec la fonction d'enseignant ».

L'application de ces dispositions sont discriminatoires si on s'en tient au principe d'égalité devant l'emploi public qui est consacré par le législateur et qui est également considéré comme un principe général de droit devant être respecté par l'autorité réglementaire.

Ainsi, un contentieux administratif a opposé l'Association nationale des Handicapés Moteurs du Sénégal (ANHMS) à l'Etat.

Le sieur Boubacar Fadiya, personne handicapée physique et membre de l'Association nationale des Handicapés Moteurs du Sénégal subit les épreuves écrites dudit concours et il est classé second sur une soixantaine d'admissibles, mais à l'épreuve d'admission dénommée confirmation, sa candidature est écartée par le jury qui estime que « l'infirmité » dont il est atteint est incompatible avec la fonction de volontaire de l'enseignement.

Le sieur Fadiya saisit le Conseil d'Etat aux fins d'annulation, pour illégalité, de la décision du jury. C'est ainsi qu'il donne mandat à l'Association nationale des Handicapés Moteurs du Sénégal afin qu'elle agisse en son nom. La Haute juridiction a rendu sa décision le 29 juin 2000.

L'ANHMS avait soulevé comme arguments, entre autres, que le fait d'avoir éliminé le sieur Fadiya à l'entretien de confirmation constitue une flagrante violation du droit à l'égal accès des citoyens à un emploi public, droit garanti par la constitution et les traités internationaux relatifs aux droits de l'homme. La question à laquelle devait répondre le juge dans cette affaire était alors de savoir, notamment, si en l'espèce, il y avait violation du principe invoqué, dès lors que la candidature d'une personne à un emploi public se trouve rejetée en raison de son « infirmité ». Le Conseil d'Etat annule la décision du jury qui exclut le sieur Fadiya et fait une application concrète de l'égal accès des citoyens à un emploi public.¹⁷

6 Politiques et programmes

6.1 Le Senegal a-t-il des politiques ou programmes qui englobent directement le handicap? Si oui énumérez la politique et expliquez comment cette politique aborde le handicap.

Le Sénégal a des politiques ou programmes qui englobent directement le handicap il s'agit de:

- l'initiation par le Gouvernement du Programme National de Réadaptation à Base Communautaire (PNRBC) depuis 2006 conformément aux directives issues du 1^{er} conseil interministériel sur le handicap du 30 octobre 2001. L'orientation du Programme National de Réadaptation à Base Communautaire dans le cadre d'une gouvernance locale est matérialisée par la lettre circulaire no 6847/MSAS/DGAS

17 Handicap international Dakar, « Etude synthétique et comparative des cadres juridiques nationaux et internationaux liés aux droits des Personnes handicapées : cas du Sénégal » ; F.S.J.P.- UCAD Dakar ; p 45-46.

du 17 juin 2013. A ce jour 45 comités de Réadaptation à Base Communautaire fonctionnels sont créés dans les départements administratifs et 14 cadres régionaux sont installés dans les principales régions du pays.

La Direction Générale de l'Action Sociale, bras technique du Ministère de la Santé et de l'Action Sociale, a conçu un plan quinquennal 2013-2017 de mise en œuvre du Programme National de Réadaptation à Base Communautaire (PNRBC) d'un cout global de 5 milliards de francs CFA. Sur le plan des résultats, de 2012 à 2014 le PNRBC qui trouve actuellement son ancrage au Ministère de la Santé et de l'Action Sociale, a réalisé au profit des personnes handicapées 5291 projets socio-économiques individuels dans huit (08) domaines d'intervention relatifs à la scolarisation, la formation professionnelle, la communication, les soins médicaux, l'appareillage, les subventions annuelles octroyées aux organisations de personnes handicapées, les secours d'urgence et la microfinance:

- La mise en œuvre du programme relatif à la carte d'égalité des chances en faveur des personnes handicapées. Ce programme recommandé par la loi d'orientation sociale no 2010-15 offre aux personnes handicapées des avantages dans les domaines de la santé, la réadaptation, l'éducation, la formation, les transports, les finances et l'emploi. Le Gouvernement du Sénégal va produire 50 000 cartes d'égalité des chances pour les personnes handicapées d'ici 2017 sous la supervision technique du Ministère en charge de l'action sociale;
- D'autres programmes destinés aux personnes handicapées existent et sont pilotés par les partenaires techniques et financiers en rapport avec l'Etat. Les détails de ces programmes sont répertoriés dans le rapport initial du Sénégal sur le handicap transmis aux Nations-Unies.

6.2 Le Sénégal a-t-il des politiques ou programmes qui englobent indirectement le handicap? Si oui énumérez chaque politique et décrivez comment elle aborde indirectement le handicap.

Le Sénégal a des politiques ou programmes qui englobent indirectement le handicap. On peut en citer:

- la stratégie nationale de couverture maladie universelle qui prend en compte les personnes handicapées;
- le programme national de bourses de sécurité familiale qui est un programme prend en compte les personnes handicapées.

7 Organismes en charge des personnes handicapées

7.1 En dehors des cours ou tribunaux ordinaires, le Sénégal a-t-il un organisme officiel qui s'intéresse spécifiquement de la violation des droits des personnes handicapées? Si oui décrire l'organe, ses fonctions et ses pouvoirs

En dehors des cours ou tribunaux ordinaires, le Sénégal n'a pas d'organisme officiel spécifiquement orientés vers la violation des droits des personnes handicapées.

7.2 En dehors des cours ou tribunaux ordinaires, le Cameroun a-t-il un organisme officiel qui, bien que n'étant pas spécifiquement en charge de la violation des droits des personnes handicapées s'y attèle tout de même? Si oui décrire l'organe, ses fonctions et ses pouvoirs.

Le Sénégal est doté d'une Direction des Droits Humains sous la tutelle du ministère de la justice en charge de la violation des droits humains.

Il y a également le Conseil Consultatif National des Droits de l'Homme, chargé de coordonner l'activité de préparation et de présentation des rapports périodiques du Sénégal et autres documents établis par le Gouvernement, destinés aux organes régionaux et internationaux de surveillance des Droits de l'Homme et du droit international humanitaire.

8 Institutions Nationales des Droits de l'Homme (Commission des Droits de l'Homme ou Ombudsman ou Protecteur du Citoyen)

8.1 Le Sénégal est-il doté d'une Commission de Droits de l'Homme ou d'un Ombudsman ou d'un Protecteur du Citoyen? Si oui ses missions incluent-elles la promotion et la protection des droits des personnes handicapées? Si votre réponse est oui, indiquez également si la Commission de Droits de l'Homme ou l'Ombudsman ou le Protecteur du Citoyen de votre pays à jamais abordé des questions relatives aux droits des personnes handicapées.

Le Sénégal est doté d'un Comité Sénégalais des Droits de l'Homme (CSDH) créé par la loi no 97-04 du 10 mars 1997. En instituant le Comité Sénégalais des Droits de l'Homme par une loi plutôt que par un décret ou un règlement, le gouvernement a valorisé son statut et sa définition « d'institution indépendante » chargée de promouvoir les droits de l'homme par la « consultation, l'observation, l'évaluation, le dialogue et la concertation ». Son mandat consiste à promouvoir et de protéger les droits de l'homme, ainsi que de présenter des rapports sur les conditions des droits de l'homme dans le pays de même concernant les droits des personnes handicapées.

9 Organisation des personnes handicapées (OPH) et autres Organisations de la Société Civile

9.1 Avez-vous au Sénégal des organisations qui représentent et défendent les droits et le bien-être des personnes handicapées? Si oui énumérez chaque organisation et décrivez ses activités.

Au Sénégal, il existe des plusieurs organisations qui représentent et défendent les droits et le bien-être des personnes handicapées. Au premier rang des organisations, il y a la Fédération Sénégalaise des Associations de Personnes Handicapées qui,

depuis sa création en 1997, est quelque sorte le cadre de partenariat, de concertation et de support à l'action collective des 29 associations sénégalaises de personnes handicapées. La Fédération a pour but:

- de servir de cadre de concertation et de support à l'action collective des associations de personnes handicapées à qui elle laisse une large autonomie dans leurs domaines spécifiques;
- de promouvoir un cadre de partenariat avec l'Etat et toute organisation nationale ou internationale œuvrant pour la protection des droits et l'autonomie des personnes handicapées;
- d'orienter et de soutenir les efforts déployés par l'Etat et/ou toute organisation nationale ou internationale pour la promotion et la protection des Droits des personnes handicapées;
- de promouvoir l'équité de genre entre toutes les personnes handicapées;
- de représenter, toutes les fois qu'une action collective doit être exercée, tant les associations qu'elle fédère, que l'ensemble des personnes handicapées auprès des pouvoirs publics, des assemblées législatives, des organismes sociaux et des entreprises privées.

La Fédération Sénégalaise des Associations de Personnes Handicapées, pour ne pas citer toutes les associations, est composée des principales catégories dans le domaine du handicap:

- Union Nationale des Aveugles du Sénégal (UNAS);
- Association Nationale des Sourds du Sénégal (ANASSEN);
- Association Nationale des Handicapés Moteurs du Sénégal (ANHMS);
- Association Nationale des Albinos du Sénégal (ANAS);
- Association sénégalaise des victimes de mines (ASVM);
- Association des étudiants handicapés de l'Université Cheikh Anta Diop de Dakar;
- Association Nationale des Anciens Militaires Mutilés et Invalides du Sénégal (ANAMIS);
- Association Nationale des Lépreux Blanchis du Sénégal (ANDLBS); etc.

Du côté de la Société Civile, il y a plusieurs ONG Nationales et Internationales parmi lesquelles on peut citer Handicap International, Sight Savers, l'Association Allemande de Lutte contre la Lèpre et la tuberculose (DAHW), Special Olympics Sénégal, Handisable, Alliance Africaine pour le Handicap, etc.

9.2 Dans les pays de l'Afrique de l'Ouest, les d'organisations de personnes handicapées (OPH) sont-elles organisées ou coordonnées au niveau national et/ou régional?

En Afrique de l'Ouest, une quinzaine d'OPH ont été créées depuis 1995 la Fédération Ouest Africaine des Associations de Personnes Handicapées (FOAPH). Par ailleurs la Fédération Sénégalaise des Associations de Personnes Handicapées est membre de la Fédération Mondiale des Personnes Handicapées.

9.3 Si le Sénégal a ratifié la CDPH, comment a-t-il assuré l'implication des Organisations des personnes handicapées dans le processus de mise en œuvre?

En 2012, la Fédération Sénégalaise des Associations de Personnes Handicapées a mis en œuvre un projet de lutte contre la pauvreté (SAPE) avec l'appui technique

de l'Alliance Africaine pour le Handicap et financier de l'Agence Allemande de Coopération Internationale (GIZ).¹⁸ Grâce ce programme spécifique, un processus de mainstreaming a été adopté et permis dans le cadre de la stratégie nationale de planification d'enclencher une démarche inclusive, participative et démocratique dans le processus de conception, de l'exécution, de suivi et d'évaluation des programmes et projets sociaux.

Plus spécifiquement dans le cadre du Programme National de Réadaptation à Base Communautaire, les personnes handicapées sont représentées dans les organes locaux de gestion composés de cadres de concertation régionaux et de comités départementaux de réadaptation à base communautaire. Aussi, dans le cadre de la mise en œuvre du programme relatif à la carte d'égalité des chances, les personnes handicapées sont représentées au sein des commissions techniques départementales chargées d'instruire les demandes de cartes d'égalité des chances.

La création prochaine du haut conseil à l'égalité des chances des personnes handicapées va faciliter davantage le suivi des politiques publiques dans le domaine du handicap en rapport avec les personnes handicapées.

9.4 Quels genres d'actions les OPH ont-elles prise elles-mêmes afin de s'assurer qu'elles soient pleinement intégrées dans le processus de mise en œuvre?

Après sa création en 1997, la Fédération Sénégalaise des Associations de Personnes handicapées a développé un plaidoyer pour l'augmentation des crédits de l'Etat destinés aux Personnes handicapées, la tenue en octobre 2001 du 1er conseil interministériel sur le handicap, le processus d'adoption de la loi d'orientation sociale pour la promotion et la protection des personnes handicapées.

9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH lors de leur engagement dans la mise en œuvre?

Pour l'application et la mise en œuvre effective de la loi d'orientation no 2010-15, il y a beaucoup de difficultés pour la délivrance des cartes d'égalité des chances.¹⁹

9.6 Y'a-t-il des exemples pouvant servir de 'modèles' pour la participation des OPH?

Le processus d'élaboration de la loi sociale, de 2004 à 2010, a été un exemple de bonnes pratiques en matière de participation des personnes handicapées. En effet,

18 Rapport d'étude sur l'état d'avancement du DSRP du niveau de participation et nature de la collaboration entre les OPH et le gouvernement sur le processus d'inclusion de la question du handicap. (Septembre-2012, Dakar).

19 Art. 3. de la loi d'orientation sociale no 2010-15 du 6 juillet 2010 relative à la promotion et à la protection des droits des personnes handicapées stipule que toute personne handicapée reçoit une carte spécifique prouvant son handicap et appelée « carte d'égalité des chances ». Cette carte est délivrée par le Ministère chargé de l'Action sociale sur proposition des commissions techniques départementales. La « carte d'égalité des chances » permet à son titulaire de bénéficier des droits et avantages en matière d'accès aux soins de santé, de réadaptation, d'aide technique, financière, d'éducation, de formation, d'emploi, de transport, ainsi qu'à tout autre avantage susceptible de contribuer à la promotion et à la protection des droits des personnes handicapées. La fonctionnalité de commissions technique et d'éducation spéciale composées des personnes qualifiées nommées sur propositions des structures de personnes handicapées, pose problème et ce, malgré la signature du décret 2012-1038 du 2 Octobre 2012 portant création, composition, attributions et modalités de fonctionnement desdites commissions dans chaque département.

plusieurs ateliers régionaux ont été marqués par la présence et l'effectivité de toutes les catégories de personnes handicapées.

9.7 Y'a-t-il des résultats spécifiques concernant une mise en œuvre prospère et/ou une reconnaissance appropriée des droits des personnes handicapées résultant de l'implication des OPH dans le processus de mise en œuvre?

Le processus d'adoption de la convention relative aux droits de personnes handicapées a vu aussi la participation de trois personnes handicapées représentant les associations. Ces représentants des organisations de personnes handicapées ont même appuyé le gouvernement lors des différentes des travaux de la commission des Nations Unies sur les droits des personnes handicapées.

9.8 Votre recherche (pour ce projet) a-t-elle identifié des aspects qui nécessitent le développement de capacité et soutien pour les OPH afin d'assurer leur engagement dans la mise en œuvre de la Convention?

Les organisations de personnes handicapées de même que les professionnels du secteur du handicap, doivent bénéficier d'un renforcement de capacités en vue de l'application et la mise en œuvre des textes législatifs et réglementaires mais également la mise en œuvre de la convention des Nations Unies.

9.9 Y'a-t-il des recommandations provenant de votre recherche au sujet de comment les OPH pourraient être plus largement responsabilisées dans les processus de mise en œuvre des instruments internationaux ou régionaux?

Les personnes handicapées et leurs organisations doivent être impliquées au niveau local, national, régional et international dans la conception, l'exécution, le suivi et l'évaluation des processus de mise en œuvre des instruments internationaux ou régionaux. A ce titre les organisations de personnes handicapées doivent intégrer les comités de suivi et la commissions départementales chargées de la mise en œuvre de la loi d'orientation sociale au Sénégal.

9.10 Y'a-t-il des instituts de recherche spécifiques au Sénégal qui travaillent sur les droits des personnes handicapées et qui ont facilité l'implication des OPH dans le processus, y compris la recherche?

Il n'existe pas d'instituts de recherche spécifiques travaillant au Sénégal sur les droits des personnes handicapées.

Toutefois, on peut relever l'existence de structures de formation supérieure favorisant des recherches relatives à la promotion et la protection des droits des personnes handicapées. Il s'agit de l'École nationale des travailleurs sociaux spécialisés (ENTSS) et l'Institut des Droits de l'Homme et de la Paix de l'Université Cheikh Anta Diop de Dakar.

En effet, l'ENTSS créée par décret no 94-562 du 2 juin 1994 disposent d'une filière formation et réinsertion des personnes handicapées au niveau de laquelle plusieurs mémoires de recherche sur les personnes handicapées ont été réalisées les étudiants avec une implication des concernées.

L'Institut des Droits de l'Homme et de la Paix (IDHP) créé par le décret 83-302 du 16 mars 1983 initie également des recherches dans le domaine du handicap et accompagne les personnes handicapées et leurs organisations.

Actuellement une étude sur les personnes affectées par la lèpre est en cours de réalisation par l'ENTSS et l'IDHP avec l'appui de l'association Allemande de lutte contre la Lèpre et la tuberculose au Sénégal (DAHWS-Sénégal).

Par ailleurs, l'Alliance Africaine pour le Handicap (ADA), Handicap International, Sight Savers, l'Association Handicap Formation Education et Communication, de même que le Bureau de la Banque Mondiale à Dakar ont développé plusieurs travaux de recherche, depuis 2004, ayant permis une connaissance acceptable des droits et l'implication des personnes handicapées elles-mêmes.

10 Branches gouvernementales

10.1 Avez-vous de(s) branche(s) gouvernementale(s) spécifiquement chargée(s) de promouvoir et protéger les droits et le bien-être des personnes handicapées? Si oui, décrivez les activités de cette (ces) branche(s).

Au Sénégal, la tutelle administrative des organisations de personnes handicapées est assurée par le Ministère de la Santé et de l'Action Sociale. En vue d'améliorer les conditions de vie des groupes vulnérables et plus particulièrement des personnes handicapées le gouvernement a renforcé le cadre institutionnel de l'action sociale par la création d'une Direction Générale de l'Action Sociale (DGAS) composée de 3 directions techniques chargées respectivement de la gestion du handicap, de la vulnérabilité et de l'action médico-sociale. La gestion du handicap est confiée à la Direction Nationale de la Protection et de la Promotion des Personnes handicapées qui a pour mission de:

- élaborer, mettre en œuvre et suivre la politique nationale en matière d'intégration socio-économique et de promotion des personnes handicapées;
- mettre en œuvre le Programme national de Réadaptation à base communautaire des personnes handicapées;
- contribuer à l'amélioration des conditions de vie des populations handicapées mutilées de la lèpre des villages de reclassement sociales à travers la réadaptation fonctionnelle.

11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

11.1 Quels sont les défis contemporains des personnes handicapées au Sénégal?

Les principaux défis contemporains concernent la lutte contre toutes les formes de discrimination, les représentations sociales négatives qui font que plusieurs enfants handicapés disparaissent à bas âge, le cantonnement injustifié de personnes

malades ou mutilées par la lèpre. La protection des droits de toutes les catégories de personnes handicapées doit également être un défi majeur. La maîtrise des données statistiques est préoccupation les acteurs du secteur du handicap car il est difficile d'intervenir sur cible dont on ne maîtrise pas le nombre.

11.2 Comment le Sénégal répond-t-il aux besoins des personnes handicapées au regard des domaines ci-dessous énumérés?

Au Sénégal, des mesures sont envisagées dans plusieurs domaines pour répondre aux besoins des personnes handicapées au regard des domaines ci-dessous énumérés :

- **Accès aux bâtiments publics;**

Ainsi le nouveau Code de la construction voté le 21 janvier 2010 par le parlement, dans son article L5 stipule que « les dispositions architecturales et les aménagements des bâtiments servant à l'habitation collective ou destinés à abriter des travailleurs, les édifices publics destinés à la formation, notamment les locaux scolaires, universitaires et les établissements sanitaires doivent être conformes aux normes de constructions, définies dans la partie réglementaire, pour l'accès des personnes handicapées ».

Cependant, rares sont encore les édifices publics accessibles aux personnesshandicapées. Malgré des principes acquis, au Ministère de l'éducation, rares sont les édifices publics accessibles aux personnesshandicapées.²⁰

- **Accès au transport public;**

Les questions de mobilité et d'accessibilité sont également abordées dans la loi d'orientation sociale no 2010-15 du 6 juillet 2010, qui y consacre un chapitre entier notamment les articles allant de 31 à 36.

En complément aux dispositions du Code de la construction, l'article 32 de la loi d'orientation sociale précise qu' « aucune autorisation de construire, rénover ou réhabiliter un édifice recevant du public, n'est délivrée par les autorités compétentes, si les plans ne respectent pas les normes définies à l'article 31 ».

Les articles suivants font état du droit des personnes handicapées à l'accès aux transports collectifs (avec des places réservées – article 33), aux transports publics ordinaires ou adaptés lorsque cela est nécessaire (article 34). Enfin, les articles 35 et 36 concernent plus particulièrement les véhicules adaptés pour personnes handicapées, donnant une exonération des droits et taxe en cas de don (et pour un usage direct), et des facilités de stationnement devant le lieu de travail du conducteur handicapé.

C'est dans cette logique que le chef de l'Etat, en accordant une audience au nouveau bureau de la Fédération Sénégalaise des associations de Personnes handicapées, leur a offert un bus adapté au transport de personnes handicapées.

- **Accès à l'éducation;**

La loi votée à l'assemblée nationale le 30 janvier 1991 portant loi orientation de l'Éducation Nationale du Sénégal vise la réalisation d'un objectif d'une scolarisation universelle de qualité et à la mise en place des conditions d'une éducation de base pour tous (donc y compris pour les enfants en situation de handicap). La loi no 2004-37 du 15 décembre 2004 modifie et complète la loi

20 Guide de poche sur la législation du handicap au Sénégal, p 20.

d'orientation de l'Éducation Nationale no 91-22, promulguée le 16 février 1991, rend l'éducation obligatoire et gratuite pour tous les enfants de 6 à 16 ans.

Toutefois, il faut signaler que l'Etat est en train de faire des efforts à ce niveau en tenant compte des difficultés de déplacement de cette catégorie sociale en adaptant les nouvelles constructions aux besoins des personnes handicapées.

On peut citer en ce sens les aménagements de passages opérés par la Faculté de droit et la mesure prise par le Doyen en vue de mettre la documentation à la disposition des étudiants handicapés, notamment au niveau du Centre de recherche rattaché à la faculté.

Par ailleurs, au niveau de la bibliothèque de l'Université Cheikh Anta Diop, la direction a également pris des dispositions en ce sens. Il existe en effet des passages aménagés de sorte à faciliter l'accès des services de documentation aux étudiants et autres personnes handicapés.

Le Centre des Œuvres Universitaire de Dakar n'est pas resté en marge de ce mouvement car de bonnes pratiques y sont observées par les autorités qui prennent en compte, de manière systématique dans la construction de nouveaux édifices, les problèmes d'accessibilité des personnes handicapées.²¹

Toutefois, la situation des enfants et jeunes adultes handicapés face à l'éducation est très disparate. En effet, 3 personnes handicapées sur 4 ne savent ni lire ni écrire dans une langue quelconque contre 3 sur 5 pour le reste de la population. Les capacités d'accueil des écoles spécialisées sont insuffisantes et la couverture géographique est très limitée avec une forte concentration sur la région de Dakar. Depuis 2007, le Ministère de l'Éducation œuvre à mieux adapter l'école aux besoins spéciaux des enfants en difficulté ou en situation de handicap. Concernant l'éducation inclusive, le choix du Ministère s'est porté sur la formation de 46 maîtres en éducation intégratrice et l'action s'inscrit dans le cadre d'un projet Pilote d'Éducation Inclusive et Intégratrice.²²

- **Accès à l'emploi.**

Au Sénégal, le Code du travail prévoit, dans son article L.180, que «un décret fixe les conditions dans lesquelles les employeurs devront réserver certains postes aux personnes handicapées».

Le décret du 7 mars 1994 fixe les modalités d'organisation et de fonctionnement des comités d'hygiène et de sécurité du travail dont une des missions est la prévention des risques professionnels pouvant être source de handicap.

L'article 29 de la loi d'orientation sociale prévoit dorénavant un quota de 15% de personnes handicapées pour tous les recrutements dans la fonction publique.

Par ailleurs l'article 26 de la loi d'orientation sociale énonce clairement que «la situation de handicap ne peut, en aucun cas, constituer un motif de discrimination pour l'accès à l'emploi dans les secteurs public et privé, lorsque sont réunies les conditions de formation et de qualification professionnelle requises».

- **Accès aux soins de santé.**

21 Handicap international Dakar, « Etude synthétique et comparative des cadres juridiques nationaux et internationaux liés aux droits des Personnes handicapées: cas du Sénégal » ; F.S.J.P.- UCAD Dakar ; p 45-46.

22 Comme ci-dessus, p 14.

Dans un autre domaine, la lettre circulaire du ministre de la santé no 023-95 / MSAL du 23 septembre 1995 assure la gratuité des soins aux personnes handicapées dans les centres de santé.

L'arrêté du 17 juillet 2001 portant Charte du Malade dans les Établissements Publics Hospitaliers dans son article 2 stipule que « les personnes handicapées doivent être prises en compte dans l'aménagement des sites d'accueil ». La lettre circulaire du ministre de la santé du 4 novembre 2004: « dans le cadre de la stratégie de promotion de l'accès aux services de santé des couches vulnérables ... toutes les dispositions nécessaires [doivent être prises] pour faciliter aux aveugles et aux membres de leurs familles l'accès aux soins dans les structures sanitaires ».

Quant à la loi du 2 mars 1998 relative à la création, à l'organisation et au fonctionnement des établissements publics de santé, elle pose un principe de non discrimination: « la recherche du bénéfice est incompatible avec la mission de service public de santé qui doit permettre à tout individu d'avoir accès aux soins à un coût compatible avec ses ressources ».

Dans la réalité les besoins des personnes handicapées en matière de soins sont multiples et coûteux. Leur coût est souvent hors de portée des personnes handicapées vivant majoritairement aisein de familles défavorisées. En terme d'accessibilité physique, rares sont les structures sanitaires disposant d'aménagements particuliers en faveur des personnes handicapées qui ignorent également l'existence de certaines dispositions en leur faveur pour leur prise en compte sur le plan sanitaire.

11.3 Le Sénégal accorde-t-il des subventions pour handicap ou autre moyen de revenue en vue de soutenir les personnes handicapées?

Sur le plan des résultats, de 2012 à 2014, le Programme National de Réadaptation à Base Communautaire qui trouve actuellement son ancrage au Ministère de la Santé et de l'Action Sociale²³, a appuyé la mise en œuvre de 5291²⁴ projets socio-économiques individuels au profit des personnes handicapées dans huit (08) domaines d'intervention relatifs à la scolarisation, la formation professionnelle, la communication, les soins médicaux, l'appareillage, les subventions annuelles octroyées aux organisations de personnes handicapées, les secours d'urgence et la microfinance.

11.4 Les personnes handicapées ont-elles un droit de participation à la vie politique (représentation politique et leadership, vote indépendant etc.) au Sénégal?

Au nom du principe d'égalité des citoyens, institué par la constitution, les personnes handicapées ont un droit de participation à la vie politique au Sénégal.²⁵

23 Arrêté ministériel no 284 en date du 24 janvier 2007 portant création et fixant les règles d'organisation et de fonctionnement du Projet de Réadaptation à base communautaire des Personnes handicapées (R.B.C)

24 Cf (Réponses du Gouvernement du Senegal au questionnaire de Madame Catalina Devandas-Agular, Rapporteuse specialE des Nations-Unies sur les droits des personnes handicapées).

25 Deux (02) femmes handicapées sont nommées conseillers respectivement à la Présidence de la République et au Conseil économique social et environnemental.

Ainsi plusieurs personnes handicapées ont été élues dans les communes. Il y a même des personnes handicapées maires de communes.²⁶

11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilité:

Les femmes handicapées ont un leadership très avéré. Elles sont d'ailleurs actives dans toutes les organisations de personnes handicapées. Au niveau de la Fédération Sénégalaise des Associations de Personnes Handicapées où elles animent un comité dynamique et se font représenter dans la plupart des manifestations des instances féminines locales et nationales. C'est ainsi que le comité national des femmes de la Fédération Sénégalaise des Associations de Personnes Handicapées initie chaque année, le 8 mars, une activité importante à l'occasion de la journée internationale de la femme. Par ailleurs les femmes handicapées sont bien représentées à l'Assemblée générale et au Conseil d'administration de la Fédération Sénégalaise des Associations de Personnes Handicapées.

Au niveau de l'enseignement supérieur, les étudiants handicapés de l'U.C.A.D. (Université Cheikh Anta Diop de Dakar) sont également très dynamiques. En guise d'exemple, le soutien de la Direction de la Vie Estudiantine en Relation avec la Cité (DVERC) à travers sa division chargée des étudiants handicapés, a permis la prise en compte des besoins de l'AEH (Association des Etudiants handicapés). Les actions combinées de l'AEH/UCAD et de la DVERC ont permis d'améliorer sensiblement l'existence des personnes en situation de handicap dans le campus.²⁷

Les nouvelles infrastructures de l'université (salles de cours, toilettes, chambres, etc.) commencent à intégrer la dimension d'accessibilité. Des bourses sont octroyées à tous les étudiants handicapés. La priorité pour se loger au campus leur est donnée. Leur accès aux services techniques et administratifs de l'université (perception de bourse, obtention de la carte d'étudiant, accès au service médical, au restaurant etc.)

Est amélioré. Le Rectorat et le Centre des Œuvres Universitaires de Dakar (COUD) prennent en charge l'achat d'aides techniques facilitant la mobilité et l'accès au campus et au savoir. Des étudiants handicapés méritants ont accès à des bourses étrangères et sont préparés à l'insertion professionnelle

Les enfants déficients intellectuels bénéficient des programmes particuliers d'éducation et de formation favorisant leur socialisation et leur autonomisation.²⁸

26 La loi d'orientation sociale no 2010-15 du 6 juillet 2010 à travers l'article 4 dispose du devoir de l'Etat et les Collectivités Locales, dans leurs ressorts respectifs, assurent la pleine et entière participation des personnes handicapées à la vie sociale, économique et culturelle de la Nation. La constitution du 7 janvier 2001 proclame dans son préambule:

- l'accès de tous les citoyens, sans discrimination, à l'exercice du pouvoir à tous les niveaux;
- l'égal accès de tous les citoyens aux services publics;
- le rejet et l'élimination, sous toutes leurs formes de l'injustice, des inégalités et des discriminations.

27 La Revue Les droits en action (édition Sénégal) fait état des mécanismes de prise en compte des besoins des étudiants en situation de handicap au sein de l'université Cheikh Anta Diop de Dakar. P 77.

28 Institution de deux structures étatiques:
- le Centre de formation de rééducation des déficients intellectuels sis dans l'enceinte du Centre Talibou Dabo; sous la tutelle du Ministère de l'Education nationale depuis 1997.

Ainsi, il existe une dizaine de centres d'éducation et de formation dans la région de Dakar travaillant en partenariat avec Special Olympics Sénégal.

Par rapport aux **enfants handicapés sensoriels**, les pouvoirs publics ont entrepris des actions allant dans le sens de la création de centres pouvant accueillir des enfants atteints de handicap. Dans ce cadre on peut citer:

- - le Centre Talibou Dabo pour les handicapés moteurs;
- - le Centre Verbo tonal pour les déficients auditifs;
- - l'institut national d'éducation et de formation des jeunes aveugles de Thiès.

12 Perspective future

12.1 Y'a-t-il des mesures spécifiques débattues ou prises en compte présentement au Sénégal au sujet des personnes handicapées?

Depuis l'adoption de la loi d'orientation sociale d'énormes efforts sont déployés pour une application effective. A ce titre, la carte d'égalité des chances alimentent beaucoup de débats. Ainsi grâce à cette carte les ayants droit sont enrôlés dans les programmes de gratuité, la couverture maladie universelle et la bourse de sécurité familiale.

Les commissions départementales joueront ainsi un rôle important pour assurer l'autonomisation des personnes handicapées en instaurant un processus itératif d'apprentissage et d'adaptation d'un système d'évaluation du handicap.

12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir au Sénégal? Pourquoi?

Parmi les réformes légales à proposer on peut noter:

- l'abrogation de la loi no 76-03 du 25 mars 1976 relative au traitement de la lèpre et au reclassement social des lépreux guéris et mutilés. Cette loi est devenue obsolète car depuis plus de 20 ans la lèpre se guérit grâce à une polychimiothérapie. De ce fait on n'a plus besoin de cantonner des citoyens sénégalais dans des maisons pavillonnaires et des villages ne figurant pas sur la carte administrative;

28 - le Centre de psycho pédagogique « Ker Xaleyi » de l'Hôpital de Fann sous la tutelle du Ministère de la Santé.

L'Etat bénéficie par ailleurs de appui des initiatives privées à l'image du centre privé psychopédagogique « Aminata Mbaye » orienté dans l'éducation et la formation des enfants déficients mentaux et ce en application des dispositions de l'article 19 de la loi d'orientation de l'éducation nationale 91-22 du 16 février 1991 qui fait référence à l'éducation spéciale, partie intégrante du système éducatif, devant assurer la prise en charge médicale, psychologique et pédagogique des enfants présentant un handicap de nature à entraver le déroulement normal de leur scolarité ou de leur formation.

- la signature des décrets relatifs à la haute autorité chargée de promotion des droits²⁹ et le fonds d'appui³⁰ pour les personnes handicapées, prévus par la loi d'orientation sociale;
- l'institution dans chaque département administratif une commission consultative chargée de l'accessibilité des édifices publics;
- la mise en œuvre un programme d'éducation inclusive favorisant l'accueil des enfants handicapés dans les écoles ordinaires;
- l'institution un programme de formation régionale sur la réadaptation à base communautaire;
- la création dans chaque département administratif un centre polyvalent d'orientation et de réadaptation des personnes handicapées.³¹

29 Art. 48 de la loi d'orientation sociale no 2010-15 du 6 juillet 2010 relative à la promotion et à la protection des droits des personnes handicapées stipule: la création à la Présidence de la République, d'une Haute Autorité chargée de la promotion et de la protection des Droits des personnes handicapées, ayant pour objectif d'appuyer les efforts de l'Etat dans l'élaboration des politiques nationales et les stratégies sectorielles dans tous les domaines touchant le handicap.

30 Art. 47 de la loi no 2010-15 du 6 juillet 2010 impose à l'Etat la mise en place d'un fonds d'appui pour les personnes handicapées, destiné à financier et à promouvoir la pleine participation, l'intégration et l'activité économique des personnes handicapées. Cependant, le financement, le fonctionnement et la répartition des ressources de ces fonds doivent être déterminés par décret.

31 Applicabilité des dispositions de l'article 5. de cette même loi qui stipulent que sont obligatoires, les politiques publiques de l'Etat, nécessaires à la prévention des handicaps, leur traitement, leur prise en charge, la réadaptation, entre autres à travers des centres de réadaptation pour personnes handicapées.

SECTION C: REGIONAL DEVELOPMENTS

**Disability rights in the African regional human rights system
during 2015**

REGIONAL DEVELOPMENTS

THE JURISPRUDENCE OF THE COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS IMPLICATIONS FOR AFRICA

*Innocentia Mgijima-Konopi**

1 Introduction

The Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD), adopted by the United Nations (UN) and entered into force at the same time as the Convention, is a crucial addition to the international system of human rights protection.¹ The Protocol provides for a mechanism for individual complaints to be submitted to the Committee on the Rights of Persons with Disabilities (CRPD Committee) by or on behalf of individuals or groups of individuals who believe that their rights under the CRPD have been violated by the state party. The Protocol gives persons with disabilities who are victims of such violations a voice and makes states more responsive and accountable to their obligations under the CRPD. The communication procedures of the Protocol are like those of other UN human rights treaty systems.²

Article 1 of the Protocol empowers the treaty-monitoring body of the CRPD, the CRPD Committee, to receive and review communications alleging violations of the Convention by participating state parties. To this end, the Committee confidentially communicates to state parties the communications received and allows the state six months to respond in writing with explanations or clarifying statements. Thereafter the

* LLB (Hons) (Witwatersrand), LLM (National University of Ireland, Galway); Disability Rights and Law Schools Project Co-ordinator, Centre for Human Rights, Faculty of Law, University of Pretoria; Innocentia.Mgijima@up.ac.za

1 Adopted on 13 December 2006, entered into force on 3 May 2008.

2 Eg Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

Committee reviews the communication and conveys its decision to the state party concerned and the author of the communication.³ Although the Protocol is a legally-binding instrument, decisions of the CRPD Committee are not legally binding. The Committee, through its decisions under the Protocol, contributes towards the interpretation and application of the CRPD and the development of normative standards. The Protocol allows the Committee to express an expert opinion as to whether the violation of a right has occurred and to recommend appropriate remedies.

The CRPD, along with its Optional Protocol, has been strongly embraced by African states. This is evidenced by the fact that, as of July 2016,⁴² African states have ratified the CRPD and 23 states are party to the Optional Protocol.⁴ This commentary seeks to, first, describe and critically discuss the emerging jurisprudence of the CRPD Committee. The focus will be on the communications where the Committee has to date found violations of the CRPD, namely, *HM v Sweden*, *Szilvia Nyusti and Péter Takács v Hungary*, *Marie-Louise Jungelin v Sweden*, *Liliane Gröninger v Germany*, *SC v Brazil* and *Zsolt Bujdosó & 5 Others v Hungary*.

Akin to their counterparts in other regions, most African countries face significant challenges in formulating, domesticating and implementing disability rights to make the rights guaranteed in the CRPD a reality for persons with disabilities on the continent. The commentary further explores the implications for the African region, where the emerging jurisprudence of the CRPD Committee may offer guidance to state parties in the interpretation and implementation of rights.

2 *HM v Sweden*

HM v Sweden was the first communication brought against a state that was reviewed by the Committee.⁵ HM, a Swedish national suffering from a degenerative chronic connective tissue disorder, was refused permission by her local municipality to install a hydrotherapy pool for rehabilitation purposes on her property. The municipality refused to permit the building of the pool on the basis that the proposed pool would be in contravention of the Planning and Building Act. The pool would to a large extent be built on a zone of land that, per the town's development plan, should not be built on. Even though HM's debilitating condition made it difficult for her to leave her house to obtain treatment or rehabilitation at a hospital without great risk of injury, the municipality maintained that they could not permit an exemption in her case. HM's appeals against the decision to

3 CRPD (n 1 above) arts 3 & 5.

4 For a list of countries that have signed, ratified and acceded to the Optional Protocol, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&lang=en (accessed 30 April 2016).

5 Communication 3/2011, *HM v Sweden*, CRPD Committee (19 April 2012), UN Doc CRPD/C/7/D/3 (2011).

several bodies, including the Administrative Court of Appeal, were refused.⁶

In her communication to the CRPD Committee, HM alleged that the state had discriminated against her by failing to take into account her particular circumstances and needs in applying the Planning and Building Act.⁷ Furthermore, the state party's refusal to grant HM permission to build the pool violated her right to enjoy the highest attainable standard of health without discrimination, her right to live independently and to be included in the community, and her right to attain and retain maximum independence and full inclusion and participation in all aspects of life through comprehensive rehabilitation, as provided for in articles 25, 19(b) and 26 of the Convention respectively.

Though *HM v Sweden* is a well-known case and the principles it sets out well established, two aspects of the Committee's findings deserve mention considering their implications for African state parties to the Convention. The Committee in its findings emphasised that the failure to afford reasonable accommodation to persons with disabilities where such accommodation does not impose a disproportionate or an undue burden to the state constitutes discrimination under articles 2 and 5 of the Convention.⁸

The principle of reasonable accommodation as set out in *HM v Sweden* has not yet found resonance on the African continent. The picture emerging from reports submitted by Tunisia, Kenya, Ethiopia, Gabon and Uganda to the CRPD Committee in accordance with state obligations under article 35 is that the concept of reasonable accommodation has not been fully incorporated in the legislations of many state parties to the Convention from the region. In countries such as Tunisia, where the concept is incorporated in national legislation, it is not defined and, consequently, there is a lack of clarity on its application.⁹ In South Africa, according to the Promotion of Equality and Prevention of Unfair Discrimination Act, all persons and entities have an obligation to reasonably accommodate persons with disabilities.¹⁰ However, reasonable accommodation is not explicitly defined in the definition section of the Act.¹¹ In Ethiopia, the concept only relates to employment and not to the other areas covered by the Convention.¹² For the principle of reasonable accommodation to take root, African state parties will first need to address

6 *HM* (n 5 above) paras 2.1-2.7.

7 *HM* (n 5 above) paras 3.1-3.4.

8 *HM* (n 5 above) paras 8.1-10.

9 Concluding Observations of the CRPD to Tunisia, UN Doc CRPD/C/TUN/1 (2011) paras 12-13.

10 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, sec 9.

11 PEPUDA (n 10 above) sec 1.

12 Concluding Observations of the CRPD to Ethiopia, UN Doc CRPD/C/ETH/1 (2016) paras 8-9.

the factors impeding the implementation of the principle. This requires them to incorporate the concept of reasonable accommodations defined in article 2 of the Convention in national legislation, explicitly recognising the denial of reasonable accommodation as disability-based discrimination. State parties should raise greater awareness of the concept of reasonable accommodation among the public and private sectors in their countries, in particular civil servants and members of the judiciary. Also, a comprehensive definition of reasonable accommodation that applies to all laws should be adopted nationally.

The CRPD Committee also recognised that a law enacted without any bias, which is applied in a neutral manner, may still have a discriminatory effect on persons with disabilities when their circumstances are not considered. The achievement of substantive equality requires that legislation and the way it is applied should not have either the purpose or effect of impairing or nullifying the recognition and enjoyment or exercise of any rights of persons with disabilities on an equal basis with others. The resounding message for African state parties is that, beyond ensuring equality in terms of outcomes in legislation, laws need to be applied to people with disabilities in a process which considers their individual circumstances.

3 *Szilvia Nyusti and Péter Takács v Hungary*

The case of *Szilvia Nyusti and Peter Takács v Hungary*¹³ provided the CRPD Committee with the opportunity to analyse the scope of the duty of the state under article 9(2)(b) of the CRPD. The article obligates states to ensure that private entities that offer facilities and services to the public consider all aspects of accessibility for persons with disabilities. The case was brought by two Hungarian nationals with severe visual impairments who separately, in their individual capacities, concluded contracts for private current account services which included banking card services with OTP Bank.¹⁴ Despite paying the same annual fees for banking card services as other clients, the complainants were unable without assistance to use the bank's automated teller machines (ATMs) as these were inaccessible, lacking braille fonts, audible instructions and voice assistance. The Committee found that Hungary was in violation of article 9(2)(b) of the Convention by failing to ensure that persons with visual impairments have unimpeded access to the services provided by the bank on an equal basis with other clients.¹⁵

13 Communication 1/2010, *Szilvia Nyusti & Péter Takács v Hungary*, CRPD Committee (16 April 2013), UN Doc CRPD/C/9/D/1 (2010).

14 *Szilvia Nyusti* (n 13 above) paras 2.1-2.17.

15 *Szilvia Nyusti* (n 13 above) paras 9.1-11.

Some research has been done that establishes that financial services and products offered by many private and public banks operating in Africa are not accessible to persons with disabilities.¹⁶ Persons with disabilities in many parts of the continent continue to be denied the opportunity to open and operate bank accounts independently, and they have limited access to financial services, including online banking services and ATMs.¹⁷

The findings of the Committee in *Szilvia Nyusti and Peter Takács v Hungary*, together with the General Comment issued by the Committee on accessibility, help in clarifying the obligations of African state parties to ensure that all goods, products and services open or provided to the public, must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise.¹⁸ The Committee made it clear that disability rights have vertical as well as horizontal application in that they are binding on the state as well as on private individuals. States undertake in article 4(1)(e) of the Convention to take the necessary measures, such as legislative and administrative measures, needed to eliminate discrimination on the basis of disability by any person, organisation or private enterprise. If disability rights are conceived as binding only on the state, they will be of limited reach as private individuals will not be placed under an obligation to desist from discrimination and to treat disabled people equally.

The Committee in *Szilvia Nyusti and Peter Takács v Hungary* provided concrete guidelines on how states can make the right to access to banking services a reality for their citizens with disabilities.¹⁹ The Committee recommended, *inter alia*, that states:

- (a) establish minimum standards for the accessibility of banking services provided by private financial institutions for persons with visual and other types of impairments;
- (b) create a legislative framework with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment by private financial institutions of previously inaccessible banking services provided by them into accessible ones;
- (c) have in place effective sanctions for non-compliance with accessibility standards;
- (d) ensure that all newly-procured ATMs and other banking services are fully accessible to persons with disabilities; and

16 O Jared-Omari & O Bosire-Zachary 'Investigating ATM system accessibility for people with visual impairments' (2013) 15 *IOSR Journal of Computer Engineering* 13-18.

17 Eg Lesotho, Zimbabwe, Kenya http://www.informativenews.co.ls/index.php?option=com_content&view=article&id=1547&catid=20&Itemid=389 (accessed 17 September 2016); <https://www.enca.com/africa/nigerias-disabled-get-first-wheelchair-friendly-atm> (accessed 17 September 2016); <http://www.gov.za/social-development-launches-national-disability-rights-awareness-month-3-nov> (accessed 17 September 2016).

18 CRPD Committee, General Comment 2 para 25.

19 *Szilvia Nyusti* (n 13 above) para 10(2).

- (e) provide for appropriate and regular training on the scope of the CRPD and its Optional Protocol to banks, judges and other judicial officials.

Increased financial inclusion of persons with disabilities is central to poverty eradication, sustainable economic growth and the achievement of the Sustainable Development Goals in Africa. By adopting the recommendations set out by the Committee in the above case and in its General Comment, African state parties will be able to pave the way for accessible financial services for persons with disabilities.

4 *Zsolt Bujdosó & 5 Others v Hungary*

In *Zsolt Bujdosó & 5 Others v Hungary*,²⁰ the names of six complainants with intellectual disabilities under guardianship were automatically removed from the electoral register in accordance with article 70(5) of the Hungarian Constitution which was in force at the time. The Hungarian Constitution explicitly stipulated that only persons with full legal capacity could exercise their right to vote.²¹ Persons placed under partial or full guardianship were excluded from voting. Due to this restriction, the complainants could not vote in either the parliamentary or municipal elections held in 2010.

The CRPD Committee examined the state party's obligation to ensure the rights of persons with disabilities to vote in elections on a non-discriminatory basis, guaranteed by article 29 of the CRPD, in a communication brought to it by Zsolt Bujdosó and five others. Broadly stated, article 29 affirms the obligation of state parties to the Convention to ensure that persons with disabilities can effectively and fully participate in the political and public affairs of their countries on an equal basis with others, which includes the right to vote.

In response to the complaint, Hungary argued that this automatic denial of the right to vote of persons under guardianship had been remedied through the passing of legislation which now required courts to individually assess on a case-by-case basis whether a person under guardianship has the capacity to vote. Hungary claimed that the new provision was in line with the landmark judgment of the European Court of Human Rights (European Court) in the case of *Alajos Kiss v Hungary*.²² In this case, the applicant had complained about his automatic disenfranchisement due to his mental health status. In a unanimous decision, the European Court held in paragraph 44 of the judgement that '[a]n indiscriminate removal of voting rights, without an individualised

20 Communication 4/2011, *Zsolt Bujdosó & 5 Others v Hungary*, CRPD Committee (2-13 September 2013), UN Doc CRPD/C/10/D/4 (2011).

21 *Zsolt Bujdosó* (n 20 above) para 2.

22 (2010) ECHR 38832/06.

judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote’.

The Harvard Law School Project on Disability submitted a third-party intervention in support of the complainants.²³ The interveners requested that the Committee in its decision decide on the broader question raised by the communication, namely, whether subjecting persons with disabilities to individualised assessment of their voting capacity is consistent with article 29 of the CRPD. The interveners submitted that article 29 of the CRPD required states to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, including by adapting their voting procedures to facilitate the exercise of the right to vote by persons with disabilities.

The Committee found Hungary to be in violation of article 29 of the CRPD.²⁴ The Committee concluded that excluding the right to vote based on actual or perceived intellectual or psychosocial disability was discriminatory and inconsistent with article 29. The Committee endorsed the view that article 29 of the CRPD did not envisage any reasonable restriction or exception on the right to vote for any group of persons with disabilities. In addition, the Committee stressed that article 12(2) required state parties to recognise and uphold the legal capacity of all persons with disabilities ‘on an equal basis with others in all aspects of their lives’, which includes their political life and, in this case, the right to vote. State parties are obligated by article 12(3) to take the necessary measures to ensure that persons with disabilities can exercise their legal capacity.

At the regional level, the African Commission on Human and Peoples’ Rights (African Commission) has made important comments on the right of persons with mental disabilities to vote under the African Charter on Human and Peoples’ Rights (African Charter). The Commission, in the case of *Purohit*,²⁵ held that, according to the Charter, the right to political participation was extended to every person, including persons with mental disabilities. In its decision, the Commission found that the exclusion by The Gambia of persons with mental disabilities in a Gambian psychiatric hospital from voting was a violation of their rights under the Charter. The Commission in paragraph 76 of the judgement stated that ‘[i]t is very clear that there are no objective bases within the legal system of the respondent state to exclude mentally-disabled persons from political participation’.

The Gambian and Hungarian cases cited above are examples of the situation in most countries. The constitutions, electoral codes and legal capacity provisions in most African countries continue to permit the

23 *Zsolt Bujdosó* (n 20 above) paras 5.1-5.11.

24 *Zsolt Bujdosó* (n 20 above) paras 9.1-11.

25 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

disenfranchisement of persons with intellectual or psychosocial disabilities based on a perceived lack of capacity to vote arising from their disability status. Section 11(1)(b) of the Tanzanian Elections Act of 1985, for instance, restricts persons with intellectual and mental health problems from registering as voters and participating in political affairs. In Gabon, per article 26 of the Law on common rules for all political elections in the Gabonese Republic of 1996, adults under guardianship and curatorship cannot be registered to vote. Article 83(1)(b) of the Constitution of Kenya prohibits a person declared to be of unsound mind from registering as a voter.

The CRPD Committee's views in *Zsolt Bujdosó* and its Concluding Observations to the African state parties whose reports it has to date reviewed, such as Uganda and Gabon, provide some guidance to African state parties on interpreting and implementing the right to vote of persons with disabilities protected in article 29.²⁶ In order to fulfil their obligations under the Convention, African state parties to the Convention need to repeal discriminatory constitutional provisions, provisions in electoral laws and regulations as well as legal capacity provisions that restrict the right to vote of persons with disabilities on an equal basis with others. State parties need to provide in their laws an unconditional right to vote to all persons with disabilities with no restriction based on real or perceived inability to vote. This means that states should abolish any existing individual assessments of the voting capacity of persons with disabilities. African state parties must, however, be aware that recognising the right to vote of persons with disabilities in their constitutions or legislation will not in itself guarantee the enfranchisement of citizens with disabilities. Ensuring that voters with disabilities can exercise their right to vote requires states to adopt a number of positive measures to overcome the obstacles that may prevent persons with disabilities from voting.

5 *Liliane Gröninger v Germany*

Liliane Gröninger²⁷ brought this case against Germany on behalf of her son on the basis that integration subsidies under the German social legislation were discriminatory and prevented the inclusion of persons with disabilities in the labour market and, thus, violated her son's right to work. The integration subsidy was an affirmative measure put in place by Germany to assist persons with disabilities to integrate into the labour market.²⁸ According to the Social code if an employer who made an offer of employment to a person with a disability whose full working capacity

26 Concluding Observations of the CRPD to Uganda, UN Doc (CRPD/C/UGA/1) (2016) paras 56-59; Concluding Observations of the CRPD to Gabon, UN Doc (CRPD/C/GAB/1) (2015) paras 62-63.

27 Communication 2/2010, *Liliane Gröninger v Germany*, CRPD Committee (4 April 2014) UN Doc CRPD/C/11/D/2 (2010).

28 *Liliane Gröninger* (n 27 above) paras 2.1-2.11.

could be restored in three years' time was eligible to apply to the employment agency for an integration subsidy. The agency would evaluate the application and decide on the duration and amount of the subsidy to be allocated. The complainant submitted that the administration of the scheme was complicated, and that potential employers found it difficult to gain access to the integration subsidy. The process excluded the participation of the person with the disability and, furthermore, the outcome and duration of the process were uncertain. The administration of the scheme deterred employers from employing persons with disabilities, including her son, who, despite being qualified, had never been employed. The scope of the scheme did not support those persons with disabilities whose full work capacity would never be restored.

In the view of the CRPD Committee, the integration subsidy scheme used by Germany to help lower the costs of employing a person with a disability for private sector employers did not effectively promote the employment of persons with disabilities.²⁹ This was evident from the low absorption in the labour market of persons with disabilities. The way in which the scheme was administered was not consistent with the state's obligation under article 27.

The Committee in its findings noted that article 27 of the CRPD required governments to 'take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise', which includes providing for reasonable accommodation measures,³⁰ and to promote policies and programmes, including affirmative action,³¹ that encourage employers to recruit persons with disabilities.³² The article, according to the Committee, implies an obligation on the part of state parties to create an enabling and conducive environment for employment, including in the private sector, for persons with disabilities who have a right to benefit from measures such as placement services and assistance in obtaining employment.³³

What may be understood by African state parties from the comments made by the Committee is that they have an obligation to promote the right to employment of persons with disabilities in the private sector; that measures to include persons with disabilities in the labour market must be effective; that incentives geared at encouraging the private sector to employ persons with disabilities should not be seen as a right of the employer, but that of persons with disabilities; and that the state is under a positive obligation to take a number of measures to ensure the inclusion of

29 *Liliane Gröninger* (n 27 above) para 6.2.

30 Art 27(1)(i).

31 Art 27(1)(h).

32 United Nations *From exclusion to equality: Realising the rights of persons with disabilities: Handbook for parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007) 87.

33 *Liliane Gröninger* (n 27 above) para 6.3.

persons with disabilities in the work place. Without such positive measures, the right to employment of persons with disabilities may turn out to be merely token or even regressive. These positive measures are what will make the right transformative. The Committee's findings also highlight the need for states to regularly assess whether policies or measures chosen to increase employment opportunities for persons with disabilities are in practice effective.

It should be noted that Germany's existing social legislation predated the ratification of the CRPD. The case reflects the importance of revising the legislation after ratification to ensure that it complies with international obligations and that programmes guarantee real inclusion and avoid both direct and indirect discrimination.

6 *Marie-Louise Jungelin v Sweden*

The CRPD Committee in 2014 adopted its views on this case brought against Sweden by Marie-Louise Jungelin, a visually-impaired citizen.³⁴ Ms Jungelin had applied to work as an assessor at the Social Insurance Agency, a public entity. Following the interviews, she was told that, although she was an ideal candidate for the work, they could not consider her for the post because their internal computer system could not be adapted to her visual impairment, as adapting the whole information technology system and other computer systems to enable her to carry out her duties would be very expensive and time-consuming.³⁵

Ms Jungelin reported the matter to the Swedish Disability Ombudsman, who took the matter to the Labour Court. The Labour Court ruled that Ms Jungelin's right to reasonable accommodation and, consequently, her right to employment had not been violated as the accommodation she needed would constitute an undue burden on the agency.

In their findings, the CRPD Committee for the first time stated that, when assessing the reasonableness and proportionality of accommodation measures and undue burden, state parties enjoy a certain margin of appreciation.³⁶ The margin of appreciation, a doctrine developed by the European Court in assessing whether a member state has breached the European Convention on Human Rights, means that a member state is

34 Communication 5/2011, *Marie-Louise Jungelin v Sweden*, CRPD Committee (3 October 2014), UN Doc CRPD/C/12/D/5 (2011).

35 *Marie-Louise Jungelin* (n 34 above) paras 2.1-2.9.

36 *Marie-Louise Jungelin* (n 34 above) para 10.5.

afforded a degree of discretion when it takes judicial, administrative and legislative decisions in the area of a right afforded in a convention.³⁷ The reason for this was that state authorities, because of their intimate knowledge of their country, are better placed to interpret what a right means in a certain context when weighing competing public and individual interests. It is important to note that the Committee was not saying that states have unlimited discretion in deciding whether accommodations requested cause an undue burden. Rather, it indicates that, because assessments of reasonable accommodation often involve the weighing of competing interests, the Committee will respect the decision if the domestic courts used an objective criterion in reaching its decision.

Five committee members issued a joint dissenting opinion asserting that the courts did not sufficiently assess the reasonableness of her request.³⁸ In the dissenting opinion, the committee members stated that reasonable accommodation must be analysed on a case-by-case basis, and that the reasonableness and proportionality of the measures of the accommodation proposed must be assessed in view of the context in which they are requested. The committee members were of the opinion that, while reasonable accommodation was in principle an individual measure, the benefit of other employees should also have been considered when assessing reasonableness and proportionality.

7 SC v Brazil

In *SC v Brazil*,³⁹ a Brazilian woman working for a national bank, and who had been demoted in her employment in accordance with company policy after having taken more than three months 'medical leave, lodged a complaint before the CRPD Committee. The prolonged medical leave had been necessitated by a series of motorcycle accidents in which she had been involved, which left her with several injuries and permanent impairment of her knee. She alleged that the bank's internal policy providing for the demotion of staff who take medical leave of more than three months had the effect of discriminating against persons with disabilities.⁴⁰ The state in response to the allegation argued that the complainant did not fall within the definition of a person with a disability as set out in article 1 of the Convention, as she had been diagnosed by professionals of the National Institute of Social Security, an agency charged with certifying disability for purposes of granting monetary benefits to persons with disabilities unable to work or live independently as having a temporary incapacity to work.

37 Open Society Justice Initiative 'An overview of the Strasbourg Court's margin of appreciation doctrine' April 2012 <https://www.opensocietyfoundations.org/sites/.../echr-reform-margin-of-appreciation> (accessed 12 March 2016).

38 *Marie-Louise Jungelin* (n 34 above) Appendix 1.

39 Communication 10/2013, *SC v Brazil*, CRPD Committee (28 October 2014), UN Doc CRPD/C/12/D/10 (2013).

40 *SC* (n 39 above) para 2.2.

Therefore, she did not comply with the aspect of long term as stated in article 1.

Although the Committee found the complaint inadmissible because the complainant had not exhausted domestic remedies and, therefore, did not consider the merits of the case, it nevertheless explored whether the complaint fell within the scope of the Convention. The Committee commented that the author did fall within the ambit of article 1 as her physical impairment, in interaction with various barriers she experienced, did in fact hinder her full and effective participation in society on an equal basis with others.⁴¹ The Committee concluded that the difference between illness and disability was a difference in degree and not a difference of kind, because a health impairment which initially starts out as an illness can develop into an impairment that constitutes a disability as a consequence of its duration and its chronic nature.⁴²

The CRPD, to allow the concept of disability to evolve over time, does not provide a definition of disability. However, the Preamble to the Convention states:

Disability is an evolving concept, and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders full and effective participation in society on an equal basis with others.

The CRPD opted to explain who persons with disabilities are rather than define disability. Countries, however, often must define disability, for instance to allocate social security benefits. To protect the rights of persons with disabilities, states often need to first clarify who falls in this category.

The decision of the Committee is a reminder to African state parties that the CRPD adopts a broad categorisation of persons with disabilities and reaffirms that all people with all types of disabilities must enjoy the rights and fundamental freedoms guaranteed by the CRPD. It also confirms that the definition of disability that states adopt must be understood in the context or purpose for which the definition was adopted.

8 Conclusion

It is encouraging to note that a number of African countries, such as Malawi, Kenya, Tanzania, Uganda, Zambia and South Africa, are making an effort to domesticate the provisions of the CRPD through measures which include promulgating disability-specific legislation, revising existing legislative provisions to make them compliant with the CRPD and the

41 SC (n 39 above) para 6.3.

42 As above.

drafting of inclusive policies.⁴³ That being said, in a preponderance of African jurisdictions, conspicuous gaps remain in the formulation, domestication and implementation of disability rights. This negatively impacts on the actual fulfilment of disability rights. The CRPD Committee's jurisprudence under the Optional Protocol reflects the views of the Committee in relation to the CRPD. The views issued by the Committee on communications brought before it consists of the Committee's collective assessment of the communications and recommendations for the enhanced implementation of the rights under the Convention. The value of the Committee's jurisprudence for African countries who are party to the CRPD as they seek to domesticate the CRPD is that, even though the findings of the Committee are not legally binding, they have great interpretative import. They help to clarify the legal obligation of state parties and constitute important guidelines in the practical implementation of rights to ensure conscientious implementation of the CRPD.

The findings of the Committee on communications brought before it to date, discussed in the commentary, provide guidance to African state parties not only on the scope of specific obligations in the Convention, such as the duty to provide reasonable accommodation, but also on how to create an enabling environment for the rights of people with disabilities to flourish. African state parties can refer to the Committee's jurisprudence in revising their legislation to ensure that it complies with the CRPD. The Committee throughout its jurisprudence stresses the importance of affirming the rights of persons with disabilities in the main provisions of law. The Committee, however, cautions states that the mere constitutional and legislative recognition of the rights of persons with disabilities, though imperative, does not automatically guarantee that persons with disabilities will enjoy these rights. There is a need, particularly in the context of historically-marginalised groups such as persons with disabilities, for states to dismantle the underlying systems and structures that continue to perpetuate the unequal enjoyment of rights through positive measures that ensure that persons with disabilities can enjoy their rights.

43 Eg, Malawi repealed its Handicapped Persons Act of 1971 and enacted the Disability Act 8 of 2012. In 2010 Tanzania enacted the Persons with Disabilities Act 9 of 2010. Zambia enacted the Persons with Disabilities Act 6 of 2012. South Africa in 2016 introduced the White Paper on the Rights of Persons with Disabilities 39792. The Persons with Disabilities Act 2003 of Kenya is currently undergoing review. The new Persons with Disabilities Bill 2015 seeks to repeal and replace the Act.

REGIONAL DEVELOPMENTS

THE RIGHT TO WORK AND EMPLOYMENT IN SOUTHERN AFRICA: A COMMENTARY ON HOW SELECTED EMPLOYMENT LAWS FARE AGAINST ARTICLE 27 OF THE CRPD

*Dianah Msipa**

1 Introduction

Persons with disabilities have historically been denied the right to employment due to discriminatory barriers and mistaken assumptions about their ability to work. As a result of these misconceptions and attitudes, employers have tended to either deny persons with disabilities employment altogether, or have hired them only for work which does not require much knowledge or skills.¹ Some employers pay their workers with disabilities a comparatively lower salary than their non-disabled counterparts who do the same work because they believe that the cost of providing reasonable accommodation in the workplace is too high.² In extreme cases, persons with disabilities may be forced into exploitative, slave labour-like situations in which they receive no pay at all, or they may be forced to work in unsafe working conditions. Still, other persons with disabilities are denied opportunities to work in the mainstream job market and they may find themselves forced, for lack of better options, into segregated work settings, such as sheltered workshops, where they work in an environment which is separate from the open labour market where non-disabled persons work.³

* LLM (McGill), Post-graduate Diploma in Legal Practice (LPC) (Northumbria), LLB (Hons) (Newcastle); Consultant on Disability and Human Rights Law and Policy.

1 JE Lord et al *Human rights. YES! Action and advocacy on the rights of persons with disabilities* 139.

2 As above. Some employers actually deny persons with disabilities employment on the basis that it would be too 'expensive' to employ persons with disabilities because they have to be accommodated.

3 As above.

In recognition of the fact that persons with disabilities continue to be denied their rights, including the right to employment, the United Nations (UN) General Assembly adopted the Convention on the Rights of Persons with Disabilities (CRPD) on 13 December 2006.⁴ The CRPD provides for the right to work and employment in article 27. In recognizing the rights of persons with disabilities to earn a living through work that is freely chosen and accepted, the CRPD relies on the principles of equal opportunity, equal treatment and non-discrimination.⁵ Many Southern African countries have signed and ratified the CRPD. In spite of this ratification, persons with disabilities in Southern Africa continue to have their rights to work and employment violated, signifying a lack of adequate implementation as well as the lack of an enabling legal framework. This commentary examines the extent to which domestic legislation in five Southern African countries complies with the standards set in article 27 of the CRPD. Such an examination is important because, in the absence of an enabling legal framework, the implementation of the right to work and employment will be ineffective.

The commentary is divided into two parts. The first part briefly explores the meaning of the right to work and employment as set out in article 27 of the CRPD. The second part examines the legislation governing work and employment in the Southern African countries of Zimbabwe, Angola, South Africa, Botswana and Swaziland, with a view to assessing the extent to which the legislation complies with the standard set in article 27 of the CRPD. Whilst it is acknowledged that the picture of employment in these countries is incomplete without taking account of the relevant policy framework, this commentary does not address the policy framework as this falls outside its scope. Therefore, the commentary will be restricted to an examination of the legislation in these countries.

2 Meaning of the right to work and employment

Article 27 of the CRPD provides for the right of persons with disabilities to work and employment. The right to work and employment has been described as an issue of non-discrimination and accessibility because disability-based discrimination has been 'prominent and persistent' in the field of employment.⁶ This right does not guarantee that everyone with a disability who is of working age will have employment, in much the same

4 Convention on the Rights of Persons with Disabilities GA Res A/RES/61/06, adopted on 13 December 2006, entered into force on 3 May 2008.

5 The Right to Decent Work for Persons with Disabilities, launched by the ILO on the International Day of Disabled Persons, 3 December 2007.

6 M Schulze 'Understanding the UN Convention on the Rights of Persons with Disabilities' <http://www.handicap-international.fr/fileadmin/documents/publications/HICRPDManual.pdf>

way that the right to health, for example, does not guarantee that a person will be healthy.⁷ Rather, the right seeks to guarantee that persons with disabilities have access to work and employment opportunities on an equal basis with others and that such work and employment is carried out in a conducive environment and under favourable conditions. The right to work and employment, therefore, encompasses two elements: first, the right to be afforded the *opportunity* on an equal basis with others ‘to gain a living by work freely chosen or accepted in a labour market’;⁸ and, second, the right to carry on such employment in a ‘work environment that is open, inclusive and accessible to persons with disabilities.’⁹ All the obligations of state parties listed in articles 27(1)(a)-(k) of the CRPD are measures intended to either create equal opportunities for employment or to create an open, inclusive and accessible work environment.

The obligation to prohibit discrimination on the basis of disability in ‘matters concerning all forms of employment ... including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions’¹⁰ falls under the category of the creation of an equal opportunity for employment and the obligation to enable ‘persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training’;¹¹ also concerns the creation of equal opportunities for work. The obligation to ‘ensure that reasonable accommodation is provided to persons with disabilities in the workplace’¹² also falls under the category of the creation of equal opportunities for work. This is because the CRPD defines disability-discrimination as including the denial of reasonable accommodations.¹³ Similarly, the obligations to ‘promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment’;¹⁴ the obligation to ‘promote opportunities for self-employment, entrepreneurship, the development of co-operatives and starting one’s own business’;¹⁵ the obligation to ‘employ persons with disabilities in the public sector’;¹⁶ the obligation to ‘promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures’;¹⁷ the obligation to ‘promote the acquisition by persons with disabilities of work experience in the open

7 Lord et al (n 1 above).

8 CRPD, art 27(1).

9 As above.

10 CRPD, art 27(1)(a).

11 CRPD, art 27(1)(d).

12 CRPD, art 27(1)(i).

13 CRPD, art 2.

14 CRPD, art 27(1)(e).

15 CRPD, art 27(1)(f).

16 CRPD, art 27(1)(g).

17 CRPD, art 27(1)(h).

labour market’;¹⁸ and the obligation to ‘promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities’¹⁹ all involve the creation of equal opportunities for work for persons with disabilities. In other words, these obligations are effectively ways in which state parties may create equal opportunities for work for persons with disabilities.

The remaining measures go to the creation of an open, inclusive and accessible work environment for persons with disabilities. In other words, states parties may create an open, inclusive and accessible work environment by ‘protect[ing] the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances’;²⁰ ‘ensur[ing] that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others’;²¹ ‘ensur[ing] that reasonable accommodation is provided to persons with disabilities in the workplace’;²² and by prohibiting slavery or servitude as well as forced or compulsory labour.²³

Together, these measures and obligations are intended to protect the right to work and employment for persons with disabilities. They are in line with some of the principles stated in the CRPD, such as non-discrimination,²⁴ equality of opportunity²⁵ and accessibility.²⁶ It is important to note that achieving equality requires the prohibition of discrimination as well as the taking of positive steps to ensure the right to equality such as affirmative action measures. Article 4(1) of the CRPD sets out the general obligations which state parties must meet. One of the obligations found in article 4(1)(b) is to ‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities’. State parties, therefore, have an obligation to ensure that there is an enabling legal framework. The measures and obligations in article 27 of the CRPD provide the standard which state parties should aspire to

18 CRPD, art 27(1)(j).

19 CRPD, art 27(1)(k).

20 CRPD, art 27(1)(b).

21 CRPD, art 27(1)(c).

22 CRPD, art 27(1)(i). The provision of reasonable accommodation falls under both categories: the creation of equal employment opportunities as well as the creation of an open, inclusive and accessible work environment. This is because the denial of reasonable accommodation is now part of the definition of disability discrimination. Therefore, in order to create equality of opportunity, there is a need to provide reasonable accommodation. At the same time, the provision of reasonable accommodation is also necessary to ensure that persons with disabilities can access buildings, information at the workplace and perform effectively in the workplace.

23 CRPD, art 27(2).

24 CRPD, art 3(b).

25 CRPD, art 3(e).

26 CRPD, art 3(f).

when enacting and/or amending such legislation, in order to adequately protect the right of persons with disabilities to work and employment at the domestic level. It is against this standard that the employment laws in five Southern African countries are evaluated.

3 Evaluation of the employment laws in selected Southern African countries²⁷

3.1 Zimbabwe²⁸

3.1.1 *Obligation to create equal work opportunities for persons with disabilities*

Constitution of Zimbabwe

The Constitution of Zimbabwe²⁹ contains provisions which create an obligation to provide work opportunities for persons with disabilities on an equal basis with others. The Zimbabwean Constitution contains a general equality and non-discrimination clause which prohibits discrimination on several grounds, including disability, in all spheres of life.³⁰ Therefore, the conclusion may be drawn that the Zimbabwean Constitution prohibits discrimination on the basis of disability in the employment sector. This conclusion is further supported by the clause in the Zimbabwean Constitution dealing with labour and employment relations, which provides that government must 'adopt reasonable policies and measures, within the limits of the resources available to them, to provide *everyone* with an opportunity to work in a freely chosen activity, in order to secure a decent living for themselves and their families'.³¹ That the Constitution of Zimbabwe intends to protect the rights of persons with disabilities to have an opportunity to work is evident in the article requiring the provision of 'vocational guidance and the development of vocational and training programmes, including those for persons with disabilities'³² so that they may access work opportunities. The provision in the Zimbabwean Constitution which is dedicated to the rights of persons with disabilities does not expressly address the right to work and employment for persons with disabilities. It does, however, provide in a rather vague fashion that

27 For purposes of this section, reference is made to disability-specific provisions and general provisions which apply to persons with disabilities by virtue of the use of terms such as 'everyone', 'all', etc. In order to save space and avoid repetition, the author will not explain when dealing with general provisions that they apply to persons with disabilities by virtue of the use of terms such as 'everyone' and 'all'.

28 Zimbabwe ratified the CRPD on 23 September 2013.

29 Constitution of Zimbabwe, 2013.

30 Constitution of Zimbabwe art 56(3).

31 Constitution of Zimbabwe art 24(1).

32 Constitution of Zimbabwe art 24(2)(c).

the state must take measures to enable persons with disabilities to become 'self-reliant'.³³ Although the language is vague, this provision may be construed to mean the rights to work and employment of persons with disabilities.

However, these provisions still fall short of the standard set in article 27 of the CRPD, and this fact becomes apparent when other provisions in the Zimbabwean Constitution, particularly those dealing specifically with persons with disabilities, are examined more closely. For example, article 22 of the Zimbabwean Constitution, which specifically addresses persons with disabilities, requires the government and all government institutions and agencies to 'develop programmes ... especially work programmes' for persons with disabilities.³⁴ However, these work programmes must be '*consistent with their capabilities* and acceptable to them or their legal representatives.'³⁵ The requirement for government to avail work programmes for persons with disabilities which are 'consistent with their capabilities' equates disability with inability and does not seem to encourage persons with disabilities to obtain work on the open market as is required by article 27 of the CRPD. This is consistent with the much-criticised medical model of disability which regards disability as a problem innate in the individual with impairment as opposed to the social model of disability, to which the CRPD espouses, according to which disability is the result of the interaction between a disabling environment and an individual with impairment. Furthermore, this provision requires the development of programmes 'for the welfare of persons with *physical or mental disabilities*.'³⁶ This means that persons with other types of disabilities, such as sensory disabilities, cannot benefit from these work programmes.³⁷ The CRPD safeguards the right to work and employment for all persons with disabilities, not only persons with certain types of disabilities.³⁸ Therefore, by failing to provide for persons with disabilities participating in the open labour market and by failing to include persons with all types of disabilities, the Constitution of Zimbabwe falls short of the standard set in article 27 of the CRPD.

Labour Act (Chapter 28:01)

The Labour Act,³⁹ the principal Act defining the fundamental rights of employees in Zimbabwe, contains provisions which create equal work opportunities for persons with disabilities. The Labour Act contains an equality and non-discrimination clause intended to provide for the creation

33 Constitution of Zimbabwe art 83(a).

34 Constitution of Zimbabwe art 22(3)(a).

35 As above (my emphasis).

36 As above (my emphasis).

37 Art1 of the CRPD lists the different types of disabilities and these include 'physical, mental, intellectual or sensory' disabilities.

38 CRPD, art 27(1).

39 Labour Act [Chapter 28:01].

of opportunities for work and employment of persons with disabilities. This Act prohibits discrimination against employees on several grounds, including disability.⁴⁰ Discrimination is prohibited in relation to various matters of employment, including job advertisement;⁴¹ the recruitment process;⁴² the creation, classification or abolition of jobs or posts;⁴³ the determination of wages and other benefits;⁴⁴ and ‘the choice of persons for posts, training, advancement, apprenticeships, transfer, promotion or retrenchment’.⁴⁵ However, provisions prohibiting non-discrimination alone are not enough to meet the standard set in article 27 of the CRPD. The Labour Act, apart from prohibiting discrimination on the basis of disability in the employment sector, does not require the taking of any other positive steps, such as affirmative action or the provision of reasonable accommodation in order to ensure that persons with disabilities are provided with an opportunity to work on an equal basis with others. Since this is the principal Act dealing with matters of work and employment in Zimbabwe, this is a fundamental failure.

Disabled Persons Act Chapter 17:01

Similarly, although the Disabled Persons Act,⁴⁶ the main Act for persons with disabilities in Zimbabwe, contains provisions intended to create equal work opportunities for persons with disabilities, the Act still falls short of the article 27 standard. The Disabled Persons Act expressly prohibits discrimination against persons with disabilities in employment⁴⁷ in order to provide for equal opportunities to work and employment. The Act prohibits employers from discriminating against persons with disabilities in relation to ‘the advertisement of employment’;⁴⁸ ‘the recruitment for employment’;⁴⁹ ‘the creation, classification or abolition of jobs or posts’;⁵⁰ ‘the determination or allocation of wages, salaries, pensions, accommodation, leave or other such benefits’;⁵¹ ‘the choice of persons for jobs or posts, training, advancement, apprenticeships, transfer, promotion or retrenchment’;⁵² ‘the provision of facilities related to or connected with employment’;⁵³ and ‘any other matter related to employment’.⁵⁴ However, as stated earlier, provisions which simply prohibit

40 Labour Act, sec 5(1).

41 Labour Act, sec 5(1)(a).

42 Labour Act, sec 5(1)(b).

43 Labour Act, sec 5(1)(c).

44 Labour Act, sec 5(1)(d).

45 Labour Act, sec 5(1)(e).

46 Disabled Persons Act [Chapter 17:01].

47 Disabled Persons Act, sec 9.

48 Disabled Persons Act, sec 9(1)(a).

49 Disabled Persons Act, sec 9(1)(b).

50 Disabled Persons Act, sec 9(1)(c).

51 Disabled Persons Act, sec 9(1)(d).

52 Disabled Persons Act, sec 9(1)(e).

53 Disabled Persons Act, sec 9(1)(f).

54 Disabled Persons Act, sec 9(1)(g).

discrimination are not enough to adequately protect the right to work and employment for persons with disabilities as laid out in article 27 of the CRPD. It is necessary to make provision for other positive steps or measures to protect the right to work.

Interestingly, the Disabled Persons Act does not require the provision of reasonable accommodation. Instead, the Act effectively states that, where an employer has not provided reasonable accommodation, they will not be deemed to have discriminated against the person with a disability.⁵⁵ This is contrary to the definition of disability discrimination contained in the CRPD, which defines disability discrimination as including the denial of reasonable accommodation.⁵⁶ This may be attributed to the fact that the Act is outdated, since it was enacted as far back as 1992. Therefore, in failing to make provision for the taking of positive steps to ensure that persons with disabilities have equal opportunities to work and in failing to require the provision of reasonable accommodation, the Disabled Persons Act falls short of the article 27 standard.

3.1.2 Obligation to provide an open, inclusive and accessible work environment

Constitution of Zimbabwe

The Constitution of Zimbabwe contains provisions which create an obligation on employers to provide an open, inclusive and accessible work environment for persons with disabilities. Article 65 of the Zimbabwean Constitution deals with labour rights and requires the provision of measures intended to provide a safe and healthy working environment. Employers are required to ensure that safe labour practices and standards are in place, and it also provides for the right of employees to receive a fair and reasonable wage,⁵⁷ to form and join trade unions and to take part in their activities,⁵⁸ to strike, sit in or withdraw their labour,⁵⁹ and the right to 'just, equitable and satisfactory conditions of work'.⁶⁰ Although this provision does not make specific reference to persons with disabilities, the term 'every person' impliedly includes persons with disabilities.

In line with article 27(2) of the CRPD, the Zimbabwean Constitution provides for freedom from slavery or servitude, providing that '[n]o person may be subjected to slavery or servitude'.⁶¹ The Zimbabwean Constitution also provides for freedom from forced or compulsory labour, stating that

55 Disabled Persons Act, sec 9(2)(c).

56 CRPD, art 2.

57 Constitution of Zimbabwe, art 65(1).

58 Constitution of Zimbabwe, art 65(2).

59 Constitution of Zimbabwe, art 65(3).

60 Constitution of Zimbabwe, art 65(4).

61 Constitution of Zimbabwe, art 54. See n 27 above.

'[n]o persons may be made to perform forced or compulsory labour'.⁶² In this regard, the Constitution of Zimbabwe contains provisions which are in line with the article 27 standard.

3.2 Angola⁶³

3.2.1 Obligation to provide equal work opportunities for persons with disabilities

Constitution of Angola

There are provisions in the Constitution of Angola⁶⁴ which create an obligation to provide equal work opportunities for persons with disabilities. However, the Constitution still falls short of the article 27 standard. The Constitution of Angola prohibits discrimination on a number of grounds, including disability and⁶⁵ in a number of spheres, including the sphere of employment. The Angolan Constitution declares that '[w]ork shall be the right and duty of all'.⁶⁶ The Constitution goes on to place an obligation on government to promote the 'implementation of policies to generate work'⁶⁷ and equal 'opportunities in the choice of profession or type of work and conditions which prevent preclusion or limitation due to any form of discrimination'.⁶⁸ Since the Angolan Constitution prohibits discrimination on the ground of disability, it may be concluded that the obligations placed on the government to create opportunities for work also apply to the creation of work opportunities for persons with disabilities.

Article 83 of the Constitution of Angola, which deals specifically with persons with disabilities, requires the state to 'foster and support special education and technical and vocational training for disabled citizens'.⁶⁹

The Constitution, therefore, has a general anti-discrimination provision as well as a general declaration that all persons are entitled to the right to work,⁷⁰ but does not really contain positive measures, such as the quota system⁷⁰ or affirmative action, which may be taken in order to

62 Constitution of Zimbabwe, art 55. See n27 above.

63 Angola ratified the CRPD on 19 May 2014.

64 Constitution of Angola 2010.

65 Constitution of Angola, art 23(2).

66 Constitution of Angola, art 76(1). See n27 above.

67 Constitution of Angola, art 76(3)(a).

68 Constitution of Angola, art 76(3)(b).

69 Constitution of Angola, art 83(4).

70 Making use of the quota system is not a necessity, particularly in light of the fact that there are divergent opinions about whether or not quota systems are desirable. The specifics of this debate are beyond the scope of this commentary. It is included here as an example of a positive step which may be taken in the protection of the right to employment.

ensure that persons with disabilities actually enjoy equal opportunities to the right to work and employment. Furthermore, it does not provide for the provision of reasonable accommodation for persons with disabilities. In this regard, therefore, it falls short of the CRPD standard.

General Labour Law 2000

The General Labour Law of Angola⁷¹ contains a provision which may be taken to be intended for the creation of equal work opportunities for persons with disabilities. In spite of this, the law still falls short of the standard set in article 27 of the CRPD. The Law contains a provision on the right to work and on the prohibition of discrimination in the employment sector on various grounds. However, disability is not mentioned as one of these grounds.⁷² Nevertheless, it may be concluded that disability discrimination is prohibited, particularly in light of the fact that the Constitution, which is the supreme law of the land, prohibits disability discrimination. The Law fails to meet the standard set in article 27 of the CRPD as it fails to provide for the taking of positive measures as well as the provision of reasonable accommodation in order to ensure that persons with disabilities have equal work opportunities.

3.2.2 Obligation to provide an open, inclusive and accessible work environment

Despite containing provisions which create an obligation to provide an open, inclusive and accessible work environment, the Constitution of Angola still fails to meet the article 27 standard. The Constitution provides for the right to 'vocational training, fair pay, rest days, holidays, protection, and workplace health and safety'.⁷³ The Angolan Constitution also creates an obligation for the provision of 'academic training and scientific and technological development, as well as vocational development for workers'.⁷⁴ By failing to provide for the provision of reasonable accommodation, the Constitution does not adequately make provision for the creation of an open, inclusive and accessible work environment for persons with disabilities.

71 General Labour Law 2000.

72 General Labour Law, art 3(1).

73 Constitution of Angola, art 76(2).

74 Constitution of Angola, art 76(3)(c).

3.3 South Africa⁷⁵

3.3.1 *Obligation to provide equal work opportunities for persons with disabilities*

Constitution of the Republic of South Africa, 1996

The Republic of South Africa has laws in place which provide for equal work opportunities for persons with disabilities. The Constitution of South Africa⁷⁶ prohibits direct and indirect discrimination on several grounds, including disability.⁷⁷ The Constitution goes on to state that '[e]very citizen has the right to choose their trade, occupation, or profession freely'.⁷⁸ Article 7(2) of the Constitution provides that the state must 'respect, protect, promote and fulfil' the rights which are contained in the Bill of Rights, including the right to work and employment. This provision may be construed to be impliedly creating a duty to put positive measures in place in line with article 27 of the CRPD.

The Employment Equity Act

The purpose of the Employment Equity Act⁷⁹ is to 'achieve equity in the workplace'.⁸⁰ Such equity is to be achieved by, first, 'promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination'⁸¹ and, second, by 'implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups'.⁸² The Act applies to all employees except members of the National Defence Force, the National Intelligence Agency and the South African Secret Service.⁸³ The Employment Equity Act contains a provision prohibiting unfair discrimination, both direct and indirect, on a number of grounds, including disability.⁸⁴ It places a duty on employers to 'take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice'.⁸⁵ This is in line with article 27 of the CRPD.

75 South Africa ratified the CRPD on 30 November 2007.

76 Constitution of the Republic of South Africa, 1996. See n 27 above.

77 Constitution of South Africa, art 9(3).

78 Constitution of South Africa, art 22.

79 Employment Equity Act, 1998.

80 Employment Equity Act, sec 2.

81 Employment Equity Act, sec 2(a).

82 Employment Equity Act, sec 2(b).

83 Employment Equity Act, sec 4(2).

84 Employment Equity Act, sec 6(1).

85 Employment Equity Act, sec 5.

3.3.2 Obligation to provide an open, inclusive and accessible work environment

Constitution of South Africa

There are provisions in the South African Constitution which create an obligation for employers to provide an open, inclusive and accessible environment. The provision dealing with labour relations in the Constitution protects the right to form and join a trade union⁸⁶ as well as the right to strike.⁸⁷ This is in line with article 27 of the CRPD. Since the Constitution of South Africa prohibits discrimination on the basis of disability,⁸⁸ it is implied that this provision applies to persons with disabilities even though such persons are not expressly referred to in the provision.

In line with article 27 of the CRPD, the Constitution of South Africa states that '[n]o one may be subjected to slavery, servitude or forced labour'.⁸⁹

Employment Equity Act

Part III of the Employment Equity Act addresses the provision of affirmative action measures, which are defined as 'measures designed to ensure that suitably-qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer'.⁹⁰ It is important to note that, according to this Act, persons with disabilities fall under the category of 'designated groups'.⁹¹ The provision of reasonable accommodation is also encapsulated within the provision on affirmative action measures.⁹² Providing for reasonable accommodation is important because, in the absence of a duty to reasonably accommodate persons with disabilities, the creation of an open, inclusive and accessible work environment cannot be achieved. The Act goes on to clarify that the taking of positive measures, such as affirmative action measures, does not constitute unfair discrimination.⁹³ This is in line with the standard in article 27 of the CRPD.

Furthermore, section 54(1)(a) of the Employment Equity Act gives the Minister power to issue codes of good practice which give guidance to

86 Constitution of South Africa, art 23(2)(a).

87 Constitution of South Africa, art 23(2)(c).

88 Constitution of South Africa, art 9(3).

89 Constitution of South Africa, art 13. See n27 above.

90 Employment Equity Act, sec 15(1).

91 Employment Equity Act, sec 1(e).

92 Employment Equity Act, sec 15(2)(c).

93 Employment Equity Act, sec 6(2)(a).

employers on how to implement the Act. Of particular relevance is the Code of Good Practice: Key Aspects on the Employment of People with Disabilities issued in terms of the EEA.⁹⁴ The Code deals with pertinent issues, such as the provision of reasonable accommodation;⁹⁵ recruitment and selection;⁹⁶ training and career advancement;⁹⁷ retaining people with disabilities;⁹⁸ and termination of employment,⁹⁹ amongst other things. Despite the fact that the Code is more of a policy document than a piece of legislation, it remains important as it must be considered when courts and tribunals are interpreting the Employment Equity Act. The matters addressed in the Code, such as the provision of reasonable accommodation, are generally in line with article 27 of the CRPD.

Labour Relations Act 66 of 1995

Further provision is made for the creation of an open, inclusive and accessible working environment in the Labour Relations Act,¹⁰⁰ which provides for several rights, such as joining a trade union.¹⁰¹ The Act uses language such as 'every employee', implying that persons with disabilities are also included within the ambit of the provision. Furthermore, dismissal on the ground of disability is automatically deemed as unfair dismissal.¹⁰² The Act makes reference to the duty to accommodate in relation to situations where employees are injured in the workplace.¹⁰³ Although this is in line with the CRPD, it falls short of the standard set therein, since all persons with disabilities are entitled to have reasonable accommodation made on their behalf in order to enable them to enjoy the right to work and employment on an equal basis with others.

Basic Conditions of Employment Act 75 of 1997

The Basic Conditions of Employment Act¹⁰⁴ deals with matters such as the regulation of working time;¹⁰⁵ leave;¹⁰⁶ remuneration,¹⁰⁷ and

94 Code of Good Practice: Key Aspects on the Employment of People with Disabilities. Sec3(1) of the Code states that the code 'is not an authoritative summary of the law, nor does it create additional rights and obligations. Failure to observe the Code does not, by itself, render a person liable in any proceedings. Nevertheless, when the courts and tribunals interpret and apply the Employment Equity Act, they must consider it.'

95 Code of Good Practice, sec 6.

96 Code of Good Practice, sec 7.

97 Code of Good Practice, sec 10.

98 Code of Good Practice, sec 11.

99 Code of Good Practice, sec 12.

100 Labour Relations Act 66 of 1995.

101 Labour Relations Act, sec 4(1)(b).

102 Labour Relations Act, sec 187(1)(f).

103 Reference is made to the duty to accommodate in secs 10(4), 10(1) & 11(b)(ii) – dealing with cases of dismissal arising from ill health or injury.

104 Basic Conditions of Employment Act 75 of 1997.

105 Basic Conditions of Employment Act, ch 2.

106 Basic Conditions of Employment Act, ch 3.

107 Basic Conditions of Employment Act, ch 4.

termination of employment,¹⁰⁸ amongst others. The Act applies to all employees and employers.¹⁰⁹ By implication, therefore, from the language used, the provisions in the Act also apply to persons with disabilities.

Code of Good Practice on Equal Pay or Remuneration for Work of Equal Value

The Code of Good Practice on Equal Pay or Remuneration for Work of Equal Value¹¹⁰ was issued in terms of the Employment Equity Act. One of the objectives of this Code is to 'provide practical guidance to employers and employees on how to apply the principle of equal pay/remuneration for work of equal value in their workplaces'.¹¹¹ The aim of the Code is to overcome the disadvantages which have been suffered by historically-marginalised groups, including persons with disabilities, in the workplace. The Code states that '[a] difference in pay/remuneration will only be unfair discrimination if the differences are directly or indirectly based on race, sex, gender, disability or any other listed or on any other arbitrary ground'.¹¹² The Code, therefore, protects persons with disabilities from being discriminated against in relation to pay/remuneration. This is in line with article 27 of the CRPD.

In South Africa, therefore, there is no single piece of legislation which alone meets the article 27 standard. Nevertheless, the different pieces of legislation in combination can be said to meet the article 27 standard.

3.4 Botswana¹¹³

3.4.1 Obligation to provide equal work opportunities for persons with disabilities

Constitution of Botswana

The Constitution of Botswana¹¹⁴ falls short of the standard set in article 27 of the CRPD. Although the Constitution does not expressly list disability as one of the grounds upon which discrimination is prohibited, it does contain a clause providing for protection from discrimination on several grounds.¹¹⁵ It is important to note that prohibiting non-discrimination

108 Basic Conditions of Employment Act, ch5.

109 Basic Conditions of Employment Act, sec 3(1). There are, however, some exceptions such as members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service and unpaid volunteers.

110 Code of Good Practice on Equal Pay or Remuneration for Work of Equal Value.

111 Code of Good Practice on Equal Pay, sec 1(1.1).

112 Code of Good Practice on Equal Pay, sec 4(6).

113 Botswana has not yet ratified the CRPD.

114 Constitution of Botswana 1966.

115 Constitution of Botswana, art 15(3).

alone does not ensure that persons with disabilities have equal work opportunities. There is a need to make provision for positive steps, such as affirmative action or the use of the quota system, to ensure that persons with disabilities have equal access to opportunities for work.

3.4.2 Obligation to provide an open, inclusive and accessible work environment

Constitution of Botswana

In line with article 27 of the CRPD, the Constitution of Botswana provides for protection from slavery and forced labour.¹¹⁶

Employment Act Chapter 47:01

The Employment Act¹¹⁷ regulates all matters pertaining to employment, such as forced labour;¹¹⁸ protection of wages;¹¹⁹ rest periods; working hours; holidays; and other conditions of work.¹²⁰ Section 120 deals with ‘regulations in relation to employment of infirm or handicapped persons’. This section gives the Minister the power to ‘make regulations in relation to the employment of persons affected by infirmity or physical handicap and, without prejudice to the generality of the foregoing, such regulations may regulate the conditions under which such persons are employed for the purpose of safeguarding their interests’. This provision suggests that the main provisions of this Act do not equally apply to persons with disabilities. It simply requires the Minister to produce provisions for ‘handicapped persons’. It goes without saying, therefore, that this Act falls short of the article 27 standard in that it fails to put in place measures to ensure that persons with disabilities have an open, inclusive and accessible work environment. Even if the provisions in the Act dealing, for example, with rest periods and working hours, are deemed to also apply to persons with disabilities, the Act would still fall short of the article 27 standard as it fails to include measures necessary for the creation of an open, inclusive and accessible work environment.

There are other Acts dealing with matters of work and employment, including the Trade Unions and Employers’ Organisations Act Chapter 48:01¹²¹ and the Vocational Training Act Chapter 47:04.¹²² However, neither of these Acts makes specific reference to persons with disabilities. This illustrates that Botswana laws do not meet the article 27 standard in

116 Constitution of Botswana, art 6.

117 Employment Act [Chapter 47:01].

118 Employment Act, part VI.

119 Employment Act, part VII.

120 Employment Act, part VIII.

121 Trade Unions and Employers’ Organisations Act ch48:01.

122 Vocational Training Act ch47:04.

as far as they fail to make provision through legislation for the right of persons with disabilities to work and employment.

3.5 Swaziland¹²³

3.5.1 Obligation to provide equal work opportunities for persons with disabilities

Swaziland Constitution 2005

The Constitution of Swaziland¹²⁴ contains provisions relating to work and employment. However, these provisions do not meet the article 27 standard. The Constitution prohibits discrimination on a number of grounds, including disability.¹²⁵ This means that disability discrimination in the employment sector is prohibited by the Swaziland Constitution. The provision in the Constitution dealing with the rights of workers states that '[a] person has the right to practise a profession and to carry on any lawful occupation, trade or business'.¹²⁶ The language used in this provision suggests that it applies to all people, including persons with disabilities. Nevertheless, the standard in article 27 has not been met. As stated earlier, the prohibition of discrimination and a declaration that all people have the right to work are inadequate for the protection of the right to work and employment for persons with disabilities. Some positive measures need to be taken in order to ensure that persons with disabilities actually have equal opportunities for work.

Employment Act 1980

The Employment Act¹²⁷ also fails to meet the standard set in the CRPD. The anti-discrimination clause in the Act lists a number of grounds upon which employers may not discriminate, but disability is not one of these grounds.¹²⁸ Persons with disabilities are not specifically mentioned in this Act. The provision does not contain a 'catch-all' phrase such as 'or other status' under which persons with disabilities might fall. This is an indication that the provisions in the Act are not mindful of persons with disabilities. The Act, therefore, omits to include important measures which are necessary for ensuring equal opportunities for work, such as quota systems and affirmative action. The Act, therefore, falls short of the article 27 standard.

123 Swaziland ratified the CRPD on 24 September 2012.

124 Constitution of Swaziland 2005.

125 Constitution of Swaziland, art 20(2).

126 Constitution of Swaziland, art 32(1).

127 Employment Act 1980.

128 Employment Act, sec 29.

3.5.2 *Obligation to create an open, inclusive and accessible work environment*

Constitution of Swaziland

Article 32 of the Swaziland Constitution deals with the rights of workers. It provides for the right to 'freely form, join or not to join a trade union for the promotion and protection of the economic interests of that worker'¹²⁹ and the right to 'collective bargaining and representation'.¹³⁰ Article 32 also requires the enactment of laws to 'provide for the right of persons to work under satisfactory, safe and healthy conditions',¹³¹ to 'ensure equal payment for equal work without discrimination',¹³² to 'ensure that every worker is accorded rest and reasonable working hours and periods of holidays with pay as well as remuneration for public holidays',¹³³ and the protection of employees 'from victimisation and unfair dismissal or treatment'.¹³⁴ In line with article 27 of the CRPD, the Constitution provides for protection from slavery and forced labour.¹³⁵ The language used in the Constitution indicates that the provisions also apply to persons with disabilities. However, the article 27 standard is still not met in the Constitution as important measures, such as the requirement to reasonably accommodate, have not been included and, without these measures, the right to work and employment for persons with disabilities will not be adequately protected.

Industrial Relations Act 2000

The Industrial Relations Act¹³⁶ regards dismissal based on disability discrimination as automatically unfair.¹³⁷ This Act, however, still falls short of the article 27 standard as it does not make provision for conditions during employment of persons with disabilities. The Act also fails to require reasonable accommodation, which may be relevant to the question of unfair dismissal. For example, an employer may terminate the employment of a person with a disability because of claims that the employee is not doing the work satisfactorily, when in fact the lack of reasonable accommodation could be a contributing factor as to why the employee is not performing to the standard required.

129 Constitution of Swaziland, art 32(2)(a).

130 Constitution of Swaziland, art 32(2)(b).

131 Constitution of Swaziland, art 32(4)(a).

132 Constitution of Swaziland, art 32(4)(b).

133 Constitution of Swaziland, art 32(4)(c).

134 Constitution of Swaziland, art 32(4)(d).

135 Constitution of Swaziland, art 17.

136 Industrial Relations Act, 2000.

137 Industrial Relations Act, sec 2(f).

Wages Act 1964

The Wages Act¹³⁸ applies to all workers. Although it does not make specific reference to workers with disabilities, it may be implied that these workers are covered in the section under the term 'all workers'. This Act does not make specific reference to persons with disabilities. This is a missed opportunity, since persons with disabilities have historically been disadvantaged as far as wages are concerned, by being paid less than other workers. The provisions in this Act were, therefore, not crafted with persons with disabilities in mind and fall short of the article 27 standard.

4 Conclusion

All the Southern African countries which have been examined in this commentary have legislation dealing with the right to work and employment. What varies between the different countries is the extent to which their legislation is mindful of the rights of persons with disabilities, particularly the right to work and employment. In some of the countries, the laws contain provisions on the right to work and employment which are specific to persons with disabilities while, in others, the provisions relating to the right to work and employment do not make mention of persons with disabilities at all. All the countries examined, with the exception of South Africa, are similar in that, despite having legislation governing the right to work and employment, they all have room for improvement as far as complying with the article 27 standard is concerned. Much of the legislation omits to make provision for important positive measures, such as the duty to provide reasonable accommodation, affirmative action and the quota system, to mention but a few. In light of the historical marginalisation of persons with disabilities in the employment sphere, such omissions can seriously compromise the ability to protect the right to work and employment for persons with disabilities. Therefore, the legislation in these countries does not meet the standard set in article 27 of the CRPD. The only exception is South Africa, whose employment legislation in combination to a large extent meets the article 27 standard. The other countries examined in this commentary have much work to do in order to comply with their general obligations under article 4(1)(b) to, at the very least, 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'. This, therefore, means, that the legislation in each of these countries needs to be amended in order to bring it in line with the standard set in article 27 of the CRPD. For these countries, such as Zimbabwe, which have disability-specific legislation which was drafted before the coming into force of the CRPD amending such legislation to bring it in line with the

138 Wages Act 1964.

CRPD, should be a matter of priority. Those countries which have no disability-specific legislation should enact such legislation to ensure that it is in line with the standards set in the CRPD. Without taking these legislative steps, it is difficult, if not impossible, to adequately protect the right of persons with disabilities to work and employment.

BOOK REVIEW

DON KULICK & JENS RYDSTRÖM: *LONELINESS AND ITS OPPOSITE: SEX, DISABILITY, AND THE ETHICS OF ENGAGEMENT* (2015)

*Paul Chappell**

Durham and London: Duke University Press. 1-345; i-xiii. ISBN 978-0-8223-5833-6.

1 Introduction

This aptly titled book, *Loneliness and its opposite*, does much to highlight the complex boundaries surrounding sexuality and disability. Based on ethnographic research conducted by Don Kulick and Jens Rydström in Denmark and Sweden, this 'must-read' book explicitly focuses on the sexual and erotic lives of adults with significant physical, communication, and intellectual disabilities, and how these lives are either facilitated or impeded by those who work and care for them. What makes this book unique and, undoubtedly one of its main strengths, is that it intertwines the personal accounts of those with severe disabilities (who, for the most part, are invisible in global disabled sexuality scholarship) with those of their parents, sexuality and disability professionals (that is, academics, sexologists, occupational therapists and sexual advisors), sex workers, and caregivers in group homes. Although the context of this book is situated in Scandinavia, the research presented provides critical and insightful scholarship that could equip African-based disability academics who are interested in promoting the sexual citizenship of people with disabilities.

Central to the context of the book, Kulick and Rydström contend that adults with significant congenital and intellectual disabilities are sexual beings. However, due to the severity of their impairments, these

* BSc (UCN), MSc (UCL), PhD (UKZN); Postdoctoral Research Fellow, Centre for Social Development in Africa (CSDA), University of Johannesburg.

individuals, especially those situated in group homes or institutions, are more likely to be dependent on others to enable them to explore and experience their sexuality. This, Kulick and Rydström contend, creates significant socio-political and ethical challenges for those who care for adults with disabilities, especially in terms of dealing with subjects such as masturbation, having a sexual partner, or purchasing sexual services from a sex worker or sexual surrogate.

Interestingly, unlike the *African disability rights yearbook*, which focuses on the United Nations (UN) Convention for the Rights of Persons with Disabilities (CRPD), the authors of *Loneliness and its opposite* make no explicit reference to the Convention and actually favour the past UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.¹ Kulick and Rydström contend that, in their opinion, the Convention is both too conservative and less progressive than the Standard Rules, as it makes no reference to sexual expression outside the realm of marriage and reproduction. Further to this, in using a capabilities approach, Kulick and Rydström contend that engaging with the sexual lives of adults with disabilities goes beyond a simple matter of rights, and constitutes questions surrounding ethics and social justice.

2 Book structure

Loneliness and its opposite is comprised of seven chapters, which provide the reader with valuable insight into the historical, socio-political and practical context of facilitating the sexual and erotic lives of adults with severe disabilities in Denmark and Sweden. Although both countries are believed to be liberal states, the way in which they deal with the sexual lives of some adults with disabilities² is in total contrast to each other. For instance, in Denmark, the sexual lives of people with disabilities are acknowledged and facilitated. In Sweden, however, the attempts at sexual access of people with disabilities are often denied or suppressed.

In the first chapter,³ Kulick and Rydström begin by outlining the significance of sex and its interrelationship with disability in academia, the media and the disability movement itself. In addition, the authors provide details of the research methodology and study population. Central to their discussions and reasons for undertaking this study, the authors are critical of the wider cultural/social disability scholarship who, in their opinion, do not really engage with the needs and desires of individuals with severe disabilities.

1 UN General Assembly, Standard Rules on the Equalisation of Opportunities for Persons with Disabilities: Resolution adopted by the General Assembly, 20 December 1993, A/RES/48/96.

2 The sexual experiences of adults with acquired disabilities, eg spinal cord injuries, strokes, etc., are not included in the study.

3 pp 1-38.

Chapter 2⁴ provides an historical overview of how disability activism and caring practices from the late 1960s began to engage with the sexualities of people with disabilities in the two countries. This chapter is central to the whole theme of the book as it sets out the varying socio-political reasonings that led to the Danes' active engagement with disabled sexualities, and the Swedes' depiction of disabled sexualities as a problem. On reflection, the Swedes' 'silence' surrounding disabled sexuality resonates with the approach taken in many African countries.

In chapter 3,⁵ Kulick and Rydström build on the previous chapter by outlining the situation in the two countries today. In particular, by drawing on various practical examples, the authors demonstrate how the actions of caregivers of adults with severe disabilities are strongly influenced by cultural attitudes that either facilitate or impede the erotic lives of adults with severe disabilities. The chapter also discusses how these contrasting attitudes influence the emergence of sexual policies and guidelines in Denmark and Sweden.

Chapter 4⁶ continues to provide particular examples of how the erotic lives of adults with severe disabilities are facilitated in Denmark and impeded in Sweden. These practical examples cover topics such as positioning a disabled client for sex with another person, aid in masturbation or assistance in acquiring a sex worker. Kulick and Rydström discuss these practical examples in terms of varying boundaries that individuals with severe disabilities and their caregivers need to consider and negotiate in relation to sexuality and disability. The boundaries discussed in the chapter include:

- public/private;
- work/intimacy;
- love/sex;
- affection/abuse;
- sex/reproduction.

In discussing these boundaries, Kulick and Rydström address some of the major practical and ethical concerns (and obstacles) often raised by caregivers, professionals and parents, in relation to addressing the sexualities of adults with severe disabilities. This chapter is significant as it could provide a useful background for the development of sexuality-related policies and guidelines that protect the rights of caregivers who work with people with disabilities in the African context.

4 pp 39-77.

5 pp 78-118.

6 pp 119-173.

Chapter 5⁷ discusses the emotive boundary between money and sex and, more specifically, the issue of disability and sex workers. The chapter begins by outlining the differences in legislation regarding sex workers in the two countries (in Denmark it is legal whereas in Sweden it is prohibited), and some of the debates concerning disability and prostitution. Drawing from interviews with male and female disabled people who paid for sexual services, caregivers, and sex workers (both gay and straight), Kulick and Rydström explicitly discuss what happens when individuals with severe disabilities approach paid sexual services. Through this chapter, the authors critically outline how dealing with the sexual lives of adults with severe disabilities also coincides with the political issue of decriminalising sex work.

In Chapter 6,⁸ Kulick and Rydström discuss in more detail how two Scandinavian welfare states, such as Denmark and Sweden, can be so similar but yet differ so widely in terms of sexuality and disability. The authors argue that these differences pertain to historical and cultural differences in the relationships between individuals and the state, the attainment of feminist discourse over the past 40 years, and the role key stakeholders have played in enhancing or impeding the facilitation of the sexual lives of adults with disabilities.

In the final chapter,⁹ Kulick and Rydström provide a critical reflection of their findings in relation to varying theoretical positioning, in particular Nussbaum's capability approach for social justice. In focusing on three capabilities appearing on Nussbaum's list of central human capabilities (bodily integrity, emotions and affiliation), the authors reiterate their main argument that failing to engage with the sexual lives of adults with severe disabilities is a failure of basic social justice. In this context, Kulick and Rydström conclude that what occurs in Denmark 'is ethically superior'¹⁰ to the situation in Sweden, and more respectful and just.

3 Conclusion

Throughout *Loneliness and its opposite*, Kulick and Rydström clearly tackle a number of difficult issues in relation to dealing with the sexual and erotic lives of adults with severe disabilities. These issues include communication, desirability, protection against sexual harassment and abuse (both for disabled adults and caregivers), privacy, sexuality education and sexual policy formation. Although the book makes no reference to the CRPD or youth with disabilities, it does, however, offer a catalyst through which to challenge current African disability and

7 pp 174-216.

8 pp 217-261.

9 pp 262-295.

10 p 264.

sexuality rights discourse, and the importance of recognising sexual access as a basis of social justice. As articulated by Kulick and Rydström:

If both disability and sexuality; by their very natures, each separately disturbs decorum and transgresses boundaries, then it stands to reason that their combination in the sex of people with disabilities will constitute a particular pungent challenge to a wide range of sensitivities, identities, divisions and relations.¹¹

Based on these reflections, *Loneliness and its opposite* is both a powerful and insightful book that is not just essential reading for disability academics and activists but also for policy makers, occupational therapists, sexuality researchers and anyone else who is interested in sexual citizenship (and social justice), sex work, agency, diversity and transformation.

11 p 172.